IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-432

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

BRIAN F. WEBER, KAISER, ALUMINUM & CHEMICAL CORPORATION, AND UNITED STATES OF AMERICA,
Respondents.

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER,
Respondent.

No. 78-436

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

BRIAN F. WEBER, *ET AL.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE GOVERNMENT CONTRACT EMPLOYERS ASSOCIATION

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INTEREST OF THE *AMICUS CURIAE**

The resolution of the issues in this case will have a dramatic impact on the operations of government contractors throughout the country. The Government Contract Employers

* Pursuant to Rule 42(2) of the Rules of this Court, written consents, of the Parties to the filing of this Brief have been obtained and have been lodged with the Clerk of the Court.

Association ("GCEA") therefore respectfully submits this brief *amicus curiae* in support of Respondent, Brian Weber in order to assist the Court in resolving the tension between the regulations promulgated under Executive Order 11246 (30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14302 (1967), and 43 Fed. Reg. 46501 (1978) ("E.O. 11246"), and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) ("Title VII").

The GCEA is a not-for-profit association of businesses and associations representing employers in the retailing, manufacturing and service industries who contract with the government. Employers represented by GCEA directly, or indirectly by membership in GCEA of their representative associations, aggregate total sales in excess of $50 billion per year. A substantial portion of this revenue is derived from contracts with the United States government. The employers represented by GCEA directly or indirectly, are subject to the affirmative action requirements of E.O. 11246 and the regulations thereunder. They also are bound by the Title VII prohibitions against discrimination in employment.

The regulations promulgated by the Department of Labor under E.O. 11246 require behavior by employers which is outlawed by the non-discrimination provisions of Title VII.

Employers who have to contend with these two conflicting government mandates are left in a quandry as to the legality of their actions and their potential liability for failure to comply with one or the other government mandates. The GCEA was formed to assist employers in resolving these tensions.

The principal concern of GCEA is to present the views of its members in examining, implementing, following, and where necessary, challenging the correctness of regulations, orders and law designed to promote equal employment opportunity for all employees.

The GCEA represents a point of view of government contractors that is not being presented to the Court by any other employer association.[1] However, the members of GCEA will be directly affected by the outcome of the instant case.[2] The decision of the Fifth Circuit below creates serious problems for members of GCEA in complying with the conflicting interpretation and requirements of Title VII and Executive Order 11246. Members of GCEA are placed in the untenable position of attempting to follow the regulations of a government agency which in fact subjects them to private actions by persons who may have been discriminated against because of this government mandated action.

As this case aptly demonstrates, while employers may engage in "affirmative action" in part to make a personal contribution to resolving what is surely one of the nation's most compelling economic and social problems, frequently such action is produced by a prudent response to one or more of the following factors:

> (i) The requirement that federal contractors commit themselves to "goals and timetables" for increasing their employment of minorities in those job categories in which they are being "underutilized," 41 C.F.R. §§ 60-2.10, 2.12; *Contractors Ass'n. of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971), and the commitments to hire and/or promote minorities according to a prescribed ratio which government agencies insist upon in order to resolve issues of employment discrimination.

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[1] Although the Equal Employment Advisory Council has filed a brief *amicus curiae* in this case, it expressly refused to take a position regarding the legality of the program at issue. Brief *Amicus Curiae* of the Equal Employment Advisory Council, page 8.

[2] Any change in the obligations of government contractors could have an adverse effect on their current affirmative action requirements. The GCEA thus urges that any change in these obligations, and any liability arising therefrom, be prospective only. *City of Los Angeles* v. *Manhart,* ____ U.S. ____, 46 U.S.L.W. 4347 (1978).

(ii) The burden of disproving discrimination which courts impose when presented with statistics showing a disproportionately low employment of minorities, *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 805 n. 19 (1973).

It is the position of GCEA that the regulations promulgated by OFCCP in fact create quotas which are violative of Title VII and contrary to the Executive Order itself. The fact that a finding of noncompliance is made by the OFCCP without taking into consideration that the reasons for a numerical imbalance in the work force is not the result of discrimination is contrary to the standards articulated by the Court in *McDonnell Douglas* v. *Green,* 411 U.S. 792 (1973), *Furnco Construction Company* v. *Waters,* ____ U.S. ____, 98 S. Ct. 2943 (1978), and *Board of Trustees of Keene State College* v. *Sweeney,* 47 U.S.L.W. 3330, 18 FEP Cases 520 (1978).

The analysis and standards proposed by this *amicus* will assist the Court in reconciling the regulations of the Department of Labor with Title VII, and in providing guidance to employers concerning the appropriate scope of affirmative action.

QUESTION PRESENTED

WHETHER RACIAL QUOTAS CAN BE IMPOSED NOT TO REMEDY PAST DISCRIMINATION BY AN EMPLOYER, OR TO ASSIST IDENTIFIABLE VICTIMS OF PAST DISCRIMINATION, BUT RATHER TO ACHIEVE A DESIGNATED RATIO OF MINORITY EMPLOYEES PRESUMED TO HAVE BEEN VICTIMS OF SOCIETAL DISCRIMINATION.

ARGUMENT

I. The Voluntary Use Of Race To Allocate Positions In A Craft Training Program Violates Title VII.

A. Title VII By Its Terms Prohibits Racial Discrimination Against Any Person.

The relevant portions of Title VII involved in this case are Sections 703(a), (d) and (j) of the Act:

> (a) It shall be unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

> (d) It shall be an unlawful employment practice for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. § 2000e-2(d).

> (j) Nothing contained in this subchapter shall be interpreted to require any employer . . . labor organization, or joint labor management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of their race, . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . in comparison with the total number or percentage of persons of such race, . . . in any community, state, section or other area, or in the available work force in any community, state, section, or other area.

42 U.S.C. § 2000e-2(j).

These provisions unequivocally prohibit the use of race as a determinant in making employment decisions. Yet it is

undisputed that the program of Petitioners Kaiser Aluminum & Chemical Corp. ("Kaiser") and United Steel Workers of America ("Union") not only classified employees according to race for entrance into the on-the-job craft training program, but it also required a rigid one white for one minority entrant into the program until the percentage of minority craft workers roughly approximated the percentage of minority population in the surrounding area of each plant.[3]

The action by Petitioners was not taken in order to remedy any past discrimination by Kaiser.[4] Nor was it taken to restore any identified victim of discrimination to his rightful place in the employment scheme.[5] Rather Kaiser and the union voluntarily instituted this program in order to increase the percentage of the black craftsmen, afford more job opportunities to blacks, avoid vexatious litigation by minority employees and satisfy the requirements of the OFCCP.[6] None of these reasons are sufficient to justify the resulting illegal discrimination against Brian Weber and the class he represents.

The legislative history of VII is replete with assurances that the Title is to apply to all persons regardless of race, religion, sex or national origin.[7] That the protections of the Act apply

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[3] *Weber* v. *Kaiser Aluminum & Chemical Corp.*, 415 F. Supp. 761, 763 (E.D. La. 1976).

[4] 415 F. Supp. 761, 765; 563 F.2d 216, 224. Both courts below specifically found that Kaiser had not discriminated in the past at its Gramercy, Louisiana plant. This finding should not be disturbed "in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949). The record is clear that no such error exists. The government had ample opportunity to dispute this finding in the courts below. It should not be permitted at this stage to dispute this finding through remand.

[5] *Cf. Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976).

[6] 415 F. Supp. at 765.

[7] See generally interpretive memorandum of Title VII of HR 7152 submitted jointly by Senators Clark and Case, floor managers, 110 Cong. Rec. 7212 (1964), and § 703(j) of the Act, 42 U.S.C. § 2000e-2(j).

equally to whites as well as blacks is beyond dispute.[8] Indeed the Court early recognized that ["d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431 (1971).

During the course of the debates in enacting Title VII, grave concerns were raised that the Act, as proposed, would require employers to disadvantage whites in order to comply with the Title.[9] This objection was met by proponents of the Act with the contention that no such treatment was intended. "[An employer] would not be obliged—*or indeed, permitted*—to fire whites in order to hire negroes, or to prefer negroes for future vacancies, or once negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier."[10] Despite these assurances, doubts as to the Act's intent persisted. Section 703(j) was inserted in the Act to alleviate these fears.

Senator Humphrey, one of the bill's drafters, commented on the purpose of § 703(j) as follows:

> A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his workforce by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly.[11]

The language and legislative history of the Act make one fundamental principle clear—discrimination in employment *against any person* on the basis of race, religion, sex or national

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[8] *See eg.* Remarks of Rep. Seller, 110 Cong. Rec. at 2579 (1964); Memorandum of Sen. Clark, 110 Cong. Rec. at 7218 (1964); *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976).

[9] *See eg.* 110 Cong. Rec. 9881 (1964).

[10] 110 Cong. Rec. at 7213 (1964), (*emphasis supplied*).

[11] 110 Cong. Rec. at 12723 (1964).

origin will not be tolerated. By denying Brian Weber access to Kaiser's craft training program solely because of his race, Petitioners violated Title VII.

B. The Use Of Racial Classifications Cannot Be Justified As Responsive To Societal Discrimination When Its Effect Is To Deprive Identified White Employees Of Their Title VII Rights.

The purpose of Title VII is twofold: "to assure equality of employment opportunities, and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 800 (1973) citing *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 429 (1971). However, equality of employment can never be achieved by disadvantaging identifiable white employees in the name of remedying past societal wrongs. Where the disadvantage comes in the form of racial quotas, as in the present case, the deprivation is particularly invidious.

In every case where a court has imposed a racial quota it has been done in response to a finding of actual discrimination.[12] Even in cases such as these courts have been cautious to impose the remedy only where the factual circumstances warrant such relief.[13] The voluntary use of racial quotas has no judicial sanction.

In *Regents of the University of California* v. *Bakke,* ____ U.S. ____, 98 S. Ct. 2733 (1978), the Court found that under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et*

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[12] *See eg., United States* v. *International Union of Elevator Constructors Local 5,* 538 F.2d 1012 (3d Cir. 1976); *EEOC* v. *Local 638,* 532 F.2d 821 (2d Cir. 1976); *United States* v. *N. L. Industries, Inc.* 479 F.2d 354 (8th Cir. 1973).

[13] *Patterson* v. *American Tobacco Co.,* 535 F.2d 257 (4th Cir. 1976); *Chance* v. *Board of Examiners,* 534 F.2d 993 (2d Cir. 1976), *cert. denied,* 431 U.S. 965 (1977); *Watkins* v. *United Steelworkers of America Local 2369,* 516 F.2d 41 (5th Cir. 1975).

seq., race can be considered as one factor in giving preferential treatment to minorities if the reason for the consideration is constitutionally justifiable. This case is inapposite in the present context for three reasons.

First, the ambiguity of legislative intent under Title VI which four members of the Court found sufficient to support preferential treatment of minorities to rectify past societal discrimination is not present under Title VII. On the contrary, both the language and legislative history of Title VII forbid preferential treatment for any racial group. Second, unlike *Bakke,* the present case presents no issue of state action. Rather this case involves action taken by purely private parties not subject to any constitutional proscription against discrimination. Thus the question presented is purely one of statutory interpretation. Finally the action taken by Kaiser and the Union was not limited to considering race as one factor in giving preferential treatment to minorities. Rather, race was the sole criterion for admission to the training program.

In the present case Petitioners attempt to avoid the clear nondiscrimination mandate of Title VII by asking the Court to read § 703(j) permissively. They argue that the language of § 703(j) can be read as permitting *voluntary* racial balance of work forces although such balance could not be *required* by the government. This argument was raised in the District Court and was properly rejected.

> After careful consideration of the legislative history of the 1964 Act, and all available jurisprudence, this Court must conclude that such an inference as Kaiser would draw from Section 703(j) cannot override the clear and unequivocal prohibitions against discrimination by an employer against any individual on the basis of race, or color in employment or training programs contained in Sections 703(a) and 703(d) of the Act. Moreover, there is absolutely nothing in the legislative history of the Act to support such an inference. It is clear that the Congress was aware of the concept of affirmative action programs during its considerations, and that it did not choose to exempt what many

> consider the salutary or benign discrimination of such programs from its sweeping prohibitions against racial discrimination by an employer against any individual.

415 F. Supp. at 766.

The fatal flaw of Petitioners' argument is that its recommended reading of § 703(j) would create a cause of action under §§ 703(a)-(d). If employers were allowed to impose racial quotas in order to racially balance their work forces both blacks and whites would be entitled to bring suit under §§ 703(a)-(d) based upon discrimination by race. Petitioners' reading thus would create an irreconcilable conflict within the statute.[14] This result cannot be tolerated.

Moreover, the fact that statutory language is written in permissive terms does not mean that Congress did not intend a mandatory reading. For example, similar permissive language in the venue provision of the National Banking Act was construed by the Court to require a mandatory reading. *Mercantile National Bank at Dallas* v. *Langdean,* 371 U.S. 555 (1963) (interpreting 12 U.S.C. § 94).

In *McDonald* v. *Santa Fe Trail Transportation Co., supra,* the case which created a cause of action for reverse discrimination, the Court held, *inter alia,* that § 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981[15] applied to white persons

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[14] Petitioners also contend that Congress' rejection of proposed amendments to extend the prohibitions of § 703(j) to E.O. 11246 is further evidence that voluntary balances of work forces are appropriate. Brief of Petitioner Kaiser at page 34. Not only does a negative inference by one House of Congress in itself deserve little if any weight, but also the views of a later Congress in interpreting an Act passed by an earlier Congress is not entitled to deference. It is the intent of the Congress that enacted § 703(j) which controls. See *International Brotherhood of Teamsters* v. *U.S.,* 437 U.S. 324 (1977).

[15] Title 42 U.S.C. § 1981 provides in pertinent part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . "

upon the same standards as nonwhites. In *Santa Fe* the Court acknowledged that § 1981 was enacted predominately to assure civil rights to former Negro slaves and not with protecting the civil rights of white persons, and that by its terms the Act did not apply to whites. Nevertheless the language and legislative history of the Act disclosed that its protections were to apply to all persons equally.

Like § 1981, Title VII was enacted predominately to erradicate racial discrimination against minorities. Also like § 1981, the protections of Title VII apply equally to whites as well as nonwhites. Thus although § 703(j) does not by its *terms* outlaw racial balance in work forces, when read in context and in conjunction with the legislative history, such balancing is banned under Title VII. Any other reading would render senseless a carefully drafted plan by Congress to create equal employment opportunity for all persons.

The basic policy of Title VII focuses on "fairness to individuals rather than fairness to classes". *City of Los Angeles* v. *Manhart,* 46 U.S.L.W. 4347, 4349 (1978). Thus to deprive identified white employees of their Title VII rights in the name of remedying past societal discrimination (which by its very nature does not redress a specific wrong to a specific person) subverts the fundamental principles of equality which the Act was designed to promote.

C. The Regulations Promulgated Under Executive Order 11246 Contravene The Express Prohibition Against Employment Discrimination Of Title VII.

Among the reasons cited by Petitioners for instituting the quota system in issue was "satisfying the requirements of OFCC[p]."[16] 451 F. Supp. at 765. The "economic coercion"[17]

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[16] This question was left open in *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. at 280 n. 8.

[17] *Pan American World Airways* v. *Marshall,* 439 F. Supp. 487, 495 (S.D.N.Y. 1977).

exercised by OFCCP in demanding that employers racially balance their work forces to reflect the percentage of minority population in the available work pool is in direct conflict with § 703(j) of Title VII.

Executive Order 11246 was enacted as a vehicle to assure that government contractors (1) not illegally discriminate and (2) develop affirmative action plans that allow all persons to share equally in jobs created because of government contracts.[18] The Executive Order is not facially contradictory with Title VII. Rather, the regulations promulgated by the Department of Labor under the authority of the Order create the conflict. This is accomplished by two means. First, the OFCCP uses the Executive Order to redefine the term "discrimination" from its common meaning and from its meaning under Title VII. Second, OFCCP requires government contractors to maintain racial and sexual quotas in order to satisfy its perception of affirmative action. This action has created the dilemma which all federal contractors face and which this Court is asked today to resolve.

The OFCCP regulations require a federal contractor to make a written work force analysis and develop a written affirmative action compliance program for each establishment.[19] Failure to establish an affirmative action plan or any substantial deviation therefrom can result in a finding of nonresponsibility and the initiation of enforcement proceedings.[20] If the utilization analysis shows that a particular employer has "underutilizations"[21] of available minorities or women,

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[18] Remarks of Sen. Saxbe, 110 Cong. Rec. at 1385 (1964).

[19] Revised Order Number 4, 41 C.F.R. § 60-2.11.

[20] 41 C.F.R. § 60-2.2(b). (See attached Appendix B p. A-12)

[21] Underutilization "merely means that there is a numerical disparity between availability and utilization". *In the Matter of Firestone Synthetic Rubber & Latex Company's Facility in Orange, Texas,* BNA Daily Labor Report, December 12, 1978, page F1 (attached hereto as Appendix D p. A-31).

(an "affected class"), it must develop "goals and timetables" to overcome the underutilization in the particular work group.[22]

The OFCCP maintains that the imposition of goals and timetables is not dependent upon any finding of past discrimination. Yet E.O. 11246 provides that sanctions can be imposed only for violation of one of the two mandates of the Order—failure to develop and maintain an affirmative action plan or discrimination on the basis of race, color, religion, sex or national origin.[23] By imposing sanctions for failure to correct an affected class problem, regardless of the reasons for its existence,[24] the OFCCP has redefined discrimination to mean the mere existence of a numerical disparity between utilization and availability. This standard is totally in conflict with that defined by the Court in *McDonnell Douglas Corp.* v. *Green, supra.*[25] Moreover, the Court has never held that statistics alone are sufficient to establish a finding of discrimination. Indeed the Court cautioned in *International Brotherhood of Teamsters* v. *U.S., supra,* that "statistics are not irrefutable; they may be rebutted. In short the usefulness depends on all of the surrounding facts and circumstances" 431 U.S. at ____. Yet the OFCCP, on the basis of numerical findings alone, makes a determination that an employer is in noncompliance and therefore subject to the sanction of debarment. Federal contractors cannot be required to meet a standard of culpability for discrimination which is lower than that under Title VII. Discrimination must have the same meaning for all equal employment laws and orders. (See opening line of "Policy Statement" of Equal Employment Opportunity Coordinating

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[22] 41 C.F.R. §§ 60-2.10, 60-2.12.

[23] Section 202(6) and Section 209, Executive Order 11246, *supra.* (See attached Appendix A p. A-2, A-4).

[24] Section 60-2.1(b) provides in relevant part "an affected class problem must be remedied in order for a contractor to be considered in compliance." 41 C.F.R. § 60-2.1(b). (See Appendix B, p. A-11).

[25] See discussion on page 15 *infra.*

Council established as part of 1972 Amendments to Title VII and EO 11246 (Appendix C p. 30a, Brief for the United States and the EEOC.)

In enforcing its erroneous view of discrimination the OFCCP imposes quotas in the guise of "goals and timetables" to remedy any affected class problems. As found by the court of appeals below these goals and timetables are indistinguishable from quotas.[26] The transformation of goals and timetables into illegal quotas is accomplished by the direction given by the OFCCP in Technical Guidance Memo No. 1 on Revised Order No. 4.[27] This guidance memoranda in relevant part provides as follows:

> "For each job category in which underutilization exists, the contractor must establish annual rates of hiring and/or promoting minorities and women until the ultimate goal is reached. These rates should be the maximum rates that can be achieved through putting forth every good faith effort, including the use of available recruitment and training facilities, and must not be lower than the percentage rate set in the ultimate goal. Numerical goals based on projected openings are required but cannot be used in the place of percentage goals."

By requiring hiring rates keyed to the ultimate "goal", all flexibility is lost and replaced by the rigidity of a racial quota. For example, under Technical Guidance Memo No. 1 if a contractor set his ultimate goal at 40% minority representation, he would be required to fill four out of ten vacancies with minorities. If this racial quota was not followed the contractor would be deviating from his affirmative action plan and be in violation of the regulations (see 41 C.F.R. 60-2.2(b)) (Appendix B p. A-12). No more clear definition of a quota can be found.

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[26] 563 F.2d at 222. *See also,* Silberman, "The Road to Racial Quotas", Wall Street Journal, August 11, 1977, at 12, col. 4.

[27] The memo is attached as appendix C (A-22) hereto. That the OFCCP is still following this memo is evidenced by *In Re the Matter of Firestone, supra* (Appendix D p. A-26).

Thus, without any showing of actual discrimination, a federal contractor who fails to comply with the above OFCCP regulations faces the sanctions of the cancellation or termination of all federal contracts, the withholding of progress payments on a particular contract, or debarment from all future federal contracts prior to a hearing.[28] It is no wonder that federal contractors such as Kaiser feel under tremendous pressure to comply with OFCCP despite the contrary mandates of Title VII.

Employers receiving government contracts who resist pressures to implement numerical goals or quotas in order to comply with Title VII invite discrimination suits and will either have to bear the expense of defense or the stigma and expense of an admission of discrimination.[29] In many cases employers face a massive, if not insurmountable, burden to justify their selection practices if they are seen as barriers to employment of

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[28] 41 C.F.R. § 60-1.26; 41 C.F.R. § 60-2.2(b); 41 C.F.R. § 60-30. See *Crown Zellerback Corp.* v. *Marshall,* 15 FEP Cases 1628 (E.D. La. 1977); *Illinois Tool Works* v. *Marshall,* 17 FEP Cases 520 (N.D. Ill. 1978), as illustrative of the government's widespread practice of imposing the above sanctions prior to a hearing. (Also see *Pan American World Airways* v. *Marshall* Fn. 17 at p. 11 *supra,* and discussion of these practices in *Smetana* "Tools of the Private Practitioner in Dealing with Government Contract Compliance under Executive Order. 11246" (Appendix E p. A-36).

[29] The EEOC attempted to alleviate these consequences by issuance of affirmative action guidelines. However these guidelines cannot be accepted as a justification for reverse discrimination. First, the guidelines were issued on the very day that certiorari was granted in the instant case and thus are not a contemporaneous interpretation of the Act which should be afforded deferrence. Second, the thrust of the guidelines are inconsistent with § 706(g) of the Act which provides for affirmative action only as a remedy for intentional discrimination. Third, the interpretation of Title VII by the EEOC is not binding on any court of law. The EEOC Guidelines are not in issue in this case. As the EEOC is an active party litigant its views in this regard should be treated the same as *post hoc* rationalizations of counsel and should not be passed upon. See *NLRB* v. *Metropolitan Life Ins. Co.,* 380 U.S. 438 (1965).

minorities and women even though there is no basis for questioning their good faith. Moreover, such reluctance subjects employers to sanctions under Executive Order 11246 including debarment from all future federal contracts.

The OFCCP's requirement that an employer establish goals and timetables without being afforded an opportunity to demonstrate that any imbalance existing in his work force is not the result of acts of discrimination is inconsistent with the Court's decisions in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), *Furnco Construction Company* v. *Waters,* ____ U.S. ____, 98 S.Ct. 2943 (1978), and *Board of Trustees of Keene State College* v. *Sweeney,* 47 U.S.L.W. 3330, 18 F.E.P. Cases 520 (1978).

In *McDonnell Douglas, supra,* the Court established the order and allocation of proof under Title VII. This procedure requires a three step analysis. First, the plaintiff must carry the initial burden of establishing a *prima facie* case of racial discrimination. The burden then shifts to the employer to articulate some nondiscriminatory reason for his action. The plaintiff is then afforded the opportunity to show that the proffered reason is a mere pretext to cover the discrimination.

These standards stand in stark contrast to the OFCCP's unilateral determination and irrefutable presumption of discrimination by the mere existence of an affected class. The employer is given no opportunity to "articulate a nondiscriminatory reason" for the underutilization. Under the OFCCP's practice the three step burden of proof under Title VII is reduced to a single determination of guilt on the basis of statistics alone.

The OFCCP regulations cannot be reconciled with Title VII. Section 703(j) specifically states that no employer shall be required to maintain a racial balance in his work force. The OFCCP regulations mandate such a balance. The conflict is clear. In such cases the regulations must fall. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952).

II. Meaningful Affirmative Action Can Be Accomplished Within The Bounds Of Title VII.

As discussed above, E.O. 11246 is not facially contradictory with Title VII. Meaningful affirmative action can be achieved under E.O. 11246 without running afoul of Title VII.

The fundamental principle of affirmative action is preparing minorities and women for entrance into the work force on an equal footing with white males. This calls for increased emphasis on training and recruitment. However, in order to remain within the bounds of Title VII recruitment and training must be done in a nondiscriminatory manner.

Employers should be required to actively solicit minorities and women to fill job vacancies. They should direct special efforts to convince minorities and women that they mean what they say about equal employment opportunity. This could involve holding special workshops to acquaint minorities and women with the opportunities available at a particular workplace, and directing job advertising to areas where it is known the message will reach minorities and women. Training should also be supplied to make all employers ready to assume the more complex and higher rewarding job positions.

The flaw of the Kaiser training program is that it set fixed racial quotas for entrance thereto. This Title VII prohibits. This infirmity can be remedied however, by providing a pool of qualified candidates selected in the manner set forth immediately above, for entry into the training program on a nondiscriminatory basis. This process can be achieved despite the provisions of Section 703(h).

Section 703(h) provides that benefits afforded employees because of a bona fide seniority system will not violate Title VII so long as such benefits are not the result of an intent to unlawfully discriminate. However seniority rights must be capable of accomodation in order to accomplish the social policy of assuring that all persons are made ready to assume full

employment, promotion, and training opportunities. Because training programs would be open to all persons without regard to race, no cause of action would accrue under Title VII for those not admitted because of insufficient places in a training program. The difficult line between *"affirmative action"* required of Government Contractors, which we suggest includes making a special effort to attract minorities and women, and *"reverse discrimination"*, as well as accommodating *"seniority"*, should be drawn at the training program level in order to increase the pool of qualified candidates for non-discriminatory selection.

If an employer has done all that he can within the bounds of Title VII to recruit and train minorities and women, he has satisfied the requirements of E.O. 11246 to implement affirmative action, the OFCCP regulations to the contrary notwithstanding. Any action beyond this which violates the rights of majority employees is forbidden by the Act and E.O. 11246. If Congress desires a different result it is up to it to legislate. As the law currently exists the action by Petitioners violates Title VII.

Until the issue of the appropriate scope of affirmative action is resolved, employers should not be subjected to liability for suits alleging "reverse" discrimination when the action of the employer was taken in good faith reliance upon the regulations of the OFCCP. The application of prospective relief in this area is appropriate under the "equitable nature of Title VII remedies". *City of Los Angeles* v. *Manhart,* 46 U.S.L.W. 4347, 4352 (1978). In *Manhart* the Court refused to grant retroactive relief in a case of first impression challenging pension fund contribution differentials based upon sex. Among the reasons for denying retroactive relief was the dilemma faced by an employer where "he is damned in the discrimination context no matter what he does" 46 U.S.L.W. at 4352 n. 38. The case before the Court today is also one of first impression. Resolving the conflicts created by Title VII and E.O. 11246 is a formidable task—one beyond the capabilities of government

contractors. Like the employees who attempted to reconcile the sexual differential contributions issue in *Manhart,* government contractors should not be penalized for being unable to predict the development of Title VII law by having any relief granted be retroactive.

CONCLUSION

For the reasons stated herein, GCEA respectfully requests that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed and that the standards proposed by this *Amicus* be adopted as a guideline for the appropriate scope of affirmative action.

Respectfully submitted,

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APPENDIX A

E.O. 11246 on Nondiscrimination Under Federal Contracts

Text of Executive Order 11246, signed by President Johnson September 24, 1965, as amended by Executive Order 11375, signed October 13, 1967. Amended Part I, effective November 12, 1967, was superseded by Executive Order 11478 (LRX 2311). Part II was amended to add sex as prohibited basis of discrimination, effective October 13, 1968.

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

PART I—Nondiscrimination in Government Employment

ED. NOTE: Secs. 101-105, barring discrimination in federal employment on account of race, color, religion, sex, or national origin, were superseded by Executive Order 11478. These provisions called for affirmative-action programs for equal opportunity at the agency level under general supervision of the Civil Service Commission; establishment of complaint procedures at each agency with appeal to the Commission; and promulgation of regulations by CSC. (See LRX 2311.)

PART II—Nondiscrimination in Employment by Government Contractors and Subcontractors

SUBPART A—DUTIES OF THE SECRETARY OF LABOR

Sec. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

SUBPART B—CONTRACTORS' AGREEMENTS

Sec. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secre-

tary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contacting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided,* however, That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

Sec. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous con-

tract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: *Provided*, That to the extent such information is within the exclusive possession of a labor union or an agency referring workers of providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, creed, or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require.

Sec. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: *And provided further*, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

SUBPART C—POWERS AND DUTIES OF THE SECRETARY OF LABOR AND THE CONTRACTING AGENCIES

Sec. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of

the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

Sec. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of Labor by a contracting agency, that agency shall report to the Secretary what action has been taken or is recommended with regard to such complaints.

Sec. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

Sec. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

SUBPART D — SANCTIONS AND PENALTIES

Sec. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate

proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a) (2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a) (5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

Sec. 210. Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

Sec. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

Sec. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209 (a) (6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor or the contracting agency involved, shall promptly notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agency which imposed the sanction.

SUBPART E — CERTIFICATES OF MERIT

Sec. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel train-

ing, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

Sec. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

Sec. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III — Nondiscrimination Provisions in Federally Assisted Construction Contracts

Sec. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 203 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

Sec. 302. (a) "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term "applicant" as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

Sec. 303 (a) Each administering department and agency shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each

administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as he may require in the performance of his functions under this Order.

(b) In the event an applicant fails and refuses to comply with his undertakings, the administering department or agency may take any or all of the following actions: (1) cancel, terminate, or suspend in whole or in part the agreement, contract, or other arrangement with such applicant with respect to which the failure and refusal occurred; (2) refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and (3) refer the case to the Department of Justice for appropriate legal proceedings.

(c) Any action with respect to an applicant pursuant to Subsection (b) shall be taken in conformity with Section 602 of the Civil Rights Act of 1964 (and the regulations of the administering department or agency issued thereunder), to the extent applicable. In no case shall action be taken with respect to an applicant pursuant to Clause (1) or (2) of Subsection (b) without notice and opportunity for hearing before the administering department or agency.

Sec. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of non-discrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: *Provided*, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

PART IV — Miscellaneous

Sec. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order, except authority to promulgate rules and regulations of a general nature.

Sec. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

Sec. 403. (a) Executive Orders Nos. 10590 (January 18, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any Executive Order superseded by this Order. All rules, regulations, orders, instructions, designations, and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the Executive orders superseded by this Order, shall, to the extent that they are not inconsistent with this Order, remain in full force and effect unless and until revoked or superseded by appropriate authority. References in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of this Order.

Sec. 404. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this Order and of the rules and regulations of the Secretary of Labor.

Sec. 405. This Order shall become effective 30 days after the date of this Order.

APPENDIX B

CHAPTER 60—OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, EQUAL EMPLOYMENT OPPORTUNITY, DEPARTMENT OF LABOR

NOTE: The President, by Executive Order 11246 (30 FR 12319), abolished the President's Committee on Equal Employment Opportunity and delegated the functions of the abolished Committee to the Secretary of Labor. By order of the Secretary of Labor, 30 FR 13441, Oct. 22, 1965, all rules, regulations, orders, instructions, and other directives, issued by the abolished Committee, not inconsistent with E.O. 11246 remain in effect for the present as those of the Secretary of Labor. All references in this chapter to "Committee", "Chairman", "Vice-Chairman", and "Executive Vice-Chairman" shall mean the Director of the Office of Federal Contract Compliance Programs of the United States Department of Labor, and all references to "a panel of the Committee" shall mean an appropriate panel of three appointed by the Director.

PART 60-2—AFFIRMATIVE ACTION PROGRAMS

Subpart A—General

Subpart B—Required Contents of Affirmative Action Programs

AUTHORITY: 5 U.S.C. 553(a)(3)(B); 29 CFR 2.7; section 201, E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303.

SOURCE: 36 FR 23152, Dec. 4, 1971, unless otherwise noted.

Subpart A—General

§ 60-2.1 Title, purpose and scope.

(a) This part shall also be known as "Revised Order No. 4," and shall cover nonconstruction contractors. Section 60-1.40 of this chapter, affirmative action compliance programs, requires that within 120 days from the commencement of a contract each prime contractor or subcontractor with 50 or more employees and (1) a contract of $50,000 or more; or (2) Government bills of lading which, in any 12-month period, total or can reasonably be expected to total $50,000 or more; or (3) who serves as a depository of Government funds in any amount; or (4) who is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, develop a written affirmative action compliance program for each of its establishments. A review of agency compliance surveys indicates that many contractors do not have affirmative action programs on file at the time an establishment is visited by a compliance investigator. This part details the agency review procedure and the results of a contractor's failure to develop and maintain an affirmative action program and then sets forth detailed guidelines to be used by contractors and Government agencies in developing and judging these programs as well as the good faith effort required to transform the programs from paper commitments to equal employment opportunity. Subparts B and C of this part are concerned with affirmative action plans only.

(b) Relief, including back pay where appropriate, for members of an affected class who by virtue of past discrimination continue to suffer the present effects of that discrimination, shall be provided in the conciliation agreement entered into pursuant to § 60-60.6 of this title. An "affected class" problem must be remedied in order for a contractor to be considered in compliance. Section 60-2.2 herein pertaining to an acceptable affirmative action program is also applicable to the failure to remedy discrimination against members of an "affected class."

[42 FR 3461, Jan. 18, 1977]

§ 60-2.2 Agency action.

(a)(1) Any contractor required by § 60-1.40 of this chapter to develop an affirmative action program at each of his establishments who has not complied fully with that section is not in compliance with Executive Order 11246, as amended (30 FR 12319). Until such programs are developed and found to be acceptable in accordance with the standards and guidelines set forth in §§ 60-2.10 through 60-2.32, the contractor is unable to comply with the employment opportunity clause. An affirmative action plan shall be deemed to have been accepted by the Government at the time appropriate compliance agency has accepted such plan unless within 45 days thereafter the Office of Federal Contract Compliance has disapproved such plan.

(2) The appropriate compliance agency shall notify the contractor and the Office of Federal Contract Com-

pliance when it has accepted an affirmative action plan.

(b) If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within his agency or through the Office of Federal Contract Compliance Programs or other Government agencies, that the contractor has no affirmative action program at each of his establishments, or has substantially deviated from such an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the regulations in this chapter, the contracting officer shall declare the contractor-bidder nonresponsible and so notify the contractor, the Director, and the compliance agency unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations. Any contractor/bidder which has been declared nonresponsible in accordance with the provisions of this section may request the Director to determine that the responsibility of the contractor/bidder raises substantial issues of law or fact to the extent that a hearing is required. Such request shall set forth the basis upon which the contractor/bidder seeks such a determination. If the Director, in his/her sole discretion, determines that substantial issues of law or fact exist, an administrative or judicial proceeding may be commenced in accordance with the regulations contained in § 60-1.26; or the Director may require the compliance agency to develop the investigation or compliance review further or to conduct additional conciliation: *Provided,* That during any preaward conferences, every effort shall be made through the processes of conciliation, mediation and persuasion to develop an acceptable affirmative action program meeting the standards and guidelines set forth in §§ 60-2.10 through 60-2.32 so that, in the performance of his contract, the contractor is able to meet his equal employment obligations in accordance with the equal opportunity clause and applicable rules, regulations, and orders: *Provided further,* That when the contractor-bidder is declared nonresponsible more than once for inability to comply with the equal employment opportunity clause, the compliance agency shall promptly send to the Director a written request that enforcement proceedings be initiated pursuant to § 60-1.26. Such request for initiation of enforcement proceedings shall be sent to the Director no later than the date of issuance of the second nonresponsibility determination.

(c) (1) Immediately upon finding that a contractor has no affirmative action program, or has deviated substantially from an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the requirements of the regulations in this chapter, the compliance agency representative or the representative of the Office of Federal Contract Compliance Programs, whichever has made such a finding, shall notify officials of the appropriate compliance agency and the Office of Federal Contract Compliance Programs of such fact. Whenever administrative enforcement is contemplated, the compliance agency shall issue a notice to the contractor giving him 30 days to show cause why enforcement proceedings under section 209(a) of Executive Order 11246, as amended, should not be instituted. The notice to show cause should contain:

(i) An itemization of the sections of the Executive Order and of the regulations with which the contractor has been found in apparent violation, and a summary of the conditions, practices, facts or circumstances which give rise to each apparent violation;

(ii) The corrective actions necessary to achieve compliance or, as may be appropriate, the concepts and principles of an acceptable remedy and/or the corrective action results anticipated;

(iii) A request for a written response to the findings, including commitments to corrective action or the presentation or opposing facts and evidence; and

(iv) A suggested date for the conciliation conference.

(2) If the contractor fails to show good cause for his failure or fails to remedy that failure by developing and implementing an acceptable affirmative action program within 30 days, the compliance agency shall promptly send to the Director a written request for enforcement proceedings pursuant to § 60-1.26 of this chapter. If an administrative complaint is filed, the contractor shall have 20 days to request a hearing. If a request for hearing has not been received within 20 days from the filing of the administrative complaint, the matter shall proceed in accordance with Part 60-30 of this chapter.

(3) During the "show cause" period of 30 days, every effort will be made by the compliance agency through conciliation, mediation, and persuasion to resolve the deficiencies which led to the determination of nonresponsibility. If satisfactory adjustments designed to bring the contractor into compliance are not concluded, the compliance agency shall promptly send to the Director a written request for enforcement proceedings pursuant to § 60-1.26 of this chapter.

(d) During the "show cause" period and formal proceedings, each contracting agency must continue to determine the contractor's responsibility in considering whether or not to award a new or additional contract.

[38 FR 2970, Jan. 31, 1973, as amended at 42 FR 3462, Jan. 18, 1977; 42 FR 5978, Feb. 1, 1977]

Subpart B—Required Contents of Affirmative Action Programs

§ 60-2.10 Purpose of affirmative action program.

An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate. An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 5630, Feb. 14, 1974]

§ 60-2.11 Required utilization analysis.

Based upon the Government's experience with compliance reviews under the Executive order programs and the contractor reporting system, minority groups are most likely to be underutilized in departments and jobs within departments that fall within the following Employer's Information Report (EEO-1) designations: officials and managers, professionals, technicians, sales workers, office and clerical and craftsmen (skilled). As categorized by the EEO-1 designations, women are likely to be underutilized in departments and jobs within departments as follows: Officials and managers, professionals, technicians, sales workers (except over-the-counter sales in certain retail establishments), craftsmen (skilled and semi-skilled). Therefore, the contractor shall direct special attention to such jobs in his analysis and goal setting for minorities and women. Affirmative action programs must contain the following information:

(a) Workforce analysis which is defined as a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job group) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by

department, job families, or disciplines, in order of wage rates or salary ranges. For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed.

(b) An analysis of all major job groups at the facility, with explanation if minorities or women are currently being underutilized in any one or more job groups ("job groups" herein meaning one or a group of jobs having similar content, wage rates and opportunities). "Underutilization" is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. In making the utilization analysis, the contractor shall conduct such analysis separately for minorities and women.

(1) In determining whether minorities are being underutilized in any job group, the contractor will consider at least all of the following factors:

(i) The minority population of the labor area surrounding the facility;

(ii) The size of the minority unemployment force in the labor area surrounding the facility;

(iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;

(iv) The general availability of minorities having requisite skills in the immediate labor area;

(v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(vi) The availability of promotable and transferable minorities within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

(2) In determining whether women are being underutilized in any job group, the contractor will consider at least all of the following factors:

(i) The size of the female unemployment force in the labor area surrounding the facility;

(ii) The percentage of the female workforce as compared with the total workforce in the immediate labor area;

(iii) The general availability of women having requisite skills in the immediate labor area;

(iv) The availability of women having requisite skills in an area in which the contractor can reasonably recruit;

(v) The availability of women seeking employment in the labor or recruitment area of the contractor;

(vi) The availability of promotable and transferable female employees within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to women.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 5630, Feb. 14, 1974; 39 FR 25654, July 12, 1974]

§ 60-2.12 Establishment of goals and timetables.

(a) The goals and timetables developed by the contractor should be attainable in terms of the contractor's analysis of his deficiencies and his entire affirmative action program. Thus, in establishing the size of his goals and the length of his timetables, the contractor should consider the results which could reasonably be expected from his putting forth every good faith effort to make his overall affirmative action program work. In determining levels of goals, the contractor should consider at least the factors listed in § 60-2.11.

(b) Involve personnel relations staff, department and division heads, and local and unit managers in the goal setting process.

(c) Goals should be significant, measurable and attainable.

(d) Goals should be specific for planned results, with timetables for completion.

(e) Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.

(f) In establishing timetables to meet goals and commitments, the contractor will consider the anticipated expansion, contraction and turnover of and in the work force.

(g) Goals, timetables and affirmative action commitments must be designed to correct any identifiable deficiencies.

(h) Where deficiencies exist and where numbers or percentages are relevant in developing corrective action, the contractor shall establish and set forth specific goals and timetables separately for minorities and women.

(i) Such goals and timetables, with supporting data and the analysis thereof shall be a part of the contractor's written affirmative action program and shall be maintained at each establishment of the contractor.

(j) A contractor or subcontractor extending a publicly announced preference for Indians as authorized in 41 CFR 60-1.5(a)(6) may reflect in its goals and timetables the permissive employment preference for Indians living on or near an Indian reservation.

(k) Where the contractor has not established a goal, his written affirmative action program must specifically analyze each of the factors listed in § 60-2.11 and must detail his reason for a lack of a goal.

(l) In the event it comes to the attention of the compliance agency or the Office of Federal Contract Compliance that there is a substantial disparity in the utilization of a particular minority group or men or women of a particular minority group, the compliance agency or OFCC may require separate goals and timetables for such minority group and may further require, where appropriate, such goals and timetables by sex for such group for such job classifications and organizational units specified by the compliance agency or OFCC.

(m) Support data for the required analysis and program shall be compiled and maintained as part of the contractor's affirmative action program. This data will include but not be limited to progression line charts, seniority rosters, applicant flow data, and applicant rejection ratios indicating minority and sex status.

(n) Copies of affirmative action programs and/or copies of support data shall be made available to the compliance agency or the Office of Federal Contract Compliance, at the request of either, for such purposes as may be appropriate to the fulfillment of their responsibilities under Executive Order 11246, as amended.

[36 FR 23152, Dec. 4, 1971, as amended at 42 FR 3462, Jan. 18, 1977; 42 FR 5978, Feb. 1, 1977]

§ 60-2.13 Additional required ingredients of affirmative action programs.

Effective affirmative action programs shall contain, but not necessarily be limited to, the following ingredients:

(a) Development or reaffirmation of the contractor's equal employment opportunity policy in all personnel actions.

(b) Formal internal and external dissemination of the contractor's policy.

(c) Establishment of responsibilities for implementation of the contractor's affirmative action program.

(d) Identification of problem areas (deficiencies) by organizational units and job group.

(e) Establishment of goals and objectives by organizational units and job groups, including timetables for completion.

(f) Development and execution of action oriented programs designed to eliminate problems and further designed to attain established goals and objectives.

(g) Design and implementation of internal audit and reporting systems to measure effectiveness of the total program.

(h) Compliance or personnel policies and practices with the Sex Discrimination Guidelines (41 CFR Part 60-20).

(i) Active support of local and national community action programs and community service programs, designed to improve the employment opportunities of minorities and women.

(j) Consideration of minorities and women not currently in the workforce having requisite skills who can be recruited through affirmative action measures.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 25654, July 12, 1974]

§ 60-2.14 Compliance status.

No contractor's compliance status shall be judged alone by whether or not he reaches his goals and meets his timetables. Rather, each contractor's compliance posture shall be reviewed and determined by reviewing the contents of his program, the extent of his adherence to this program, and his good faith efforts to make his program work toward the realization of the program's goals within the timetables set for completion. There follows an outline of examples of procedures that contractors and Federal agencies should use as a guideline for establishing, implementing, and judging an acceptable affirmative action program.

Subpart C—Methods of Implementing the Requirements of Subpart B

§ 60-2.20 Development or reaffirmation of the equal employment opportunity policy.

(a) The contractor's policy statement should indicate the chief executive officers' attitude on the subject matter, assign overall responsibility and provide for a reporting and monitoring procedure. Specific items to be mentioned should include, but not limited to:

(1) Recruit, hire, train, and promote persons in all job titles, without regard to race, color, religion, sex, or national origin, except where sex is a bona fide occupational qualification. (The term "bona fide occupational qualification" has been construed very narrowly under the Civil Rights Act of 1964. Under Executive Order 11246 as amended and this part, this term will be construed in the same manner.)

(2) Base decisions on employment so as to further the principle of equal employment opportunity.

(3) Insure that promotion decisions are in accord with principles of equal employment opportunity by imposing only valid requirements for promotional opportunities.

(4) Insure that all personnel actions such as compensation, benefits, transfers, layoffs, return from layoff, company sponsored training, education, tuition assistance, social and recreation programs, will be administered without regard to race, color, religion, sex, or national origin.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 25654, July 12, 1974]

§ 60-2.21 Dissemination of the policy.

(a) The contractor should disseminate his policy internally as follows:

(1) Include it in contractor's policy manual.

(2) Publicize it in company newspaper, magazine, annual report and other media.

(3) Conduct special meetings with executive, management, and supervisory personnel to explain intent of policy and individual responsibility for effective implementation, making clear the chief executive officer's attitude.

(4) Schedule special meetings with all other employees to discuss policy and explain individual employee responsibilities.

(5) Discuss the policy thoroughly in both employee orientation and management training programs.

(6) Meet with union officials to inform them of policy, and request their cooperation.

(7) Include nondiscrimination clauses in all union agreements, and review all contractual provisions to ensure they are nondiscriminatory.

(8) Publish articles covering EEO programs, progress reports, promotions, etc., of minority and female employees, in company publications.

(9) Post the policy on company bulletin boards.

(10) When employees are featured in product or consumer advertising, employee handbooks or similar publica-

tions both minority and nominority, men and women should be pictured.

(11) Communicate to employees the existence of the contractors affirmative action program and make available such elements of his program as will enable such employees to know of and avail themselves of its benefits.

(b) The contractor should disseminate his policy externally as follows:

(1) Inform all recruiting sources verbally and in writing of company policy, stipulating that these sources actively recruit and refer minorities and women for all positions listed.

(2) Incorporate the Equal Opportunity clause in all purchase orders, leases, contracts, etc., covered by Executive Order 11246, as amended, and its implementing regulations.

(3) Notify minority and women's organizations, community agencies, community leaders, secondary schools and colleges, of company policy, preferably in writing.

(4) Communicate to prospective employees the existence of the contractor's affirmative action program and make available such elements of his program as will enable such prospective employees to know of and avail themselves of its benefits.

(5) When employees are pictured in consumer or help wanted advertising, both minorities and nonminority men and women should be shown.

(6) Send written notification of company policy to all subcontractors, vendors and suppliers requesting appropriate action on their part.

§ 60-2.22 Responsibility for implementation.

(a) An executive of the contractor should be appointed as director or manager of company Equal Opportunity Programs. Depending upon the size and geographical alignment of the company, this may be his or her sole responsibility. He or she should be given the necessary top management support and staffing to execute the assignment. His or her identity should appear on all internal and external communications on the company's Equal Opportunity Programs. His or her responsibilities should include, but not necessarily be limited to:

(1) Developing policy statements, affirmative action programs, internal and external communication techniques.

(2) Assisting in the identification of problem areas.

(3) Assisting line management in arriving at solutions to problems.

(4) Designing and implementing audit and reporting systems that will:

(i) Measure effectiveness of the contractor's programs.

(ii) Indicate need for remedial action.

(iii) Determine the degree to which the contractor's goals and objectives have been attained.

(5) Serve as liaison between the contractor and enforcement agencies.

(6) Serve as liaison between the contractor and minority organizations, women's organizations and community action groups concerned with employment opportunities of minorities and women.

(7) Keep management informed of latest developments in the entire equal opportunity area.

(b) Line responsibilities should include, but not be limited to, the following:

(1) Assistance in the identification of problem areas and establishment of local and unit goals and objectives.

(2) Active involvement with local minority organizations, women's organizations, community action groups and community service programs.

(3) Periodic audit of training programs, hiring and promotion patterns to remove impediments to the attainment of goals and objectives.

(4) Regular discussions with local managers, supervisors and employees to be certain the contractor's policies are being followed.

(5) Review of the qualifications of all employees to insure that minorities and women are given full opportunities for transfers and promotions.

(6) Career counseling for all employees.

(7) Periodic audit to insure that each location is in compliance in area such as:

(i) Posters are properly displayed.

(ii) All facilities, including company housing, which the contractor main-

tains for the use and benefit of his employees, are in fact desegregated, both in policy and use. If the contractor provides facilities such as dormitories, locker rooms and rest rooms, they must be comparable for both sexes.

(iii) Minority and female employees are afforded a full opportunity and are encouraged to participate in all company sponsored educational, training, recreational and social activities.

(8) Supervisors should be made to understand that their work performance is being evaluated on the basis of their equal employment opportunity efforts and results, as well as other criteria.

(9) It shall be a responsibility of supervisors to take actions to prevent harassment of employees placed through affirmative action efforts.

§ 60-2.23 Identification of problem areas by organizational units and job groups.

(a) An in-depth analysis of the following should be made, paying particular attention to trainees and those categories listed in § 60-2.11(b).

(1) Composition of the work force by minority group status and sex.

(2) Composition of applicant flow by minority group status and sex.

(3) The total selection process including position descriptions, position titles, worker specifications, application forms, interview procedures, test administration, test validity, referral procedures, final selection process, and similar factors.

(4) Transfer and promotion practices.

(5) Facilities, company sponsored recreation and social events, and special programs such as educational assistance.

(6) Seniority practices and seniority provisions of union contracts.

(7) Apprenticeship programs.

(8) All company training programs, formal and informal.

(9) Work force attitude.

(10) Technical phases of compliance, such as poster and notification to labor unions, retention of applications, notification to subcontractors, etc.

(b) If any of the following items are found in the analysis, special corrective action should be appropriate.

(1) An "underutilization" of minorities or women in specific job groups.

(2) Lateral and/or vertical movement of minority or female employees occurring at a lesser rate (compared to work force mix) than that of nonminority or male employees.

(3) The selection process eliminates a significantly higher percentage of minorities or women than nonminorities or men.

(4) Application and related preemployment forms not in compliance with Federal legislation.

(5) Position descriptions inaccurate in relation to actual functions and duties.

(6) Tests and other selection techniques not validated as required by the OFCC Order on Employee Testing and other Selection Procedures.

(7) Test forms not validated by location, work performance and inclusion of minorities and women in sample.

(8) Referral ratio of minorities or women to the hiring supervisor or manager indicates a significantly higher percentage are being rejected as compared to nonminority and male applicants.

(9) Minorities or women are excluded from or are not participating in company sponsored activities or programs.

(10) De facto segregation still exists at some facilities.

(11) Seniority provisions contribute to overt or inadvertent discrimination, i.e., a disparity by minority group status or sex exists between length of service and types of job held.

(12) Nonsupport of company policy by managers, supervisors or employees.

(13) Minorities or women underutilized or significantly underrepresented in training or career improvement programs.

(14) No formal techniques established for evaluating effectiveness of EEO programs.

(15) Lack of access to suitable housing inhibits recruitment efforts and employment of qualified minorities.

(16) Lack of suitable transportation (public or private) to the work place inhibits minority employment.

(17) Labor unions and subcontractors not notified of their responsibilities.

(18) Purchase orders do not contain EEO clause.

(19) Posters not on display.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 25654, July 12, 1974]

§ 60-2.24 Development and execution of programs.

(a) The contractor should conduct detailed analyses of position descriptions to insure that they accurately reflect position functions, and are consistent for the same position from one location to another.

(b) The contractor should validate worker specifications by division, department, location or other organizational unit and by job title using job performance criteria. Special attention should be given to academic, experience and skill requirements to insure that the requirements in themselves do not constitute inadvertent discrimination. Specifications should be consistent for the same job title in all locations and should be free from bias as regards to race, color, religion, sex or national origin, except where sex is a bona fide occupational qualification. Where requirements screen out a disproportionate number of minorities or women, such requirements should be professionally validated to job performance.

(c) Approved position descriptions and worker specifications, when used by the contractor, should be made available to all members of management involved in the recruiting, screening, selection, and promotion process. Copies should also be distributed to all recruiting sources.

(d) The contractor should evaluate the total selection process to insure freedom from bias and, thus, aid the attainment of goals and objectives.

(1) All personnel involved in the recruiting, screening, selection, promotion, disciplinary, and related processes should be carefully selected and trained to insure elimination of bias in all personnel actions.

(2) The contractor shall observe the requirements of the OFCC Order pertaining to the validation of employee tests and other selection procedures.

(3) Selection techniques other than tests may also be improperly used so as to have the effect of discriminating against minority groups and women. Such techniques include but are not restricted to, unscored interviews, unscored or casual application forms, arrest records, credit checks, considerations of marital status or dependency or minor children. Where there exist data suggesting that such unfair discrimination or exclusion of minorities or women exists, the contractor should analyze his unscored procedures and eliminate them if they are not objectively valid.

(e) Suggested techniques to improve recruitment and increase the flow of minority or female applicants follow:

(1) Certain organizations such as the Urban League, Job Corps, Equal Opportunity Programs, Inc., Concentrated Employment Programs, Neighborhood Youth Corps, Secondary Schools, Colleges, and City Colleges with high minority enrollment, the State Employment Service, specialized employment agencies, Aspira, LULAC, SER, the G.I. Forum, the Commonwealth of Puerto Rico are normally prepared to refer minority applicants. Organizations prepared to refer women with specific skills are: National Organization for Women, Welfare Rights Organizations, Women's Equity Action League, Talent Bank from Business and Professional Women (including 26 women's organizations), Professional Women's Caucus, Intercollegiate Association of University Women, Negro Women's sororities and service groups such as Delta Sigma Theta, Alpha Kappa Alpha, and Zeta Phi Beta; National Council of Negro Women, American Association of University Women, YWCA, and sectarian groups such as Jewish Women's Groups, Catholic Women's Groups and Protestant Women's Groups, and women's colleges. In addition, community leaders as individuals shall be added to recruiting sources.

(2) Formal briefing sessions should be held, preferably on company premises, with representatives from these recruiting sources. Plant tours, presen-

tations by minority and female employees, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefings. Formal arrangements should be made for referral of applicants, followup with sources, and feedback on disposition of applicants.

(3) Minority and female employees, using procedures similar to subparagraph (2) of this paragraph, should be actively encouraged to refer applicants.

(4) A special effort should be made to include minorities and women on the Personnel Relations staff.

(5) Minority and female employees should be made available for participation in Career Days, Youth Motivation Programs, and related activities in their communities.

(6) Active participation in "Job Fairs" is desirable. Company representatives so participating should be given authority to make on-the-spot commitments.

(7) Active recruiting programs should be carried out at secondary schools, junior colleges, and colleges with predominant minority or female enrollments.

(8) Recruiting efforts at all schools should incorporate special efforts to reach minorities and women.

(9) Special employment programs should be undertaken whenever possible. Some possible programs are:

(i) Technical and nontechnical co-op programs with predominately Negro and women's colleges.

(ii) "After school" and/or work-study jobs for minority youths, male and females.

(iii) Summer jobs for underprivileged youth, male and female.

(iv) Summer work-study programs for male and female faculty members of the predominantly minority schools and colleges.

(v) Motivation, training and employment programs for the hard-core unemployed, male and female.

(10) When recruiting brochures pictorially present work situations, the minority and female members of the work force should be included, especially when such brochures are used in school and career programs.

(11) Help wanted advertising should be expanded to include the minority news media and women's interest media on a regular basis.

(f) The contractor should insure that minority and female employees are given equal opportunity for promotion. Suggestions for achieving this result include:

(1) Post or otherwise announce promotional opportunities.

(2) Make an inventory of current minority and female employees to determine academic, skill and experience level of individual employees.

(3) Initiate necessary remedial, job training and workstudy programs.

(4) Develop and implement formal employee evaluation programs.

(5) Make certain "worker specifications" have been validated on job performance related criteria. (Neither minority nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbent.)

(6) When apparently qualified minority or female employees are passed over for upgrading, require supervisory personnel to submit written justification.

(7) Establish formal career counseling programs to include attitude development, education aid, job rotation, buddy system and similar programs.

(8) Review seniority practices and seniority clauses in union contracts to insure such practices or clauses are nondiscriminatory and do not have a discriminatory effect.

(g) Make certain facilities and company-sponsored social and recreation activities are desegregated. Actively encourage all employees to participate.

(h) Encourage child care, housing and transportation programs appropriately designed to improve the employment opportunities for minorities and women.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 25654, July 12, 1974]

§ 60-2.25 Internal audit and reporting systems.

(a) The contractor should monitor records of referrals, placements, transfers, promotions and terminations at all levels to insure nondiscriminatory policy is carried out.

(b) The contractor should require formal reports from unit managers on a schedule basis as to degree to which corporate or unit goals are attained and timetables met.

(c) The contractor should review report results with all levels of management.

(d) The contractor should advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance.

§ 60-2.26 Support of action programs.

(a) The contractor should appoint key members of management to serve on Merit Employment Councils, Community Relations Boards and similar organizations.

(b) The contractor should encourage minority and female employees to participate actively in National Alliance of Businessmen programs for youth motivation.

(c) The contractor should support Vocational Guidance Institutes, Vestibule Training Programs and similar activities.

(d) The contractor should assist secondary schools and colleges in programs designed to enable minority and female graduates of these institutions to compete in the open employment market on a more equitable basis.

(e) The contractor should publicize achievements of minority and female employees in local and minority news media.

(f) The contractor should support programs developed by such organizations as National Alliance of Businessmen, the Urban Coalition and other organizations concerned with employment opportunities for minorities or women.

Subpart D—Miscellaneous

§ 60-2.30 Use of goals.

The purpose of a contractor's establishment and use of goals is to insure that he meet his affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin.

§ 60-2.31 Preemption.

To the extent that any State or local laws, regulations or ordinances, including those which grant special benefits to persons on account of sex, are in conflict with Executive Order 11246, as amended, or with the requirements of this part, we will regard them as preempted under the Executive order.

§ 60-2.32 Supersedure.

All orders, instructions, regulations, and memoranda of the Secretary of Labor, other officials of the Department of Labor and contracting agencies are hereby superseded to the extent that they are inconsistent herewith, including a previous "Order No. 4" from this Office dated January 30, 1970. Nothing in this part is intended to amend 41 CFR Part 60-3 published in the FEDERAL REGISTER on October 2, 1971 or Employee Testing and Other Selection Procedures or 41 CFR 60-20 on Sex Discrimination Guidelines.

APPENDIX C

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Federal Contract Compliance
WASHINGTON, D.C. 20210

In Reply Refer To: 4228-3

MEMORANDUM

TO: ALL CONTRACT COMPLIANCE OFFICERS

FROM: PHILIP J. DAVIS
Director

SUBJECT: Technical Guidance Memo No. 1 on Revised Order No. 4

The purpose of this memo is to give specific guidance on the proper interpretation on certain selected issues that have been or continue to be raised regarding Revised Order 4. Agencies are expected to implement these interpretations when reviewing affirmative action programs. Further guidance memos will be issued and serially numbered for your retention.

Each affirmative action program must contain an analysis that satisfies each of the following requirements:

(1) Workforce analysis which is defined as a listing of each job classification as appears in applicable collective bargaining agreements or payroll records (not job group) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. For each job classification, the total number of male and female incumbents, and the total number of

male and female incumbents in each of the following groups must be given: Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job classification should be given. All job classifications, including all managerial job classifications, must be listed.

(2) Identification of Job Groups. After the workforce analysis is presented, job classifications may be grouped for the purpose of further analysis. Job groups should be composed of one or more jobs having similar content, wage rates and opportunities. Jobs with clearly different utilization patterns should not be grouped together (e.g., grouping predominantly male clerical jobs with predominantly female clerical jobs should be avoided). Job groups should relate to the data on availability. When data on detailed skills is available more detailed job groups can be used. If promotion through progression lines is rigid, and hiring above entry level is the rare exception, the subsequent availability analysis should be conducted on either entry level positions, or based upon skill requirements for those positions which the majority of employees could be expected to reach within five years or less after employment, and these jobs should be identified as job groups.

(3) Availability Analysis. Minority and female availability must be separately analyzed for each job group. The affirmative action program should include the specific percentages of minority persons (stated separately for Blacks, Spanish Surnamed Americans, American Indians and Orientals) and minority and non-minority women determined to be available in the applicable labor area for each job group.

A separate analysis must be prepared for each job group.

An exception may be made for production workers if it is concluded that utilization requirements will be similar for all units in production activities. A separate analysis will be required for maintenance employees, and likely individual analyses will be needed for individual crafts.

Analysis should be based upon local state employment security agencies' *Manpower Information for Affirmative Action Programs* data which is now available in most localities. The specific figures shown in Tables I, II, and III in those releases can be used in the analysis of population, workforce, unemployment, skill availability. Current occupations of employed persons indicated in Table III should at no time be considered the only basis for utilization, but must be expanded by evaluation of opportunities through training and recruitment.

(4) Underutilization Analysis. Whenever the percentage in a job or group of jobs of total minorities, or of any minority group exceeding 2% or more of the labor area, or of women is lower than the percentage of such persons available in that job category within the applicable labor area, the affirmative action program must specifically state that underutilization exists in that category.

Some agencies have interpreted required goals too narrowly to mean only an annual goal. Where underutilization exists and wherever numbers or percentages are relevant in developing corrective action, each program must contain goals and timetables which satisfy each of the following requirements:

(1) A goal must be established for each job group in which underutilization exists and must be designed to completely correct the underutilization. The goal must be stated as a percentage of the total employees in the job group and must be equal to the percentage of minorities or women available for work in the job group in the applicable labor market.

A single goal for minorities is acceptable, unless, through the company's evaluation it is determined that one minority is underutilized in a substantially disparate manner, in which case separate goals and timetables for such minority groups may be required individually, and it may further be required, where appropriate, that separate goals be established within the minority groups by sex. (See Order 4, 60-2.12(k).)

(2) For each job category in which underutilization exists, a specific timetable must be established for reaching the ultimate goal in the minimum feasible time period.

(3) For each job category in which underutilization exists, the contractor must establish annual rates of hiring and/or promoting minorities and women until the ultimate goal is reached. These rates should be the maximum rates that can be achieved through putting forth every good faith effort, including the use of available recruitment and training facilities, and must not be lower than the percentage rate set in the ultimate goal. Numerical goals based on projected openings are required but cannot be used in place of percentage goals.

(4) Each program must contain specific and detailed action oriented programs, including recruitment and training programs, which comply with Revised Order 4. These programs must, among other required ingredients, commit the contractor to undertake every good faith effort to contact and make use of relevant recruitment and training resources available in the community and to use its own resources for recruiting and training minorities and women to fill positions in job groups where underutilization exists. Data regarding promotable employees, community training facilities and company training facilities must be prepared by the company itself, and related to the locality.

APPENDIX D

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
	:	
FIRESTONE SYNTHETIC RUBBER AND LATEX COMPANY'S FACILITY IN ORANGE, TEXAS	:	Case No. 78-OFCC-13

LOUIS GEORGE FERRAND, JR., ESQUIRE
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For Firestone

Before: BURTON S. STERNBURG
Administrative Law Judge

ADVISORY DECISION

Statement of the Case

This is a proceeding instituted under the provisions of Executive Order 11246, as amended, 3 CFR 339 and the applicable regulations issued thereunder, 41 CFR Chapter 60 et seq.

On August 29, 1978, Weldon J. Rougeau, Director of the Office of Federal Contract Compliance Programs (OFCCP) issued a Notice of Hearing wherein he directed that a hearing be held for purposes of taking oral argument and accepting affidavits with respect to two issues involved in a compliance review of the Affirmative Action Program for Firestone Synthetic Latex and Rubber Company's facility in Orange, Texas. The issues were described in the Notice as follows:

(1) assuming no dispute as to availability under 41 CFR 60-2.11(b)(1)(i) - (viii) [or, as appropriate 2.11(b)(2)(i)-(vii)], when must underutilization be declared under 41 CFR 60.211(b)?

(2) if underutilization is declared, when must goals be established under 41 CFR 60-2.12?

By a letter dated September 15, 1978, in response to Firestone's third request for a "substantial question of law or fact" hearing pursuant to 41 CFR 60-2.2(b) of the regulations, the Director of OFCCP gave Firestone permission to brief a third issue, i.e. "whether the Constitution prohibits the Federal Government from imposing goals on its contractors in the absence of a finding of discrimination."

On October 31, 1978, following the dissolution of a temporary restraining order issued by the U.S. District Court for the Eastern District of Texas, Beaumont Division, a hearing was held in the captioned matter in Washington, D.C. In accordance with the provisions of the notice of hearing, the parties were afforded thirty minute arguments and the opportunity to submit briefs and affidavits in support of their respective positions.

Subsequently on November 3, 1978, after the close of the hearing, the Director of OFCCP, in an apparent attempt to settle a dispute which arose at the hearing concerning the type of decision to be rendered, directed a letter of clarification to the undersigned with copies to all parties. The letter reads in pertinent part as follows:

> ... the purpose of this preliminary informational and advisory hearing currently pending before you is to assist me in determining whether to grant or deny the substantial issue request. In that regard, your findings concerning the two issues enumerated in my August 29, 1978, Notice of Hearing are to be directed towards determining whether Firestone has a substantial justifiable argument regarding its contractual obligation to develop a utilization analysis and to establish goals in accordance with the regulatory standards set out in 41 CFR 60-2.11(b) and 41 CFR 60-2.12. Such review includes whether Firestone was aware of the requirements prior to entering into current Government contracts. You are not, however, to attempt to resolve the argument by ultimately recommending whether Firestone's or the Government's interpretations, in the abstract, are correct because this is not a 41 CFR 60-2.2(b) substantial issues hearing.

Following the issuance of the aforementioned letter, both parties declined the opportunity for further oral argument and opted instead to submit briefs and affidavits in support of their respective positions.

FINDINGS OF FACT 1/

Firestone Synthetic Rubber and Latex Company (hereinafter "Firestone") is a Government contractor subject to the requirements of Executive Order 11246, as amended, and the implementing regulations issued pursuant thereto at 41 CFR Chapter 60. (See p. 1 of Memorandum in Support of Motion for Consideration of Additional Issues, for Allowance of Discovery, and for Continuance filed by Firestone in this Court on October 23, 1978).

On November 19, 1976, Firestone entered into Contract No. DAA EO 776 C3561 with the United States Army in the amount of $1,760,226. (See paragraph 3 of the October 2, 1978, Affidavit of Katherine A. Baldwin, hereinafter "Baldwin Affidavit No. 1," filed with the Brief of the Office of the Solicitor in this Court on October 2, 1978).

Firestone, at all times material to this dispute, has employed more than 50 persons at its Orange, Texas facility. (See p. 1 of Attachment to Appendix B of Baldwin Affidavit No. 1).

Prior to November 1977, in conducting utilization analyses for the Affirmative Action Program (AAP) at its Orange, Texas facility, Firestone declared underutilization in accordance with the Secretary's regulation at 41 CFR 60-2.11(b) and the Director of OFCCP's standard, i.e., whenever the availability percentages for women or minorities in a given job group exceeded Firestone's actual utilization of such persons. Whenever underutilization for minorities or women exceeded half of a person for a given job group, Firestone set goals in accordance with the Secretary's regulation at 41 CFR 60-2.12. (See November 17, 1978 affidavit of Katherine A. Baldwin, filed with this Court November 20, 1978, hereinafter "Baldwin Affidavit No. 2").

On November 8-10, 1977, the Department of Energy conducted an on-site compliance review, pursuant to 41 CFR 60-1.20(c), of Firestone's Orange, Texas facility. During the review, DOE's compliance officer, Mr. Cordova, informed Firestone

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1/ There is no dispute with respect to the facts which are based upon the admissions of the parties and the affidavits of Katherine Baldwin and attachments thereto.

officials that the 1977 and 1978 Affirmative Action Programs for its Orange facility failed to meet the requirements of Executive Order 11246, as amended, and the regulations promulgated thereunder, because of inadequacies in Firestone's utilization analysis required by 41 CFR 60-2.11. At that time, Firestone agreed to revise its utilization analysis and subsequently, by letters dated November 22, 1977, and December 15, 1977, submitted a revised utilization analysis. (See Attachments 1 and 2 to Appendix A of Baldwin Affidavit No. 1).

On January 30, 1978, Firestone submitted its revised 1978 AAP, including goals and timetables for job groups for which Firestone had declared underutilization. However, Firestone did not declare underutilization or set goals whenever the availability of women or minorities exceeded Firestone's actual utilization of such persons in a given job group but rather, it declared underutilization by using the standard deviation method of statistical significance at the 5% level.

On February 2, 1978, Mr. Cordova, having reviewed the revised 1978 AAP, advised Firestone by letter that the AAP did not meet the requirements of 41 CFR Part 60-2. The "AAP Review Findings," which were attached to the February 2, 1978 letter, identified Firestone's job group analysis as one of two deficient areas. The utilization analysis was found unacceptable because underutilization was declared by Firestone only in those situations where the difference between the "expected number" and the "observed number" of minorities or women was statistically significant at the 5% level. (See Appendix B of Baldwin Affidavit No. 1).

In the "AAP Review Findings" attached to the February 2, 1978 letter to Firestone, Mr. Cordova set forth the OFCCP standard for determining the existence of underutilization. Firestone was advised to use the underutilization standard prescribed by OFCCP, i.e., to revise its AAP to "specifically state that underutilization exists for every job group where the percentage of [minorities and women] employed in a job group is less than the percentage of persons available in that job group." (See p. 4 of Appendix B of Baldwin Affidavit No. 1).

On February 16, 1978, Firestone and Department of Energy representatives met to discuss Mr. Cordova's "AAP Review Findings" of February 2, 1978. Although Firestone agreed to submit a 1978 AAP with supplemental revisions, it did not agree to declare underutilization for every job group where the percentage of minorities and women employed was less than their availability. (See p. 4 of the Brief of the United

States Department of Labor, filed October 2, 1978.)

On February 27, 1978, Firestone requested a substantial issues determination and a hearing from the Director of OFCCP, Weldon J. Rougeau, pursuant to 41 CFR 60-2.2(b). Firestone, in its letter to the Director, explained that it had not declared underutilization in the several job groups at its Orange, Texas facility where the disparity between availability and current utilization was not significant at the 5% level. (See Appendix A of Baldwin Affidavit No. 1.)

On May 15, 1978, the Director of OFCCP denied Firestone's request for a substantial issues determination, citing Firestone's failure to follow OFCCP's interpretation of 41 CFR 60-2.11(b) in conducting a utilization analysis. The Director granted Firestone thirty (30) days in which to complete a utilization analysis which complied with the regulations. He also expressed his willingness to consider further evidence, if after conducting the proper utilization analysis, Firestone continued to dispute DOE's requirements with respect to utilization analyses. (See Appendix C of Baldwin Affidavit No. 1.)

In his May 15, 1978, letter denying Firestone's substantial issues request, the Director explained to Firestone that "underutilization" as used in 41 CFR 60-2.11(b), "merely means that there is a numerical disparity between availability and utilization. If such a disparity exists, the contractor is required under 41 CFR 60-2.12 to construct goals and timetables, regardless of whether or not it has ever discriminated in employment." (See Appendix C of Baldwin Affidavit No. 1.) Two examples attesting to OFCCP's position on underutilization were cited, the relevant portions excerpted and copies enclosed for Firestone's information. The first cited example, "Technical Guidance Memo No. 1 on Revised Order No. 4," was issued to "All Contract Compliance Officers" by the Director of OFCCP on February 22, 1974. The second example cited was a November 13, 1974, letter explaining underutilization from Under Secretary of Labor Schubert to Frank Carlucci, Under Secretary of the Department of Health, Education and Welfare. (See Attachments 1 and 2 of Appendix C of Baldwin Affidavit No. 1.)

On June 29, 1978, DOE representatives met with Firestone to discuss the remaining unresolved issues regarding the revised 1978 AAP for the Orange, Texas, facility. At the meeting, Firestone was informed that on the issue of underutilization, OFCCP would not vary from the underutilization standard expressed by the Director of the OFCCP in "Technical Guidance Memo No. 1 on Revised Order No. 4," the letter of November 13, 1974 from Mr. Schubert to HEW, and Mr. Rougeau's

May 15, 1978 letter. (See Appendix D of Baldwin Affidavit No. 1.)

On July 3, 1978, Firestone again requested a determination from Mr. Rougeau that a substantial question of law existed with respect to the proper standard of underutilization. (See Appendix D of Baldwin Affidavit No. 1.)

On August 15, 1978, DOE issued a notice to Firestone prusuant to 41 CFR 60-1.28, giving it 30 days to show cause why enforcement proceedings under the Executive Order should not be instituted. Among the deficiencies listed was the continued failure of Firestone to identify underutilization in its 1978 revised AAP for every job group where the percentage of minorities or women employed in the job group was less than the percentage available for that group. Examples of job groups in which Firestone improperly failed to identify underutilization were cited, and in recommending corrective action, the findings provided sample calculations how underutilization should be determined in accordance with the OFCCP standard. The revised 1978 AAP minority and female goals for the Orange, Texas facility were also found unacceptable. As corrective action, Firestone was told to establish annual numerical and percentage goals for each underutilized job group. (See pp. 2-3, 5 of enclosure to Appendix E to Baldwin Affidavit No. 1.)

DISCUSSION AND CONCLUSIONS

Firestone takes the position that substantial factual and legal questions exist with respect to the manner and method utilized by the Director of the OFCCP in determining underutilization. In support of this position Firestone points out that "availability data" is not predicated on any particular scientific approach but rather on a negotiated agreement between representatives of the contractors involved and OFCCP. In view of the unreliability of such "availability data" Firestone argues that it is not reasonable to declare "underutilization" when there is a disparity between "availability data" with respect to minorities or women and the presence of such persons actually on the contractors payroll. Accordinging to Firestone a more reasonable approach would be to declare "underutilization" only when the difference between availability of minorities or women and their current employment rate is statistically significant at the "5% level of significance." In support of its position in this regard, Firestone cites the decision of the Supreme Court in Hazelwood School District v. United States, 97 S.Ct. 2736(1977). Firestone further argues, that irrespective of what test is used to determine underutilization, in the absence of a finding of discrimination, the imposition

of goals and timetables to rectify any disparity between availability and employment is unconstitutional. In this latter respect, Firestone relies in the main on the courts decisions in Weber v. Kaiser Aluminum and Chemical Corporation 563 F.2d 216 (5th Cir. 1977), cert. pending, U.S.L.W. 3168 (1978); Regents of the University of California v. Bakke, 98 S.Ct. 2733.

The Government on the other hand takes the position that there are no substantial questions of fact or law in that (1) Firestone was or should have been aware of the consistent position of OFCCP with respect to when underutilization is to be declared; (2) the declaration of underutilization when there is a difference of one-half of one person between availability and employment is not unreasonable since it comports with the intentions of the Executive Order; (3) the Executive Order is not controlled by Title VII and therefore it need not comport with the "5% level of significance" utilized therein for purposes of establishing discrimination; and (4) the establishment of flexible goals and timetables, absent a finding of discrimination, is not unconstitutional.

As more fully set forth in the Director's November 3, 1978, letter of clarification, my function in the instant proceeding is to render an advisory opinion with respect to whether or not Firestone has a substantial justifiable argument regarding its contractual obligation to develop a utilization analysis and to establish goals and timetables in accordance with the regulatory standards set out in 41 CFR 60-2.11(b) and 41 CFR 60-2.12.

The facts, which are not in dispute, indicate that Firestone was at all times aware of the requirements of the Order, the regulations and the OFCCP's interpretations and application of same. In fact for the first few years of the current contract Firestone did adhere to and follow the position currently urged by OFCCP. Accordingly, there does not appear to be any substantial issue of fact warranting a full factual hearing under the regulations.

With respect to whether or not the method utilized by OFCCP in determining underutilization is "reasonable," Firestone relies in the main on various court cases involving Title VII of the 1964 Civil Rights Act, as amended.

Firestone admits, and I so find, that the Executive Order has the force and effect of law. Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, cert. denied, 404 U.S. 84. (See also cases cited on page 10 of the Government's pre-hearing brief.) In these circumstances and considering the legislative history of Title VII, particularly the 1972 debates thereon, it is clear that there was

no intent to limit the Executive Order and make it subordinate to, or controlled by, Title VII. The debates, etc., indicate that enforcement of the Executive Order was to be separate and apart from Title VII and that the Order was to be the vehicle for insuring that Government contractors would develop affirmative action programs that would allow for all citizens to share equally in the jobs generated by Government contracts. (See 118 Congressional Record 1385, Remarks of Senator Saxbe.)

Inasmuch as attempts to merge the Executive Order and Title VII were defeated during the 1972 debates it follows that the tests applied in determining discrimination under Title VII are not controlling in determining underutilization under the Executive Order. Accordingly, the mere fact that the 5% standard of significance utilized in Title VII cases for purposes of establishing prima-facie cases of discrimination has received court approval does not make such standard of underutilization a more reasonable one than the discrepancy of 1/2 of one person utilized by OFCCP in declaring underutilization. This is particularly true in view of the purposes of the respective pieces of legislation. Thus, Title VII is designed to prevent and remedy discrimination, while the Executive Order is designed to foster job opportunities for all people in proportion to their availability irrespective of a finding of discrimination. This is a significant distinction. In view of the foregoing and considering the different objectives of the respective pieces of legislation, it does not appear that Firestone's argument relative to the reasonableness of the OFCCP's standard for declaring underutilization warrants the substantial issues hearing urged by Firestone. 2/

Lastly, with regard to the constitutionality or legality of the goals and timetables approach, as noted supra, Firestone takes the position that such goals and timetables are indeed quotas and, absent a showing of discrimination, are unconstitutional. In support of its position in this latter respect, Firestone cites Weber v. Kaiser Aluminum and Chemical Corporation and Regents of the University of California v. Bakke, supra, wherein the courts have indicated that

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2/ In reaching this conclusion, I have not ignored the alleged unscientific method utilized in arriving at the availability figures. However, inasmuch as such figure is a product of negotiation between the parties and not an arbitrary determination by OFCCP, I fail to see why Firestone should be allowed a 5% deviation from such figure. Had Firestone disagreed with the availability figure, then a substantial issue determination might well have been in order at that time.

establishment of racial quotas in the absence of a finding of discrimination are unconstitutional. The Government however, would distinquish those cases which arose under Title VII on the ground that the affirmative action programs arising under the Executive Order do not establish "quotas" but rather flexible goals. According to the Government, "Where good faith efforts have been made, a contractor may not be sanctioned for its failure to fully utilize minorities or women."

A reading of the regulations, particularly Section 60-2.12, supports the Government's position that the goals are flexible. Thus, Section 60-2.12(e) states that

> Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.

Since the above cited regulation specifically make the "goal" something less than a "quota" it would appear that affirmative action plans formulated under the Executive Order without a prior finding of discrimination are not unconstitutional. Further support for such conclusion is found in the regulations as whole. Thus the regulations make it clear that the goals should be significant, measurable, attainable, specific for planned results with timetables for completion. The regulations caution that they are not intended to, and should not, be used to discriminate against any applicant or employee because of color, religion, sex or natural origin.

In view of the foregoing considerations, it does not appear that the goals and timetables approach is designed to reach the level of a quota. An affirmative action plan which rises to such level would of course be contrary to the regulations and, upon the basis of the court cases cited by Firestone, unconstitutional.

On the other hand, it is difficult to imagine how a contractor could reach the goals set forth in an affirmative action plan, all things being equal, without according some preference in hire to minorities and women. According such preferences to minorities and women narrows and to some extent destroys the distinction between flexible goals and quotas.

Inasmuch as the Bakke and Kaiser Aluminum cases, supra, as well as the Government's petition for certiorari in Kaiser Aluminum 3/ indicate that the establishment of quotas and/or preferences absent a finding of discrimination may be illegal, it appears that a substantial question of law does exist with respect to whether the imposition of goals and timetables under Executive Order 11246, absent a finding of discrimination, conflicts with the Constitution and Title VII.

BURTON S. STERNBURG
Administrative Law Judge

Dated: December 8, 1978
Washington, D.C.

3/ In the petition the Government states: "Bakke teaches that the legality of an affirmative action program may turn on the presence of governmental findings of discrimination by the employer and the degree of governmental participation in developing the affirmative action plan."

BSS:yw

APPENDIX E

THE TOOLS OF THE PRIVATE PRACTITIONER IN DEALING WITH GOVERNMENT CONTRACT COMPLIANCE UNDER EXECUTIVE ORDER 11246*

GERARD C. SMETANA†

I. INTRODUCTION

This morning I wish to discuss some of the current and more crucial problems that face the lawyer in dealing with the Equal Employment Opportunity requirements imposed upon government contractors by Executive Order 11246. As more fully discussed by previous speakers, the Executive Order imposes essentially three kinds of obligations upon government contractors.

1. That he not engage in practices which discriminate on the basis of race, religion, color, national origin, or sex;

2. that he develop an affirmative action program which will promote equal employment opportunity, if he employs 50 or more employees, and has a covered contract of $50,000 or more; and

3. that he comply with the reporting provisions stipulated by the rules and regulations of the EEOC.

Although not within the scope of my presentation today, every attorney involved in this area should be aware that recent statutes have been enacted imposing similar types of requirements on government contractors and subcontractors with respect to Vietnam-era veterans[1] and the handicapped.[2]

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[1]Section 2012 of the Vietnam-era Veterans Readjustment Act; Section 503 of the Veterans Employment Act of 1972.

[2]Section 503 of the Vocational Rehabilitation Act of 1973.

Also, some states require companies who contract with the state to meet the same or similar requirements relating to the employment of disadvantaged persons. However, this morning I am from necessity limiting the scope of my remarks to those problems arising under Executive Order 11246, which regulates the equal employment activities of federal government contractors or their subcontractors.

The practitioner may approach these problems with somewhat more confidence or at least sense of perspective if he is aware of the legal authority and source for the foregoing requirements of Executive Order 11246. Thus, the authority of the President to issue executive orders is not inherent in the office, but must find its source either in the Constitution or a specific Act of Congress. *Youngstown Steel and Tube Co. v. Sawyer,* 343 U.S. 579, 635-638 (1952). Those courts of appeal that have dealt with the problem have held that Executive Order 11246 is implicitly authorized by the Federal Procurement Statutes.[3] *Contractors Association of Eastern Pennsylvania v. Secretary of Labor et al.,* 442 F.2d 159 (3rd Cir.), *cert. denied,* 404 U.S. 854 (1971); *Farkas v. Texas Instrument Co.,* 375 F.2d 629 (5th Cir., 1966), *cert. denied,* 389 U.S. 977 (1967); *Farmer v. Philadelphia Electric Co.,* 329 F.2d 3, 8-10 (3rd Cir., 1964). Although the Supreme Court has not squarely addressed the propriety of Executive Order 11246, the most cogent rationale for upholding the Executive Order was expressed in *Contractors Association of Eastern Pennsylvania* by the Third Circuit. There it was held that the Federal Procurement Statutes implicitly authorized the President to take reasonable measures to insure the government contracts were not premised upon inflated labor costs resulting from the exclusion from the labor pool of available minority work force. While asserting that the Executive could not by fiat impose his notion of desirable social legislation, the court believed the President empowered to protect the federal government's legitimate interest in assuring the "largest possible pool of qualified manpower to be available for the accomplishment of its projects" (*supra,* at 171). The question is relevant here not only because some may consider it still open for litigation, but more pertinently, because the Third Circuit's rationale implies some limitations on the agencies implementing and construing Executive Order 11246. Thus, for instance, as I will discuss later, the government's authority to obtain back pay from government contractors for employees who were allegedly discriminated against, is doubtful if the government's only legitimate concern is to prospectively assure the availability of a broad-based labor force by which the contracting would be performed economically and efficiently. Back pay is a remedy which operates retroactively and not prospectively.

Whatever your views concerning whether Executive Order 11246 is validly authorized, in a great number of cases you will most likely need to

[3]40 U.S.C. § 486(a); 40 U.S.C. § 471 *et seq.* and 50 U.S.C. App. § 2062 *et seq.*

proceed on the basis that it is valid. Therefore, you will be concerned with the more pragmatic problems of applying and construing the Executive Order as written. These problems fall within two categories: those of preventive law, that is, counseling your client on compliance and the second, corrective law, which entails representing the client in compliance proceedings initiated by one of the government's compliance agencies. Those will be the two main topics of my remarks.

II. PREVENTIVE LAW—COUNSELING THE CLIENT ON COMPLIANCE WITH EXECUTIVE ORDER 11246

A. *The Basic Tools and the Threshold Problem of Who Is a Covered Government Contractor or Subcontractor*

Ideally, of course, the practitioner will have the opportunity of counseling his client with respect to structuring a compliance program and avoiding those problems which may lead to the threat of cancellation of the government contract or debarment of the contractor from future contracts with the government. The basic tools of the practitioner in this instance are not only the Executive Order itself (found at 30 FR, 12319) but the rules and regulations of the Office of Federal Contract Compliance, 41 CFR 60.1 *et seq.*, the Proposed Affected Class Guidelines, which, although not officially promulgated, are in fact being followed by the government agencies (*Federal Register,* March 26, 1975), and also as a helpful guide to OFCC's views and procedures, the Compliance Manual of the OFCC (Daily Labor Reporter No. 134, July 11, 1975).

Also, a word about the governmental agencies involved in the enforcement of the Executive Order. While the Office of Federal Contract Compliance has supervisory authority, you will find yourself dealing with one of the contracting governmental agencies such as the Department of Defense, the GSA, or the Department of Agriculture, to name only a few. Each of the federal agencies directly involved in procurement of goods and services for the government has been assigned to police compliance with the Executive Order in specific industries, and the compliance agency for your client's particular industry will not necessarily be the one for whom the client is performing the government contract.

With these rudimentary matters in mind, I can turn to the threshold compliance question of who is subject to the Executive Order and what kinds of transactions are covered thereby. The Executive Order, read together with the OFCC's implementing regulations, require that all contracts between the

government and a private concern contain a written EEO clause which sets forth in general terms the contractor's commitment (1) to non-discrimination, (2) to develop a written affirmative action program if he employs 50 or more workers and his contract is for $50,000 or more, and (3) to file various reports and certificates and to make his records available for inspection by the government.

But what happens if your client has no written contract with the government or the written contract does not contain an EEO clause? The question arises whether equal opportunity obligations are contractual in nature and apply only when specifically agreed upon by the contractor or whether the obligation arises by operation of the Executive Order. The OFCC's implementing regulations provide that the EEO clause is implicitly incorporated in every government clause by virtue of the Executive Order and the regulations themselves. Two district courts have sustained this view.[4] In both of those cases, the Justice Department sued public utilities supplying essential power and service to the government for specific performance of the EEO clause, even though the clause was not physically incorporated into the written agreements. In both cases, the courts held the companies bound on the grounds that anyone doing business with the government is subject to all statutes governing government contracts and that the Executive Order had the force of such statutory law. The precedential underpinnings of those cases are dubious since the courts relied upon an early Supreme Court case holding only that the war powers provision of the Constitution gave the Executive the authority to terminate government contracts upon a showing of necessity. It is quite a different matter to say, as these two courts held, that, as a principle of general application, the government may vary written terms of a contract based upon executive fiat incorporating by reference wholly new contractual obligations not originally contemplated by the parties.

Even if the law of these cases is sustained by higher courts, they may not be dispositive of another kind of situation. At least in one of the foregoing cases,[5] the court noted that the government contractor had been given actual notice of the requirements of Executive Order 11246. If there is neither an express agreement to the EEO clause by the contractor or actual notice thereof, there remains some question of whether the contractor can be bound thereby, particularly since the Executive Order, if read literally, provides that any such obligations be created contractually rather than by operation of the law. However, because the courts have broadly construed the federal commitment to the policy of equal employment opportunity, a lawyer must counsel his client that there is a strong possibility that any transaction with

[4]United States v. New Orleans Public Service Inc., 8 FEP Cases 1089 (E.D. La., 1974); United States v. Mississippi Power & Light Co., 19 FEP Cases 1084 at 1089 (S.D. Miss., 1975).

[5]United States v. New Orleans Public Service Inc., *supra*, n. 4.

the government covered by the OFCC's regulation subjects him to an equal employment opportunity obligation.

An even more intriguing question, fraught with serious practical difficulties, related to whether a *subcontractor* to a government contract can be bound to the EEO clause only by virtue of the contractual relationship or whether this can be achieved by operation of the Executive Order. In this regard, the Executive Order requires all government contractors to include the EEO clause in all subcontracts necessary to the performance of the prime government contract with the Government. If you represent the prime government contractor, you will want to make certain that your client avoids the pitfall of inadvertently failing to incorporate the EEO clause in all covered subcontracts, including purchase orders for goods as well as contracts for services. Otherwise, the prime contractor may find himself in the following dilemma. The Government may cancel his prime contract for failure of the subcontractor to comply with the EEO clause. The subcontractor, on the other hand, having no such clause in his agreement with the prime contractor and not being put on notice thereof, may refuse to comply and further, even sue the prime contractor for breach of contract resulting from the government's cancellation of the prime contract.

If a prime contractor comes to you after he has already found himself in a situation of this kind, there are two possible courses to follow. You may refer the subcontractor to the OFCC's regulations providing that the equal employment clause is incorporated into the subcontract by operation of the regulations and assert that the subcontractor is bound thereby whether he had notice or not. However, for reasons already expressed, it is certainly questionable whether this provision of the regulation is authorized by and consistent with the Executive Order. The second possible course of action is to invoke those provisions of the OFCC's regulations requiring the contracting agency to engage in mediation and conciliation of any disputes before it imposes a sanction such as contract cancellation. Under this provision, you may be able to entice the agency to involve the recalcitrant subcontractor in a tripartite conciliation effort between the prime contractor, the subcontractor and the agency to resolve the dilemma on a negotiated basis.

Finally, with respect to coverage under the Executive Order, the practitioner should familiarize himself with the provisions of the regulations for exemptions (41 C.F.R. 60-1.5). Generally, contracts and subcontracts that are under $10,000 are exempt[6] as are contracts to be performed outside the United States with labor recruited outside the United States. Further, the Director of the OFCC may in his discretion exempt contracts when it is in the national interest or when national security reasons are present.

[6]Where a contractor has several contracts, or is providing an indeterminate amount of goods or services, the aggregate of the annual business done with the government is generally controlling.

B. *Compliance with Nondiscrimination Requirements of EEO 11246*

Next for consideration are the problems of compliance with each of the three major provisions of the Executive Order: (1) the nondiscrimination requirement; (2) the affirmative action requirement, and (3) the reporting and disclosure requirement.

First, with respect to the nondiscrimination requirement contained in the EEO clause, the contractor should examine his employment policies and practices in light of the legal criteria that have been developed by the courts for interpreting Title VII and the Equal Pay Act. Satisfaction of these criteria is at the least the fundamental requirement of the EEO clause. Of principal concern will be possible systematic discrimination in areas such as testing requirements; discriminatory recruitment practices; and those sensitive areas such as seniority, lay-off and promotion rules, which perpetuate past practices of discrimination against an "affected class." It is unquestionably to the client's advantage to identify and correct any of these problems before they are ferretted out by the governmental compliance agencies, all of whom have become within the last year vigilant and vigorous in their compliance activities. For one thing, it is much more economical for the contractor to undertake corrective measures voluntarily, since under the OFCC's recently proposed guidelines, back pay has become a normal remedy for the so-called "affected class" type of violations. Moreover, corrective adjustments can be made in a much more orderly manner if planned in advance rather than taken precipitously under the threat of summary debarment or cancellation of an existing contract.

However, the difficulties of identifying at least the "affected class" situations have been compounded by the vagueness of the OFCC's proposed guidelines which seem to be broader than the criteria developed by the courts for finding similar violations under Title VII. Thus, the guidelines state that any employee who continues "to suffer the relief" which statement is so broad as to include any employee who at any time was ever discriminated against and presently is working in a lower paid job classification as a result thereof even if the employer maintains no present practices which restrict his movement out of the job in which he was initially placed. Under Title VII past discrimination is remedial only if the employer maintains a current practice, such as departmental seniority, which inhibits the employees from transferring out of jobs in which they were discriminatorily placed. There exists a great deal of controversy over whether the OFCC's guidelines are valid insofar as they may require more of government contractors than is required under Title VII. Certainly the language of Executive Order 11246 would not justify such an expansive reading. Nevertheless, some caution must be exercised in advising clients as to whether he can ever be certain that he has complied with the OFCC's interpretation of Executive Order 11246.

Where a union contract maintains a provision which may have the effect of inhibiting employment opportunities of an affected class, these must be changed. The guidelines specifically refuse to recognize such union agreement as a defense. If the required revisions in the collective bargaining agreement cannot be achieved through negotiation with the union, you may wish to consider resorting to an action for declaratory judgment seeking a determination of whether the EEO clause in the government contract requires changes in the collective bargaining agreement. *Jersey Central Power & Light Co. v. I.B.E.W.*, ____ F.2d ____, 9 FEP Cases 117 (3rd Cir., 1975).

New Jersey Central Power & Light, is an interesting case and, although it arises in an EEOC context, it is instructive in dealing with similar problems that could emerge under the Executive Order. As a result of a charge filed with the EEOC in 1972, the Company, the Unions, and the EEOC entered into a conciliation agreement which provided *inter alia* for an affirmative action program designed to increase the percentage of minority group and female employees employed by the Company. The Company and the involved Unions had a collective bargaining agreement which provided for lay-off and recall according to employment seniority. The Company found itself faced with the need to lay off a substantial number of employees which, if pursued on the basis of seniority, would result in a disproportionate impact on recently-hired black employees. Faced with Union claims that work reduction should proceed according to reverse seniority and EEOC claims that any reduction in force had to be made so as to obtain a larger proportion of minority employees and women action for declaratory relief naming both the Unions and the EEOC as parties.

The Third Circuit held that a facially neutral Company-wide seniority system, without more, is a *bona fide* seniority system and will not be modified even though it will operate to the disadvantage of females and minority groups as a result of past employment practices. The Court observed that none of the evidence before it demonstrated that the seniority provisions of the collective bargaining agreement were not *bona fide*, and remanded the case to the District Court for further proceedings. On the petition of the EEOC, and the Company, the Supreme Court has granted *certiorari*. Not only is the substantive issue of great significance, but the court's approval of the declaratory judgment procedure to resolve the conflicting claims made against the employer is a useful precedent in this area.

C. *Compliance with Requirements for an Affirmative Action Program: Quotas or Goals?*

The OFCC's affirmative action guidelines (41 C.F.R. 60-2.1 to 60-2.32) requires every contractor or subcontractor with 50 or more employees and a contract of $50,000, to develop a written affirmative action program to promote the goal of equal opportunity in employment. In its ideal form the

affirmative action program, as contemplated by the guidelines, is a critical self-analysis of the employer's deficiencies and the development of a plan for correcting such deficiencies.

The central aspect of the affirmative action program is the requirement that the employer establish numerical goals and time tables for the employment and promotion of minority group members. These goals must reflect the percentage of minority group persons available in the work force for the applicable geographical area in which the employer's facility is located. Whereas, in large metropolitan areas, there may be more than one "geographical area" to choose from (that is, a limited suburban district as opposed to a more extensive metropolitan area), the government compliance agencies will invariably require the contractor to use the geographical area yielding the highest number of minority groups in the labor force.

The incipient danger in the use of goals is that under the pressure of the compliance agency to meet these goals, the employers may yield to the temptation to resort to quota or preferential hiring. The practice of quota hiring raises serious legal questions where qualified non-minority applicants are rejected because they do not help fulfill the employer's goals. Reduced to basic terms, this amounts to rejecting such applicants because of their race, sex, religion or national origin. There is an alternative to meeting the goal requirements of the affirmative action program which, though more difficult in application than quota hiring, is a much more advisable practice. That alternative is for the employer to intensify his recruitment efforts from those sources and from those areas of the community which will yield a higher number of qualified minority applicants.

The moral implications of quota hiring aside, a contractor who resorts to such practice exposes himself to a potential legal action by the aggrieved person. Of course the law is currently unsettled on the issues of whether reverse discrimination violates Title VII[7] and whether governmental action precipitating reverse discrimination constitutes a denial of equal protection.[8] Indeed, one of the most significant questions currently pending before the Supreme Court this term is whether reverse discrimination violates Title VII. In that case, *McDonald v. Santa Fe Transportation Co.*,[9] the Court will review the Fifth Circuit's determination that Title VII did not protect Caucasians from employment practices which discriminated in favor of minority employees. The Court's decision on the issue will certainly affect the manner in which the OFCC can use goals.

Although a number of courts have approved the use of preferential hiring requirements as a remedial measure to rectify discriminatory prac-

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[7]McDonald v. Santa Fe Transportation Co., 10 FEP Cases 1165 (5th Cir., 1975), *cert. granted*, U.S. Supreme Court No. 72-260, 212 DLR at page A-2.

[8]DeFunis v. Odegaard, 416 U.S. 312 (1974).

[9]*Supra*, note 7.

tices, most of those same courts have recognized that use of quotas to correct racial imbalance in an employer's work force where unrelated to discrimination is not justified. *Rios v. Steamfitters Local 638,* 501 F.2d 622, 8 FEP Cases 293 (2nd Cir., 1974) and cases cited.[10] If reverse discrimination is determined to be unlawful under Title VII, there will have to be some rethinking of these cases. In any event, however, the goal provisions of the affirmative action programs required by the Executive Order are not predicated on past discrimination by the contractor, but merely on the racial imbalance in his work force. Consequently, there is probably no legal justification for satisfying the goals through quota hiring. Accordingly, at least until the law becomes settled, one cannot easily discount the threat of liability, by way of a class action possibly, for quota hiring.

Finally, the view is held in some quarters that as currently implemented, the OFCC's regulations and guidelines improperly foster quota hiring, which might well be violative of the Equal Protection Clause, if not the Executive Order itself. Although the regulations of the OFCC are laced with disclaimers of rigid enforcement of the goal requirements, they also provide that a substantial departure from any provision of a contractor's affirmative action program which, of course, includes specific goals, is grounds for cancellation, debarment or other sanctions. (*Compare* 41 C.F.R. § 60-2.2(c) and 60-2.12(k).) At least in some circumstances the only way a contractor may be able to meet the requisite goals and avoid a substantial deviation therefrom is through quota hiring. Currently, the order of the federal district court in the *Alameda*[11] case is being challenged on appeal on the grounds that it construes and implements the OFCC's goal requirements so as to require, in effect, quota hiring. In that case it is being urged that such a requirement is unconstitutional.

Another aspect of the affirmative action program requirements deserves particular care. Although the purpose of such AAP's is to occasion a critical self-analysis by the employer, it must be borne in mind that these AAP's may be subject to disclosure to either the EEOC or litigants engaged in discovery and even to members of the general public. Even though regulations provide that the AAP is to be kept at the employment location at which it applies it is subject to disclosure to the agency compliance officer. Pursuant to the memorandum of understanding between the OFCC and the EEOC a compliance agency is required to make available any information pertaining to a government contractor against whom a charge has been filed with the EEOC. 39 F.R. 35855 (October 4, 1974). Moreover, under OFCC regula-

[10]The court in *Rios* was of the view that strict mathematical hiring quotas was a proper remedial measure if they were of a temporary nature to be abandoned once the minority composition of the employer's work force reached equilibrium with the ratio of minorities in the relevant labor market.

[11]The Legal Aid Society of Alameda County v. Brennan, 381 F.2d 125, 8 FEP Cases 178 (D.C. Cal., 1974), on appeal to the Ninth Circuit, No. 74-3014.

tions parts or all of such data may be disclosed to the public pursuant to the current interpretation of the Freedom of Information Act. Therefore, some care should be exercised in drafting the affirmative action program so as to avoid making unnecessary admissions and insuring that all statements are placed in a proper context.

D. *The Pitfalls Inherent in the OFCC's Reporting Requirements*

The OFCC regulations, of course, require the government contractor to file certain reports, including the EEO-1 and to disclose all of its records relevant to compliance upon request. The crucial feature of which one should be aware is that once the records or data of the government contractor becomes part of the compliance agency's files it may be subject to disclosure either to the general public under the Freedom of Information Act or to the EEOC pursuant to the special inter-agency agreement already mentioned.

Accordingly, there are two procedures for opposing disclosure, of which the practitioner should be aware. First, the OFCC's regulations (41 C.F.R. 60-60.4) provide for administrative consideration of objections to the production of documents requested by a compliance officer on the grounds of relevancy. Further, these regulations provide the contractor with a procedure for having any information classified as confidential and hence exempt from disclosure to the public under the Freedom of Information Act. Moreover, there is at least one pending case in which the authority of the OFCC and its compliance agency to make any disclosures of EEO related information obtained from government contractors is under attack. (*Castilio, et al. v. Dunlop and the Chamber of Commerce of the United States,* pending before the Ninth Circuit in Appeals Nos. 75-1870, 75-2858.) There is a serious question raised in that case concerning whether Section 709(e) of Title VII which bars the disclosure of EEO information to the public applies to the OFCC and its compliance agencies as well as to the EEOC. In a related proceeding Justice Douglas, ruling upon a motion for stay, strongly indicated that Section 709(e) would prevent the disclosure by any government agency of EEO data since the policy of that statute was to insure cooperation with the Government through an assurance of confidentiality.[12] However, it should be noted that this view has been rejected by some district courts.[13]

The second avenue for obtaining relief from disclosure of the contractor's EEO data if the administrative procedures are unavailing is through the courts pursuant to the Administrative Procedures Act[14] or possibly the

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[12]Chamber of Commerce v. Legal Aid Society, U.S. Sup. Ct. No. A-233, decided September 29, 1975: *See also,* Administrator, F.A.A. v. Robertson, _____ U.S. _____, S. Ct. 2140 (1975).

[13]*E.g.*, Sears, Roebuck & Co. v. G.S.A., _____ F. Supp. _____, 8 FEP Cases 1155 (D.D.C., 1974).

[14]Sears, Roebuck & Co. v. G.S.A., *supra,* n. 13.

Declaratory Judgment Act. Limited relief has been obtained in some cases wherein the courts have enjoined the disclosure of those portions of an employer's EEO data which are considered confidential commercial information.[15] However, those cases provide only limited relief in exempting from disclosure confidential trade secrets, commercial or financial information or personnel data, the disclosure of which would constitute an invasion of personal privacy.

In addition to the possibility that a government contractor's records may be disclosed to the public there is also a provision by which the OFCC or its compliance agencies will disclose all such information in its files to the EEOC once a charge has been filed against that particular government contractor. As already indicated, the alleged authority for this provision is a memorandum of understanding of September 11, 1974[16] For those of you who have clients whose interests are aggrieved by such inter-agency disclosure, there is the possibility of judicial relief by way of a declaratory judgment suit. Currently there are at least two cases[17] in which disclosure pursuant to the memorandum of understanding is being challenged on the grounds that (1) the memorandum of understanding constitutes a rule within the meaning of the Administrative Procedures Act and was not promulgated in accordance with the rule making procedure of the APA (2) it violates a specific statutory prohibition against the interchange of information between agencies,[18] (3) that the memorandum constitutes the usurpation of the authority of another governmental body (*see* Section 715 of Title VII of the Civil Rights Act) and (4) the procedures outlined in the memoranda constitute a denial of administrative due process because they provide for no notice, hearing or appeal from an adverse agency decision to disclose the information.

There is still another means by which disclosure of a government contractor's compliance data might result. In *Legal Aid Society of Alameda County v. Brennan, supra* (on appeal sub. nom. *Castilio v. Dunlop and the Chamber of Commerce of the United States)* a federal district court ordered that AAP's and other compliance data furnished by government contractors to a compliance agency be disclosed to a private litigant pursuant to discovery proceedings. It would appear in a case such as that where discovery is being made of documents generated by a private contractor although such documents are in the files of the Government, that the private contractor

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[15]Westinghouse Electric Corp. v. Schlesinger, 7 FEP Cases 682 (E.D. Va., 1974); United States Steel Corp. v. Schlesinger, 8 FEP Cases 923 (E.D. Va., 1974); General Motors Corp. v. Schlesinger, 8 FEP Cases 923 (E.D. Va., 1974); Sears, Roebuck & Co. v. G.S.A., _____ F. Supp. _____, 8 FEP Cases 1155 (D.D.C., 1974).

[16]39 F.R. 35855 (October 4, 1974).

[17]Emerson Electric Company v. Schlesinger, C.A. No. 12-75-A (E.D. Va.); Chrysler Corp. v. Brennan, No. 74-850-C (E.D. Mo.).

[18]44 U.S.C. § 3508.

would have standing to intervene at least for the purposes of opposing discovery. A more serious and more interesting issue being litigated on appeal in that case concerns the standing of such a private party to invoke the exemptions from disclosure under the Freedom of Information Act when the Government itself has disclaimed any reliance thereon. Even though many of the FOIA exemptions are in the literal terms of the statute for the benefit of the Government, there is some legislative history and support in the case law[19] for the proposition that the exemptions are available to private parties to protect data they have submitted to the Government.

III. REPRESENTING THE CLIENT IN AGENCY PROCEEDINGS: DEFENDING CHARGES OF NONCOMPLIANCE WITH THE EXECUTIVE ORDER

A. *Introduction—The Consequences to a Government Contractor of Noncompliance with the Executive Order 11246*

Having discussed above some of the problems entailed in assisting a client in structuring his compliance program, attention must now be given to some of the more important aspect of handling charges of noncompliance. This aspect of the practitioner's art is particularly delicate because not only are the stakes high, but the Government has a great deal of leverage. This is because the ultimate sanctions for noncompliance are cancellations of an existing contract and debarment from future contracts, which for many clients would deprive them of a lucrative source of income. Moreover, the Government has sought to increase its leverage by asserting the right to summary *de facto* debarment without a hearing for an alleged violation. This weapon, in most instances, maximizes the pressure on the government contractor to settle. With this appreciation for the possible exposure of the clients resulting from possible noncompliance, we can next turn to the agency procedures for determining matters of compliance.

B. *The Agency Procedures for Administrative Determination of Charges of Noncompliance*

There are essentially four stages of the agency proceedings beginning with the investigative phase and ending with an administrative hearing and final determination.

Compliance Review. The investigative procedures are ordinarily begun with a compliance review which more often than not is conducted on the basis of a random selection of contractors for review. The review may consist of little more than an audit of the affirmative action program or it may entail

[19]Rural Housing Alliance v. Dept. of Agriculture, 498 F.2d 73, 82 (D.C. Cir., 1974) *reh. denied*, 502 F.2d 1179.

an on-site review of the employer's AAP and supporting personnel records together with employee interviews or even the submission to the compliance officer of substantial data and documentation for an off-site analysis. Investigations may also be initiated by charges filed with the compliance agency by aggrieved persons.

Mediation and Conciliation. If the preliminary determination is made by the agency that a violation exists, that agency is required by the Executive Order to seek mediation and conciliation as a condition to proceeding further, although the OFCC regulations provide in some instances for summary debarment on an interim basis prior to mediation and conciliation (41 C.F.R. 60-2.2(c)). It is during the mediation and conciliation proceedings that you will be able to dispose of most matters. Ordinarily the agencies have demonstrated a great deal of flexibility in formulating remedial measures to resolve the alleged noncompliance.

Show Cause Order. If mediation and conciliation fails, a compliance agency will issue an order to show cause why a specific sanction should not be levied against a contractor for the alleged violation. To this initial pleading the contractor is required to file a written answer and the stage is set for the formal administrative hearing and decision.

Administrative Hearing and Final Determination. Where a contractor has been served with an order to show cause he must, together with his answer, file a request for a hearing. Upon such request he is entitled to a full evidentiary hearing before a duly appointed hearing officer and the right to representation by counsel. At the cose of the hearing the hearing officer prepares a recommended decision to which the parties have the opportunity of taking exceptions and the final decision is made by the head of the compliance agency after approval thereof by the Director of the OFCC (41 C.F.R. 60-1.20 *et seq.*).

Having in mind the procedural steps in a compliance case, we may next concern ourselves with some of the tactical considerations. As already mentioned, you will want to explore carefully on behalf of your client the possibility of reaching an agreement with the agency through mediation and conciliation. For the most part, the compliance agencies and the OFCC have exhibited a great deal of flexibility not only in fashioning prospective remedial measures, but also in establishing a back pay formula in matters such as alleged "affected class" violations. However, you should be fully cognizant that such settlements with the compliance agencies or the OFCC are not binding upon the EEOC or private litigants under Title VII at least where the grievants have not individually signed releases pursuant to such a settlement agreement. Although the effect of such releases signed by individual employees has not been definitively settled you may seek to enhance the effectiveness of such a settlement agreement by obtaining releases and thereby seeking to bind those individuals executing such releases. *See United States*

v. Allegheny-Ludlum Industries, 63 F.R.D. 1, 8 FEP Cases 198 (N.D. Ala., 1974), *aff'd,* 11 FEP Cases 167 (5th Cir., 1975).

Where the issues of the case are complex, cutting across different areas of the law, and the potential violations are extensive, a so-called coordinated settlement may constitute a feasible tool for extricating your client in an orderly manner. The unique feature of a coordinated settlement is that both the EEOC and the OFCC and even possibly the Department of Labor are parties thereto and the settlement is comprehensive enough to dispose of all claims by the Government, at least, arising under the Executive Order, Title VII and the Equal Pay Act. An example of this approach is the ATT coordinated settlement executed on January 18, 1973. This approach not only makes peace with the government agencies involved (and thereby removes the threat of an OFCC debarment or contract cancellation) but may well discourage and inhibit the bringing of class actions although it will not be a bar to such class actions for employees who decline to execute releases.

In balancing the merits of settlement as opposed to the advantages of contesting the issues in an administrative hearing, some attention should be devoted to the interaction between the OFCC and the EEOC's enforcement procedures. For instance, if you decide to litigate an alleged violation of the government contractor's obligations under the Executive Order you will be developing an evidentiary record in an administrative hearing, which record may well find its way into the hands of the EEOC or even potential class action litigants. This may afford our potential adversaries with a valuable insight into the Company's policies and practices. Also, in this same vein you may find it futile to contest the OFCC's jurisdiction or authority in some matters such as whether it is authorized to award back pay, since it is often the OFCC's procedure merely to refer alleged violations which are not settled by it to the EEOC for investigation and prosecution. Moreover, do not overlook the possibility that this referral practice may be used to your advantage in certain situations. Thus, where a union proves recalcitrant by refusing to alter offensive provisions in its collective bargaining agreement, you may be able to persuade the union to settle by pointing out that the OFCC has in the past referred such matters to the EEOC.

Finally, there is the question of whether and to what extent judicial review is available to check abuses or errors of law committed by the OFCC or its compliance agency. One aspect of this problem is whether, if after having exhausted your administrative remedies, you may obtain judicial review of the final agency determination. It is quite likely that the Administrative Procedures Act may be construed to confer jurisdiction upon the federal courts for at least limited judicial review. A second aspect of this problem involves the jurisdiction of the federal courts to enjoin agency policies or practices which are *ultra vires* such as possibly the award of back pay to aggrieved employees by the OFCC or its compliance agencies. This question is discussed more fully later. It is sufficient to note here that despite

one district court decision to the contrary, such suits probably may be maintained under the Administrative Procedures Act (5 U.S.C. § 705).

C. *Remedies and Sanctions Employed by the OFCC and Compliance Agencies*

Any decision concerning whether to settle or contest a question of compliance under Executive Order 11246, necessarily entails a consideration of what sanctions and remedies may be imposed against the government contractor. Often the most crucial sanction to which the OFCC lays claim is summary *de facto* debarment. Although the Executive Order provides that no contractor can be debarred without a hearing, Section 60-2.2(b)(c) of the OFCC's regulations provide that a contractor in violation of the affirmative action requirements may be declared nonresponsible prior to a hearing and thus suspended from eligibility to bid on a government contract during the pendency of such hearing and final agency decision. This, of course, is nothing less than summary *de facto* debarment. There are some limitations upon this procedure contained in the OFCC's regulations which you will want to consult but it remains a potent weapon for coercing government contractors into accepting the OFCC's views of compliance. In *Crown Zellerbach v. Wirtz,*[20] Judge Sirica found that the Executive Order required notice and hearing before the contractor could be debarred. However, a subsequent decision in the Southern District of New York, *Commercial Envelope,*[21] held to the contrary, without dealing at all with the *Crown Zellerbach* decision or its rationale. In my view *Crown Zellerbach* is correct and summary *de facto* debarment not only violate the Executive Order, but also constitutes a denial of administrative due process. Certainly you want to be aware of this potential tool for attacking the procedure if your client is confronted with such a situation.

While a summary *de facto* debarment is an interim sanction pending the outcome of the agency's decision, there are of course ultimate sanctions for noncompliance authorized by Section 209 of the Executive Order. These are cancellation, permanent debarment and an action in the federal courts for specific enforcement of the contract or for an injunction restraining violations of the EEO clause. The injunctive relief authorized extends not only to the contractors but individuals or groups "who prevent directly or indirectly . . . compliance with the provisions" of the Executive Order. This presumably authorizes actions against recalcitrant unions who attempt to block compliance with the provisions of the EEO clause.

You will note that the Executive Order nowhere explicitly authorizes compliance agencies to assess back pay against any government contractor.

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[20]281 F. Supp. 337, 1 FEP Cases 275 (D.C.C., 1968).

[21]Commercial Envelope Manufacturing Co., Inc. v. Dunlop, _____ F. Supp. _____, 11 FEP Cases 117 (S.D.N.Y., 1975).

Nevertheless, the OFCC and its proposed guidelines of affected class and back pay (*Federal Register* dated March 26, 1975) asserts that it has this power. You will want to check these guidelines for the limitations period applied (two years for ordinary violations, three years for willful violations) and the formula for determining back pay. The authority of the agencies to assess back pay under the Executive Order was challenged in *Kerr Glass Manufacturing v. Dunlop,* CA 74-0597 (D.D.C.). Questions concerning the legal authority for such remedy stem not only from the lack of any explicit provision therefor in Executive Order 11246, but also upon the limited nature of the statutory authorization underlying the Executive Order itself. If, as the Third Circuit has held,[22] the justification for the Executive Order lies in insuring the Government a broad pool of labor, a retroactive remedy such as back pay would not serve that purpose and therefore would be extraneous to the legitimate purposes for which the Executive Order was promulgated. In my view, these are persuasive theories for challenging the OFCC on this issue, but the courts have not yet ruled.

The district court in *Kerr Glass* did not reach that issue because it found that the contractor had not exhausted his administrative remedies before the compliance agency. With all due respect, I believe the court to have erred and misapplied *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967), which authorizes declaratory judgment to review the sufficiency of an agency's rules where such rules affect a broad class of persons. The OFCC's guidelines effectively constitute "rules", particularly since they are currently being implemented, and should not be immune from immediate judicial review. The Government used a ploy in that case which may have influenced the decision when it simply declared that summary *de facto* debarment would not be instituted against the contractor, and asserted that accordingly there was no imminent jeopardy threatened. It may be that the only manner in which to overcome this obstacle is through a class or an associational suit alleging that the backpay guidelines affect all government contractors and that the agency's practice has been manipulated to avoid judicial review.

A final word on the effect of OFCC remedies. Like settlements entered into with the OFCC, its decisions and remedial relief imposed do not bar either Title VII actions or the imposition of broader relief based upon the same conduct.

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[22]Contractors Association of Eastern Pennsylvania v. Secretary of Labor, et al., 442 F.2d 159 (3rd Cir.), *cert. denied,* 404 U.S. 854 (1971).

IV. CONCLUSION

As is apparent from the foregoing remarks, the law in this area is in a state of flux, especially with respect to the parameters of the OFCC's authority, not only with respect to its procedures, but with respect to its substantive interpretations of the provisions of Executive Order 11246. The practitioner dealing in this area will find himself challenged not only with respect to his scholarship, but with respect to his tactical skills and intuition. Hopefully within the next few years the courts will lend some definitive guidance which will enable government contractors to fulfill their EEO obligations in an orderly and coherent fashion.


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