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Hanson: The Affirmative Action Requirement of Executive Order 11246

THE AFFIRMATIVE ACTION REQUIREMENT OF EXECUTIVE ORDER 11246 AND ITS EFFECT ON GOVERNMENT CONTRACTORS, UNIONS AND MINORITY WORKERS

INTRODUCTION

Congress, with the enactment of the Civil Rights Act of 1964,¹ finally has made an effort to end a problem of long standing and of national dimension — discrimination in employment. Title VII of the Act specifically prohibits discrimination on the basis of race, color, religion, sex or national origin by an employer, employment agency or labor organization.² The passage of this Act climaxed over twenty years of debate on dozens of bills designed to solve the problem of employment discrimination. And while it took Congress until 1964 to act in this field, another branch of the federal government has been involved, in varying degree and with varying success, for almost thirty years.³

The executive branch first became involved on June 25, 1941, when President Roosevelt, reacting to a threatened demonstration march on Washington by 100,000 Negroes,⁴ promulgated Executive Order 8802⁵ prohibiting discrimination in government and in defense industries. He stated:

I do hereby reaffirm the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin, and I do hereby declare that it is the duty of employers and of labor organizations, in furtherance of said policy and of this order, to provide for the full and equitable participation of all workers in defense industries, without discrimination because of race, creed, color, or national origin. . . .⁶

He also directed all federal contracting agencies to include in their defense contracts “a provision obligating the contractor not to discriminate against any worker because of race, creed, color, or national origin. . . .”⁷ This order has served as the foundation for subsequent orders by other Presidents, and, since 1941, a series of executive orders “has expanded both the substance of the nondiscrimination obligation and the number of contractors subject to it.”⁸

¹42 U.S.C. § 2000e (1964).

²Definitions of who is an employer, employment agency or labor organization for purposes of the Act are found in 42 U.S.C. § 2000e-1(b), (c), (d).

³For a comprehensive treatment of the history and effectiveness of the early executive orders, see M. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* (1966).

⁴*Id.* at 9.

⁵Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

⁶*Id.*

⁷*Id.*

⁸Note, *Executive Order 11246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U. L. REV. 590 (1969). See also SOVERN, *supra* note 3.

The passage of the Civil Rights Act of 1964 did not result in a termination of the executive branch's involvement in the area. On September 24, 1965, President Johnson issued Executive Order 11246⁹ which, in addition to retaining the nondiscrimination clause of earlier executive orders, imposed upon contractors the duty to undertake "affirmative action"¹⁰ to ensure equal job opportunity. The coverage, procedure and sanctions provided in Executive Order 11246 are quite different from what Congress provided in Title VII.¹¹ This Comment will examine the effect of the affirmative action requirement on government contractors, labor unions and minority workers.

EXECUTIVE ORDER 11246

IN GENERAL

Executive Order 11246 places two major obligations on employers subject to its provisions. The first is that contractors not "discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin."¹² This is basically the same language which President Roosevelt used in Executive Order 8802 thirty years ago. It imposes a negative duty, a duty to refrain from discriminating. The second obligation is of more recent origin and requires that contractors "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."¹³ This "affirmative action" requirement first appeared in Executive Order 10925, issued by President Kennedy in 1961.¹⁴ In addition to expending the obligation of contractors, Executive Order 10925 was also the first of the series of executive orders to provide strong and specific penalties for noncompliance.¹⁵

President Johnson, while retaining the contractor obligations and the sanctions of the Kennedy order, changed the administrative structure of the entire compliance program. He assigned overall supervisory authority to the Secretary of Labor and authorized him to adopt rules and regulations to achieve the purposes of the Order.¹⁶ Pursuant to this authority, the Secretary of Labor established the Office of Federal

⁹Exec. Order No. 11246, 3 C.F.R. 402 (Supp. 1970).

¹⁰This was not the first executive order to impose this obligation. President Kennedy issued Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961) which contained an affirmative action requirement.

¹¹For a discussion of Title VII's provisions, see Bender, *Title VII Seven Years After*, this issue.

¹²Exec. Order No. 11246 § 202 (1), *supra* note 9.

¹³*Id.*

¹⁴Exec. Order No. 10925, *supra* note 10.

¹⁵SOVERN, *supra* note 3.

¹⁶Exec. Order No. 11246 § 201, *supra* note 9.

¹⁷Department of Labor, Secretary's Order No. 26-65, 31 Fed. Reg. 6921 (1966).

Contract Compliance (OFCC) in 1966,¹⁷ which then issued rules and regulations governing the compliance program.¹⁸

WHO IS SUBJECT TO EXECUTIVE ORDER 11246?

The extent of coverage of Executive Order 11246 is found in Parts II and III of the Order and in the regulations issued by the OFCC. Section 202 of the Order provides that "all Government contracting agencies" except those "exempted in accordance with Section 204" shall include the nondiscrimination and affirmative action clauses in every Government contract entered into. Section 204 gives the Secretary of Labor authority to "exempt a contracting agency from the requirement of including any or all of (the obligations) in any specific contract, subcontract, or purchase order", but only when he deems that "special circumstances in the national interest so require." Section 204 also gives the Secretary authority to establish rules and regulations for the exemption of 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.¹⁹

Section 301 provides that federally assisted construction is also subject to the Order. Thus, "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" are covered.

The regulations issued in pursuance of the authority in the Order further define the coverage. Contracts and subcontracts, other than bills of lading, for less than \$10,000 are exempt.²⁰ Contracts and subcontracts for indefinite quantities are exempt only if the purchaser has reason to believe that the amount to be ordered in any year will be less than \$10,000.²¹

It is obvious that coverage of federal contracts and federally assisted construction directly affects a large number of the nation's employers. However, it is important to note that Executive Order 11246 applies *only* to contractors/employers. It does not apply to unions, where much of the discrimination actually occurs. In this respect, Executive Order 11246 differs from Title VII of the Civil Rights Act of 1964, which applies generally to employers, employment agencies and labor organizations.

¹⁷41 C.F.R. § 60 (1970).

¹⁸Exec. Order No. 11246 § 204, *supra* note 9.

²⁰41 C.F.R. § 60-1.5(a) (1970). The amount of the contract, not the amount of federal assistance, is the determining figure.

²¹*Id.* § 60-1.5(b).

OBLIGATIONS OF CONTRACTORS

What is a contractor covered by the Order required to do to be in compliance? In addition to the previously mentioned duty not to discriminate, and the duty to take affirmative action (discussed in more detail in part III of this Comment), the Order requires that the contractor (1) state in all solicitations or advertisements for employees that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin; (2) advise each labor union or representative of workers with which he has a collective bargaining agreement of his commitments under the Order; (3) comply with all provisions of the Order and of the rules, regulations, and orders of the Secretary of Labor; (4) furnish all information and reports required by the Order and regulations and permit access to his books and records for purposes of ascertaining compliance; (5) include the obligations imposed by the Order in every subcontract or purchase order, unless specifically exempted.²²

The regulations provide for extensive regular reporting and also give the Director of the OFCC authority to request "other information" prior to, or after an award, or both.²³ When the contractor or subcontractor has a collective bargaining agreement with a union or other agency for the referral of workers, the report must include information as to such union's or agency's practices and policies affecting compliance by the contractor. But where the information sought is within the exclusive possession of the labor union and the union refuses to provide it, a proviso allows the contractor to set forth this fact and what effort he has made to obtain such information.²⁴ Also, the contracting agency or the Secretary of Labor has authority to direct that the contractor submit a signed statement from any union or referral agency with which he deals to the effect that the union's or referral agency's practices and policies do not discriminate and that the signer will affirmatively cooperate in the implementation of the Order. Where the union or referral agency refuses to execute such a statement, the contractor shall so certify in his report and set forth what efforts have been made to secure such a statement.²⁵

ENFORCEMENT

Section 205 provides that 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. . . ." Each agency is required to appoint or designate compliance officers from among its own personnel. "It shall be the duty of such officers to seek compliance with the objectives of

²²Exec. Order No. 11246 § 202, *supra* note 9.

²³41 C.F.R. § 60-1.7(b)(2) (1970).

²⁴Exec. Order No. 11246 § 203 (c), *supra* note 9.

²⁵*Id.* § 203 (d).

this Order by conference, conciliation, mediation, or persuasion."²⁶ The OFCC serves in a coordinating and supervising function. It also designates certain agencies as "compliance agencies." Generally, these are the agencies that do the greatest dollar volume with a particular contractor. They are assigned to enforce the Order for a particular company as a whole, thus, eliminating duplication by separate agencies monitoring the same contractor.

The regulations also provide for "compliance reviews" to be made regularly by the compliance agency.²⁷ The purposes of the review is to determine if the prime contractor or subcontractor is fulfilling his obligations under the Order. Where deficiencies are found to exist, the regulations state that compliance should first be sought "through conciliation and persuasion."²⁸

In addition to compliance reviews, provision is made for the handling of specific complaints. Any employee or applicant for employment with a covered contractor may file a complaint alleging discrimination.²⁹ The complaint must be in writing, and be filed with the agency or OFCC within 180 days of the date of the alleged discrimination.³⁰ In most cases complaints will be investigated by the agency. But the OFCC may assume jurisdiction of a complaint and conduct its own investigation.³¹ Where, after investigation, it appears to the agency or the OFCC that a violation of the equal employment opportunity clause has occurred, the regulations direct that "informal means" should be used to resolve it whenever possible.³² Where the informal fail, provision is made for a hearing for the contractor before the agency or the OFCC.³³ A contractor found guilty of a violation after hearing is then subject to the sanctions for noncompliance discussed in part E of this paper.

SANCTIONS AND PENALTIES

It is in this area that the contract between Title VII and Executive Order 11246 is most clearly presented. The only direct remedies available to the EEOC are "informal methods of conference, conciliation, and persuasion."³⁴ The Order also provides that informal methods be tried first, but, unlike Title VII, provides for sanctions and penalties in the event the informal methods fail. Section 209 of the Order provides that either the Secretary of Labor or the contracting agency may:

²⁶*Id.* § 205. The informal means of obtaining compliance are similar to those provided in Title VII.

²⁷41 C.F.R. § 60-1.20 (1970).

²⁸*Id.*

²⁹*Id.* § 60-1.21.

³⁰*Id.*

³¹*Id.* § 60-1.25.

³²*Id.* § 60-1.24.

³³*Id.* § 60-1.26.

³⁴42 U.S.C. § 2000e-6(a) (1964). Suits may also be brought by the Attorney General in certain instances. See, Bender, *supra* note 11.

- (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 of 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 non-discrimination 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 employment policies in compliance with the provisions of this Order.

Nature of the Affirmative Action Requirement

What must a contractor do to comply with the Order? What does "affirmative action" mean? Neither Executive Order 10925, which first used the term, nor Executive Order 11246, its successor, define it. Section 202 (1) of 11246 states that affirmative 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.

Thus, in at least the above mentioned areas, the contractor is required to take affirmative action to ensure that discrimination is eliminated. But what is it that the contractor must do?

In response to many complaints about lack of specificity of the affirmative action requirement, the Labor Department, through the OFCC, issued additional regulations effective January 30, 1970.³⁵ These regulations outline the required contents of affirmative action programs and then provide "suggested" methods of implementing and judging an acceptable affirmative action program. The purpose of an affirmative action program is defined in terms of obtaining "results" through "good faith effort" by contractors.³⁶ The contractor is expected to analyze

³⁵41 C.F.R. § 60-2 (1970).

³⁶*Id.* § 60-2.10.

the situation, taking into account such factors as the percentage of minority population in the area, the percentage of minority work force as compared with the total work force, the size of the unemployed minority work force and the availability of minorities having requisite skills in an area in which the contractor can reasonably recruit. After making this analysis, the contractor must design "goals, timetables and affirmative action commitments" to correct any identifiable deficiencies.³⁷ "Where deficiencies exist and where numbers or percentage are relevant in developing corrective action, the contractor shall establish and set forth *specific goals and timetables*."³⁸ (emphasis added)

The suggestions for implementation deal primarily with methods which the contractor should use to communicate his equal employment opportunity policy to his own supervisors and employees, to unions and other recruiting sources, etc. It is also suggested that each contractor appoint an executive to direct the company equal employment programs and develop audit and reporting systems which will measure the effectiveness of the program.

Whether the contractor is able to meet his goals and timetables is not the sole factor in determining if he is in compliance with the Order.

Rather each contractor's compliance posture shall be reviewed and determined by reviewing the contents of his program, the extent of his adherence to his 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.³⁹

When contractors fail to come up with adequate affirmative action programs on their own, the government may do it for them. An example of this is the highly controversial Philadelphia Plan.⁴⁰

Pursuant to his authority under Executive Order 11246 and the regulations, the Secretary of Labor issued orders in June and September of 1969 providing for an affirmative action plan for construction contractors in the Philadelphia area. The Plan was formulated after a Labor Department study revealed that although the overall minority groups representation in the construction industry in the Philadelphia area was thirty percent, minority representation in six high paying building trades was approximately one percent. This small percentage of minority workers was attributed to the following factors:

- (a) Contractors hire a new employee complement for each construction job on the basis of referral by the construction craft unions;

³⁷*Id.* § 60-2.11.

³⁸*Id.*

³⁹*Id.* § 60-2.13.

⁴⁰For detailed discussions of what is now properly termed the "Revised Philadelphia Plan," see Leiken, *Preferential Treatment in the Skilled Building Trades; An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84 (1970) and Comment, *The Legality of the "Revised Philadelphia Plan"*, 30 MD. L. REV. 114 (1970).

(b) The refusal of certain of these unions to admit Negroes to membership or apprenticeship programs;

(c) A preference in work referrals to union members and to persons who had work experience under union contracts.⁴¹

Public hearings were held to determine the availability of minority group persons and the impact of the program on existing labor forces. The Plan was then issued, establishing ranges within which the minority group employment goals should be set in the six trades. It provided that in the first year, employment ranges vary between 4 and 9 percent and for yearly increases until in the fourth and last year the ranges would be between 19 and 26 percent.⁴²

The Plan provided that if a contractor met his goals he would be presumed to be in compliance. However, the obligation to meet the goals was not absolute and a contractor who failed to meet his goals could still be in compliance if he could demonstrate that he made every good faith effort to meet his commitments.⁴³

The Plan's legality has already been challenged. In *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*,⁴⁴ a Federal District Court in Pennsylvania upheld the Plan against allegations of contractors that it violated the provisions of the Civil Rights Act of 1964 and was therefore illegal. Specifically, the contractors contended that the provisions of the Plan for specified goals for minority group participation 1) imposed "quotas" 2) required "preferential treatment" for minority workers and 3) constituted "reverse discrimination", all of which are prohibited by Title VII of the Civil Rights Act. The language in Title VII which they relied on to support their allegations is found in Section 703.⁴⁵

(a) It shall be an 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 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. . . .

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor management committee subject to this title to grant preferential treatment to any individual or to any group because of the

⁴¹*Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 311 F. Supp. 1002, 1005 (E.D. Pa. 1970).

⁴²Order from Arthur A. Fletcher and John L. Wilks, September 23, 1969, United States Dept. of Labor, 115 Cong. Rec. 17,135 (daily ed. Dec. 18, 1969).

⁴³41 C.F.R. § 60-2.13.

⁴⁴*Contractors Association*, *supra* note 41.

⁴⁵42 U.S.C. § 2000e-3 (1964).

race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer. . . .

The court held that the Plan "is no more or less than a means for implementation of the affirmative action obligations of Execution Order 11246."⁴⁶ It does not violate Title VII in that it does not require a contractor to hire a definite percentage of a minority group. "It merely requires that he makes every good faith effort to meet his commitment to attain certain goals. If a contractor is unable to meet the goal but has exhibited good faith, then the imposition of sanctions . . . would be improper and subject to judicial review."⁴⁷ The case is now pending before the Third Circuit.

It is doubtful that the controversy over the legality of the Plan is over. At least one other Federal District court has also upheld the legality of a Philadelphia-type plan,⁴⁸ but the question probably will not be settled until the Supreme Court decides it. Meanwhile, the government is going forward with Philadelphia-type plans in many of the nation's largest cities.

Effect of Executive Order 11246

CONTRACTORS

The Federal Government has made clear its intention to end discrimination in employment. Congress, through Title VII, has imposed obligations not to discriminate on employers, employment agencies and labor organizations. The President, however, has chosen to utilize the government's purchasing power to achieve the same end. The Executive Order places the burden of its obligations directly on the contractor, who must comply if he wishes to do business with the government. And the obligations which he must meet have become very real. No longer can a contractor get by on a simple statement on non-discrimination. Not even the fact that he does not discriminate among the employees referred to him by a union will suffice if the union only refers whites. The Order places prime responsibility on the contractor because he is the only party who can be directly controlled through the power of the government contract. The government in effect has said that it does not want to listen to the contractor's problems with the unions or other referral agencies. If he wants a contract, it is his responsibility to see that the end "result" of his employment practices is non-discriminatory.

This, of course, presents problems for the contractor. He is faced with a maze of rules and regulations which are still vague about how he is to achieve the designated goals. He is forced to devote a sub-

⁴⁶Contractors Association, *supra* note 41 at 1009.

⁴⁷*Id.* at 1010.

⁴⁸Joyce v. McRane, 320 F. Supp. 1284 (N.J. 1970).

stantial amount of time and effort to studying and complying with their requirements. All this will not come without some expense and the result will be that the cost of non-discrimination will be passed to the government in the form of higher contract prices.

The contractor will undoubtedly encounter resistance to his affirmative action plan from the unions with which he has to deal. The unions will not be eager to lose the control they have enjoyed over who will work. Yet the Labor Department has made it clear that where contractors are unable to meet their goals through the union referral halls, they are expected to disregard the exclusive hiring-hall agreement and go outside the union to secure minority workers.⁴⁹ Such action could result in a union charge that the contractor has breached the collective bargaining agreement. However, one writer who has considered this problem concludes that such a charge would be unsuccessful.⁵⁰ He reasons that federal labor policy, as evidenced by recent decisions under the National Labor Relations Act and Title VII, is clearly opposed to discrimination by unions. Section 301 of the Taft-Hartley Act

gave the courts power to fashion a body of contract-enforcement law that would be appropriate for collective bargaining relationships and applicable in both state and federal courts. In making decisions under the section, courts are to give heavy weight to general federal labor law policies.⁵¹

Where the contractor is unable to reach his goals through union referrals, the reason is usually that the union is discriminating against minority groups. "In such a case, a federal or state court properly exercising its authority under section 301 should refuse to enforce the referral-hall agreement."⁵²

That the contractor will not be able to rely on a collective bargaining agreement with the unions to avoid his obligations under the Order is evidenced in *Weiner v. Cuyahoga Community College*.⁵³ There a contractor submitted a bid on mechanical work in connection with campus construction which was partially federally funded. His bid was the lowest submitted. He also submitted an affirmative action plan, but it failed to provide unequivocally that he would implement an acceptable program. The contractor attempted to make equality in hiring subject to the availability of minority workers and dependent on referral of all labor from the union with which he had a collective bargaining agreement. The Ohio Supreme Court affirmed a lower court's holding that

⁴⁹U.S. Dept. of Labor, Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction (June 27, 1969).

⁵⁰Leiken, *supra* note 40.

⁵¹*Id.* at 110.

⁵²*Id.*

⁵³238 N.E.2d 839, *aff'd* 19 Ohio St.2d 35, 249 N.E.2d 907 (1969), *cert. denied* 396 U.S. 1004 (1970).

officials of the college did not abuse their discretion when they rejected the contractor's bid, even though it was the lowest submitted. The court relied on the fact that under the bidding regulations, the college was obligated to accept the lowest *and best* bid and that since the contractor had failed to comply with state and federal policy with regard to employment discrimination, his bid was not the lowest and best bid. Specifically, he did not meet the standards imposed by the Order.

Another recent case, *Trustees v. Volpe Construction Co.*,⁵⁴ helps illustrate the effect of the Order on contractors. An educational institution sought declaratory relief in Massachusetts state court in regard to a contract entered into for construction of a residence hall. The University alleged that the contractor had breached the nondiscrimination and affirmative action clauses contained in its contract. The allegation stated that 1) the contractor employed a work force of about 90 persons on the project of which only four were Negroes and only two were Puerto Ricans, 2) a sufficient number of Negroes and Puerto Ricans lived within the area such that, if the contractor had not discriminated and had taken affirmative action to insure that persons were employed without regard to their race, color, or national origin, the number of minority group workers employed by the contractor would be approximately 20% of the total number of persons so employed. They also alleged that the contractor had furnished the University with information that was "incomplete, misleading and false."

The lower court sustained the contractor's demurrer. On appeal, the contractor argued, inter alia, that the Massachusetts court did not have jurisdiction to hear the case since the enforcement of compliance with Executive Order 11246 is exclusively within the jurisdiction of federal courts and agencies. But the court held that just because the government may enforce a specific provision under the Executive Order does not mean that the University is unable to enforce a similar provision. The University has a right to enforce the provisions of the contract between it and the defendant contractor. "The fact that a specific provision in the contract is covered by a regulation of a Federal agency regarding the enforcement of that regulation does not deprive the University of the right to enforce the contractual obligations."⁵⁵

The case was remanded to be heard on the merits. But its significance lies in the fact that the court found that the provisions of the Order were not the exclusive means of enforcement and did not bar an action in state court on a breach of contract theory by a party other than the federal government.

These cases illustrate that the obligations imposed by the Order are indeed real and that they can be enforced. Further, if the con-

⁵⁴264 N.E.2d 676 (1970).

⁵⁵*Id.* at 682.

tractors do not set up acceptable affirmative action programs on their own, they will be faced with Philadelphia type plans, with the government setting their goals for them. As discussed earlier, the question of the legality of the Philadelphia Plan has already been resolved in favor of the Plan in Federal District Court. A plan similar to the Philadelphia Plan was likewise upheld in *Joyce v. McRane*.⁵⁶ The court's holding was basically the same as that in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*,⁵⁷ saying that since the plan sets up goals for minority employment, rather than quotas, and no sanctions can be imposed on a contractor who does not meet his goals where there has been a good faith attempt to meet them, it does not violate Title VII's ban on preferential treatment.

While the ultimate test of the legality of such plans will have to await a Supreme Court ruling, the fact remains that for the present at least, contractors will have to comply with them. This means they must use their "good faith efforts" to achieve "results". The desired results are stated in terms of "goals" — specified percentages of the work force which should be composed of minority workers. The regulations have been interpreted as not imposing a prohibited quota system.⁵⁸ But while such plans do not on their face impose a quota system, the practical effect in a great many cases is that they will result in a quota system or at least preferential treatment.

The contractor knows that the simplest way for him to avoid the imposition of sanctions for noncompliance is to make sure that the percentage of minority workers in his employment compares favorably with the percentage of minority workers in the total work force of the area. If the total work force contains 30% minority workers, the contractor knows that if he has between 25 and 35 minority workers on his force of 100, the government will presume that he is in compliance. If he has already hired 90 of his 100 needed men, and only 15 of them are minority workers, a non-minority applicant for one of the remaining 10 jobs does not have a chance. And the reason is because of his color or race. This is the concept of "reverse discrimination" which Title VII expressly forbids.⁵⁹ On its face, the Executive Order forbids it also,⁶⁰ but it cannot be denied that it does and will occur. What the contractor is supposed to do when he is looking for those last 10 men, is to select them without regard to race, color, etc. and then, when he fails to meet his goals under his affirmative action plan, all he has to do to be in compliance with the Order is demonstrate his "good faith attempt" to meet those goals.⁶¹ But this involves more hassle and there

⁵⁶*Joyce*, *supra* note 48.

⁵⁷*Contractors Association*, *supra* note 41.

⁵⁸*Id.*; *Joyce*, *supra* note 48.

⁵⁹42 U.S.C. § 2000e-3 (1964).

⁶⁰Exec. Order No. 11246 § 202 (1), *supra* note 9.

⁶¹41 C.F.R. § 60-2.13.

is always the chance that his good faith attempt will not be found to be good enough. Faced with this choice, many contractors may find it much easier to just make sure they have the "proper" percentage of minority workers in their employ.

UNIONS

It has already been observed that although unions are responsible for much of the employment discrimination,⁶² they are not directly covered by the Executive Order. And in the past, before there was a requirement that the contractor take affirmative action, the unions really were not affected by the Executive Orders. Since they were not covered, they went on discriminating in their membership and in their requirement that they not discriminate among applicants for jobs, really had no one to discriminate against since the unions referred only whites. In this sense, it can be said that the affirmative action obligation imposed on contractors is really an attempt by the government to do indirectly that which it could not do directly.

Executive Order 11246 does refer specifically to unions in several places. A contractor is required to include in his compliance reports statements of union practices and policies.⁶³ He also can be directed to obtain a statement from the union that it does not discriminate and that it will affirmatively cooperate in implementing the Order.⁶⁴ If the union refuses to give information or to sign such a statement the contractor is to report this fact and the efforts he made to get the information or statement.⁶⁵ These provisions were probably meant

to convey the veiled threat that an uncooperative union will jeopardize the . . . contractor's chances of getting and keeping government work, which would in turn jeopardize the jobs of the workers represented by the recalcitrant union.⁶⁶

Unions are also mentioned in the section providing for sanctions. The Secretary of Labor or the contracting agency may publish the names of unions which it has concluded have failed to comply with the Order.⁶⁷ The Secretary may also recommend to the Justice Department that an injunction be sought against "organizations, individuals or groups who prevent directly or indirectly or seek to prevent directly or indirectly compliance with the provisions of this Order."⁶⁸ Recommendations may be made to the Equal Employment Opportunity Commission or the Department of Justice to institute proceeding under Title

⁶²This is, of course, a generalization and is not meant to imply that all unions engage or have engaged in discriminatory practices.

⁶³Exec. Order No. 11246 § 203 (c), *supra* note 9.

⁶⁴*Id.* § 203 (d).

⁶⁵*Id.*

⁶⁶SOVERN, *supra* note 3 at 128.

⁶⁷Exec. Order No. 11246 § 209 (a), *supra* note 9.

⁶⁸*Id.*

VII if the Secretary or the contracting agency finds that a union is violating that Act.⁶⁹

But perhaps the greatest effect on unions may come about through proceedings against the contractor. If a union's discriminatory hiring and referral practices prevent the contractor from complying with the Order, the sanctions which can be imposed against the contractor will also hurt the union. Termination of a government contract and blacklisting of the contractor results in loss of jobs for union members. Thus, it is in the union's own interest to help the contractor comply with the Order, and although the union might not admit and refer minority workers out of a true sense of nondiscrimination, the "result" will at least be in keeping with the government policy.

The *Joyce* case discussed earlier provides some insight into the effect of the Order on the union. The action was brought against the Treasurer and the Director of Purchasing for the State of New Jersey by contractors and contractor associations to obtain determination of the validity of an affirmative action plan promulgated by the state of New Jersey in compliance with the Order. The contractors were seeking a declaratory judgment to determine whether they could by law comply with the instructions to bidders containing the affirmative action obligation. The defendants counterclaimed, alleging the validity of the affirmative action plan and naming as third party defendants all labor unions having jurisdiction over the labor force in the area. The unions contended that they were not proper parties and that, absent any evidence of discrimination, a union is free to pick and choose its members as it sees fit.

The court held that since the unions were for the most part responsible for supplying the workers to the contractors, any matter that deals with the regulation of this work force must include them as proper parties.

To rule otherwise would defeat the intention of Executive Order 11246, in that the Government could bind the contractor to affirmative action yet this would be meaningless as the contractor could contract away this obligation through collective bargaining agreements with the unions.⁷⁰

The court agreed that, absent any evidence of discrimination, a union is free to pick and choose its members as it sees fit. But, the court noted, here the findings preceding the affirmative action plan indicated that discrimination had occurred. And to the union's contention that the court can not tamper with the union membership roles, the court answered that it could, citing cases where a court has not hesitated in the face of racial discrimination to take affirmative action by means of injunction to see that there is a racial balance in the work force.⁷¹

⁶⁹*Id.*

⁷⁰*Joyce*, *supra* note 48 at 1291.

⁷¹*Id.* at 1292.

This case illustrates that although the Order does not apply directly to unions, is certainly affects them and provides a means to remedy their past discriminatory practices. The regulations recognize that unions will be affected and provide for hearings to be held in certain instances.

Whenever compliance with the equal opportunity clause may necessitate a revision of a collective bargaining agreement, the labor union or unions which are parties to such an agreement shall be given an adequate opportunity to present their views to the Director.⁷²

MINORITY WORKERS

The amount of benefit to be derived by the minority workers is of course dependent on the success of the Order on employers and unions. If the Order's requirements are closely monitored and its sanctions unhesitatingly applied to noncooperative contractors and unions, there is no doubt that it will go a long way toward eliminating employment discrimination.

The minority worker must depend on the government to enforce the Order's obligations. True, he can file a complaint with the contracting agency or the OFCC, but then it is up to the government to decide what to do with it. It has also been held that the Order does not create a right to bring a private civil action to achieve compliance.⁷³ For more direct remedies in the area of discrimination, the minority worker could proceed under Title VII or the National Labor Relations Act.

CONCLUSION

While the affirmative action requirement is likely to result in some preferential treatment of minority workers, it is submitted that the white workers' interest in true nondiscrimination workers in ending a problem which has been with us too long. Even if the government could enforce the duty not to discriminate, without the additional requirement of affirmative action, it would take too long to solve the problem. The blacks and other minorities, because of their knowledge of past union practices would not go in great numbers to request membership. And even those who did would still face an apprenticeship program of five years or so. Under these circumstances, it would take at least a generation to achieve minority representation in the work force. But that is not soon enough. The affirmative action requirement promises quicker results, and may be justifiable for that reason.

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⁷²41 C.F.R. § 60-1.9(a) (1970).

⁷³Farkas v. Texas Instrument Company, 375 F.2d 629 (5th Cir. 1967); *Farmes v. Philadelphia Electric Company*, 329 F.2d 3 (3rd Cir. 1964).

