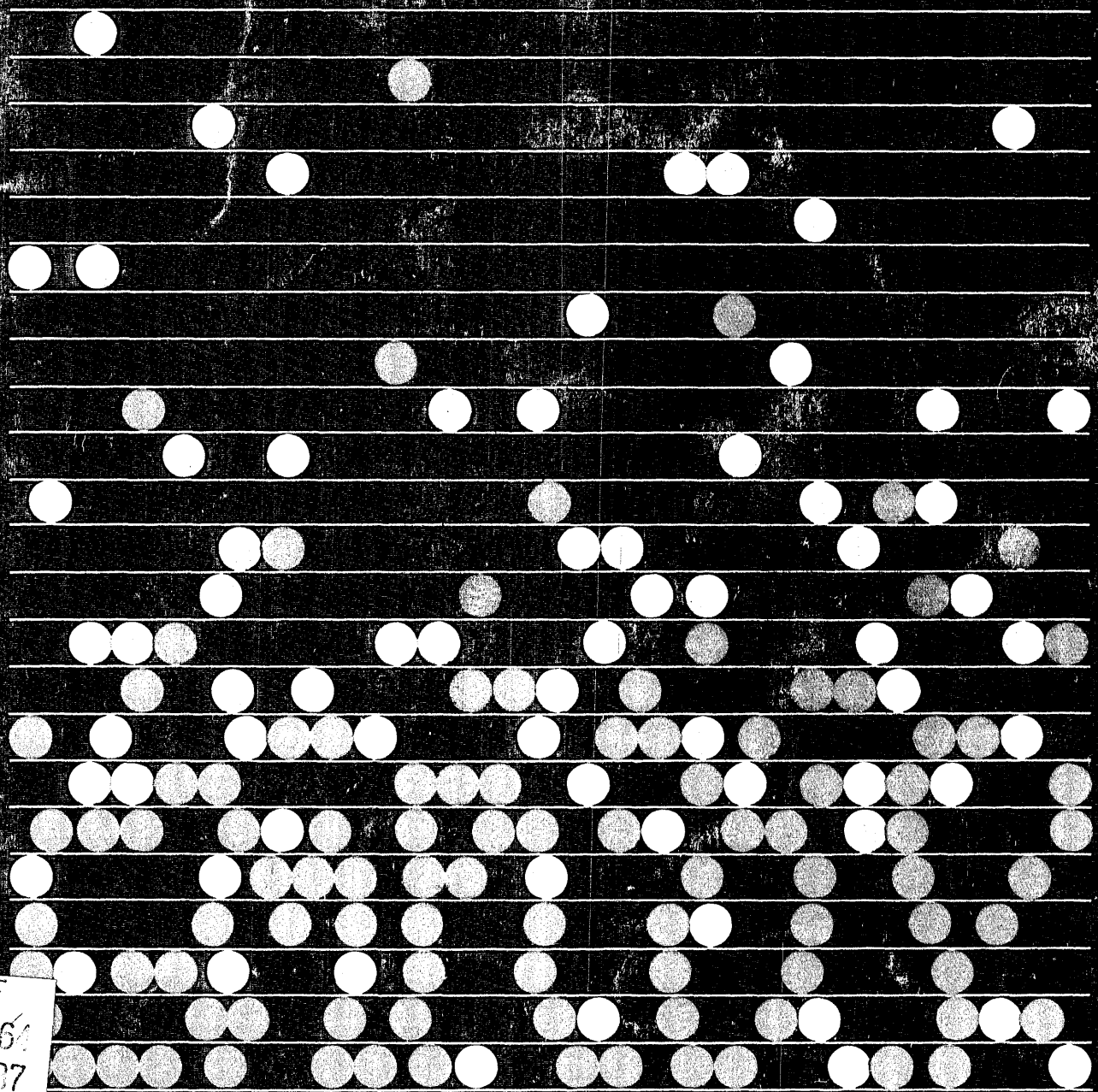




Promises and Perceptions

Federal Efforts to Eliminate Employment Discrimination Through Affirmative Action

October 1981



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Report of thirteen State Advisory Committees to the United States Commission on Civil Rights prepared for the information and consideration of the Commission. This report will be considered by the Commission and the Commission will make public its reaction. In the meantime, the material contained in this report should not be attributed to the Commission but only to the participating Advisory Committees.

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The United States Commission on Civil Rights, created by the Civil Rights Act of 1957, is an independent, bipartisan agency of the executive branch of the Federal Government. By the terms of the act, as amended, the Commission is charged with the following duties pertaining to discrimination or denials of the equal protection of the laws based on race, color, religion, sex, age, handicap, or national origin, or in the administration of justice: investigation of individual discriminatory denials of the right to vote; study of legal developments with respect to discrimination or denials of the equal protection of the law; appraisal of the laws and policies of the United States with respect to discrimination or denials of equal protection of the law; maintenance of a national clearinghouse for information respecting discrimination or denials of equal protection of the law; and investigation of patterns or practices of fraud or discrimination in the conduct of Federal elections. The Commission is also required to submit reports to the President and the Congress at such times as the Commission, the Congress, or the President shall deem desirable.

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Promises and Perceptions

Federal Efforts to Eliminate Employment Discrimination
Through Affirmative Action

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The material contained in this report is that of 13 State Advisory Committees to the United States Commission on Civil Rights and, as such, is not attributable to the Commission. This report has been prepared by the State Advisory Committees for submission to the Commission and will be considered by the Commission in formulating its recommendations to the President and the Congress.

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Letter of Transmittal

U.S. Commission On Civil Rights
October 1981

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Dear Commissioners:

The chairpersons and members of 13 State Advisory Committees are pleased to transmit this report, *Promises and Perceptions: Federal Efforts to Eliminate Employment Discrimination Through Affirmative Action*. The report is based primarily upon factfinding meetings in 10 cities around the country, interviews with knowledgeable people, and an examination of the laws and regulations under which the major Federal enforcement agencies discharge their responsibilities in the area of equal employment opportunity.

The report focuses upon the Office of Federal Contract Compliance Programs (OFCCP), the Equal Employment Opportunity Commission (EEOC), and the Office of Personnel Management (OPM). Although no rigorous analysis of the effectiveness of these agencies was attempted, the report does provide (1) a brief overview of the legal authority upon which they operate, (2) descriptions by Federal regional officials of the manner in which they implement pertinent law and official policy, and (3) the perceptions held by these officials and other affected parties of the problems encountered in the implementation process.

Although the report contains no specific recommendations for Commission action, the Advisory Committees are hopeful that you will find this report from the field useful in its portrayal of grassroots perceptions and in the development of your recommendations for translating the promise of equal employment opportunity into nationwide reality.

Respectfully,

From the Advisory Committees of

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*The people listed here served in their designated capacities on the respective State Advisory Committees to the U.S. Commission on Civil Rights at the time factfinding meetings for this study were held in the spring of 1980. Members are listed only for the Committees in those States where such meetings were held, except for Iowa, Kansas, and Nebraska

which joined with Missouri to conduct the region-wide meeting held in Kansas City, Missouri. Advisory Committee members serve without compensation and assist the Commission with its investigative and information dissemination functions. To those named here, the Office of Regional Programs extends its appreciation.

Acknowledgments

Significant contributions were made to this project by countless numbers of people. Not least among them were the Federal officials, employers, union officials, and citizens who provided valuable information in interviews and factfinding meetings across the country. Space prohibits mentioning them by name, but our gratitude for their time and knowledge is great.

Members of 13 State Advisory Committees to the U.S. Commission on Civil Rights also contributed immeasurably to the effort by conducting factfinding meetings and interviews. All who served on these Committees at the time the study was conducted are listed at the beginning of this report, but those who made substantial contributions by their helpful criticism of various drafts of the report are identified here: Bradford E. Brown, Tracy Amalfitano, and Dorothy Jones of Massachusetts; Howard Rienstra of Michigan; Earl Mitchell, Wanda Peltier, and Gloria Valencia-Weber of Oklahoma; Minoru Yasui of Colorado; and Van Perkins of California. In each of 10 regional offices of the Commission, a project coordinator was designated to oversee preparations for and execution of data-gathering activities. These persons were Joanne Birge, Richmond Doyle, Sally James, Ira Krause, Isidro Lucas, Mary Minter, Yvonne Schumacher, Victoria Squier, Mary Lee Walsh, and Etta Lou Wilkinson.

Special recognition is due staff members of the Central States Regional Office for the difficult task of analyzing 10 factfinding meeting transcripts and countless interview notes, on the basis of which they constructed the first draft of an integrated report. They made this major contribution under the guidance of Regional Director Melvin Jenkins.

Subsequent revisions were made with the help of other regional office staff, including Ruthanne DeWolfe, Ira Krause, Mary Minter, Larry F. Riedman, and Gregory Squires. Donald Dickerson and Nina G. Rosoff of the Office of Federal Civil Rights Evaluation also contributed substantially to revisions.

Donald A. Deppe, program specialist in the Office of Regional Programs, guided the report through each of the phases described above. His work was supervised by Thomas L. Neumann, former Director of the Office of Regional Programs, and John Binkley, Deputy Director of that office.

During the final stages of publication, editorial and technical assistance were provided by staff of the Publications Management Division.

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From Nondiscrimination to Affirmative Action

Background

Government efforts to combat discrimination in the United States are older than the Nation itself. For example, history records antislavery agitation on the part of at least some pre-Revolutionary leaders of colonial America. Several delegates to the constitutional conventions in the late 1700s attempted to have slavery declared unlawful, and a few States officially took such action.¹

The first concerted official action taken at the national level occurred after the Civil War. With the adoption of the 13th, 14th, and 15th amendments to the Constitution, slavery was declared unlawful, and blacks were, at least according to the letter of the law, guaranteed all rights due any citizen, including the right to vote. The Civil Rights Act of 1866 and the Voting Rights Act of 1870 provided that “[all citizens] of the United States shall have the same right, in every State and Territory in the United States [to make and enforce contracts, to own and convey property, and to due process and equal protection under the laws] as is enjoyed by white citizens. . . .”² During World War II Franklin D. Roosevelt issued Executive Orders 8802³ and 9346⁴ prohibiting employment discrimination by defense industries and in the Federal Government, and creating the Fair Employment Practice Committee. In many respects, these more than 150 years of efforts to eradicate discrimination constitute little

more than a prelude to what has been a major increase in Federal antidiscrimination activities and a significant redirection of those efforts within the past two decades.

The 1960s and 1970s have witnessed a flurry of new civil rights laws, Executive orders, and administrative regulations, frequently implemented by new agencies created by those laws and orders. Since passage of the Civil Rights Act of 1964 and subsequent court decisions related to that act, the Federal Government’s civil rights enforcement effort, particularly in the area of employment, has changed dramatically in size and focus. Among the most significant changes is a shift of primary attention from individual to institutional discrimination and from the test of intent to that of results. As the U.S. Supreme Court concluded in the 1971 case of *Griggs v. Duke Power Company*:

Under the [Civil Rights] Act [of 1964], practices, procedures. . . neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory employment practices. . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.⁵

Proof of constitutional violations still requires evidence of intent.⁶ But, in virtually all cases, results-oriented information, such as the number of minority employees, may be relied upon to determine intent. As the Supreme Court noted in the 1977 case of *Teamsters v. U.S.*, “In many cases the only available

¹ J. Franklin Jameson, *The American Revolution Considered as a Social Movement* (Princeton: Princeton University Press, 1967), pp. 3–26.

² Civil Rights Act of 1866, ch. 31, §1, 14 Stat. 27 (current version at 42 U.S.C. §1982 (1976)); Voting Rights Act of 1870, ch. 114, §16, 18, 16 Stat. 144 (Current version at 42 U.S.C. §1981 (1976)).

³ Exec. Order No. 8802, 3 C.F.R. 957 (1938–43 Comp.).

⁴ Exec. Order No. 9346, 3 C.F.R. 1280 (1938–43 Comp.).

⁵ *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 432 (1970) (emphasis in original).

⁶ *Washington v. Davis*, 426 U.S. 229, 238–39 (1976).

avenue of proof is the use of . . . statistics to uncover clandestine and covert discrimination.”⁷

This shift in emphasis from individual to institutional discrimination and from intent to results is also evidenced in remedies required in those cases where unlawful discrimination has been found. Pledges of nondiscrimination or the establishment of neutral, colorblind employment systems are frequently rejected as inadequate in favor of affirmative action aimed at altering the results of those systems.⁸ Affirmative action may involve implementation of a comprehensive employment program, including creation of a new equal opportunity department as part of personnel administration; work force analysis; changes in recruitment, selection, promotion, and separation policies; numerical goals and timetables; and monitoring programs to measure progress and indicate additional changes in personnel administration where such changes are necessary for eliminating the effects of past discriminatory policies and procedures. Affirmative action can also involve simply a few specific remedies such as goals and timetables for promotion of current employees.⁹ The specifics of particular affirmative action programs may differ. However, the critical principle, established in just the past few years, is that the elimination of employment discrimination and the provision of equal employment opportunity require some kind of positive or affirmative action. Passive nondiscrimination is not sufficient to remedy the effects of prior discriminatory actions.¹⁰

These shifts, from intentions to results in determining the existence of discrimination and from neutral to affirmative approaches in remedying violations, constitute perhaps the most profound, but certainly not the only changes that have taken place in the Federal civil rights enforcement effort in the last 20 years. Though discrimination has been viewed primarily as a racial issue throughout much of American history, today many other groups, including women, Hispanics, the handicapped, Euro-ethnics, veterans, and others, are demanding similar protection. Group consciousness has in-

creased greatly in this latest epoch of the Nation's attempts to assure the rights of all citizens.

These new thrusts have not met with universal approval. Some critics point to continuing and increasing gaps between white males and other groups in such areas as income and employment as evidence of failure by the Federal Government to eliminate discrimination and guarantee equal employment opportunity.¹¹ Others claim that adequate progress is being made (some claim too much) and that affirmative action amounts to illegal quota systems and “reverse discrimination,” which do not serve any individual or group well.¹²

Much of the controversy surrounding affirmative action reflects a failure to understand fully the complex and pervasive nature of discrimination as a societal *problem* and to articulate clearly the meaning of affirmative action as a *solution* to that problem. Concurrent with the factfinding meetings and interviews reported here, the Commission engaged in a rigorous analysis of this “problem-remedy” approach to affirmative action and recently published a proposed statement, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*.¹³ This document draws extensively on past Commission publications and consolidates much existing law and policy. It is commended to the reader interested in exploring ways by which a sound conceptual approach to the subject of affirmative action can facilitate answers to difficult questions raised by proponents and opponents alike.

Introduction

Thirteen State Advisory Committees to the U.S. Commission on Civil Rights submit in this report an overview of: (1) the major laws and regulations governing affirmative action and the Federal civil rights enforcement effort of three principal agencies in the area of employment; (2) the procedures described by the officials of these agencies to implement law and official policy; and (3) the critical problems with that effort as perceived by enforcement officials and other affected persons,

Dismantling the Process of Discrimination, A Proposed Statement (January 1981).

¹¹ U.S., Commission on Civil Rights, *Social Indicators of Equality for Minorities and Women* (1978).

¹² Nathan Glazer, *Affirmative Discrimination* (New York: Basic Books, 1975), pp. 66–76; Robert Chandler, *Public Opinion: Changing Attitudes on Contemporary Political and Social Issues* (New York: R.R. Bowker Company, 1972), p. 19.

¹³ U.S., Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*.

⁷ Intl. Bhd. of Teamsters v. United States, 431 U.S. 324, 339–40, n. 20 (1977), quoting United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971).

⁸ NAACP v. Allen, 493 F.2d 614, 620–21 (5th Cir. 1974); and Morrow v. Dillard, 580 F.2d 1284, 1296 (5th Cir. 1978).

⁹ 29 C.F.R. §1608 (1980); 42 U.S.C. §2000e–5(g) (1976). Many people quoted in subsequent chapters of this report use the terms “affirmative action,” “affirmative remedies,” and “affirmative action programs.” Where these terms are attributed to these sources, the meaning may not be precisely what is described here.

¹⁰ U.S., Commission on Civil Rights, *Affirmative Action in the 1980s:*

including employers, union leaders, minorities, women, and other interested individuals.

The information contained in this report was obtained through interviews with agency officials in both headquarters and regional offices; reviews of relevant laws, court decisions, regulations, and other documents; and factfinding meetings held in 10 cities around the country where officials and other affected persons expressed their views.¹⁴

Each of the following chapters focuses on the responsibilities and activities of a particular Federal agency. Chapter 2 examines the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor, which is responsible for assuring equal employment opportunity and requiring affirmative action among Federal contractors. Chapter 3 examines the Equal Employment Opportunity Commission (EEOC), the Federal Government's chief law enforcement agency in the area of employment discrimination, and the affirmative remedies resulting from its enforcement efforts. This chapter focuses only on EEOC's private sector responsibilities. Chapter 4 looks at the Office of Personnel Management's (OPM) responsibilities pertaining to State and local government. Both EEOC and OPM have responsibility to assure equal employment opportunity within the Federal Government. That responsibility is the subject of chapter 5.

One goal of this report is to help the public understand the significance and complexity of Federal efforts to eliminate employment discrimination through affirmative action. Consequently, it is not intended as an indepth legal or technical document, nor does it strive for rigorous evaluation. It is descriptive rather than analytical, and it is hoped that interested persons will utilize the Federal resources described to help remedy employment discrimination in their communities.

Another goal is to advise the U.S. Commission on Civil Rights of pertinent civil rights issues as they appear in the various States and localities. Employ-

¹⁴ A factfinding meeting is similar in format to a Commission hearing, with two major differences: The Advisory Committees have no power to subpoena witnesses, nor can they require testimony under oath. The following are the 10 factfinding meetings conducted by Advisory Committees to the U.S. Commission on Civil Rights whose proceedings were utilized in this report, together with the short form used to identify each transcript in the text of the report: Massachusetts Advisory Committee, Boston, Mass., Mar. 25-26, 1980. The transcript is cited as Boston Transcript. New Jersey Advisory Committee, Newark, N.J., Apr. 10-11, 1980. The transcript is cited as Newark Transcript. Pennsylvania Advisory Committee, Philadelphia, Pa., Mar. 18, 1980. The transcript is cited as Philadelphia Transcript. Tennessee Advisory Committee, Knoxville, Tenn., Apr. 24-25, 1980. The transcript is cited as Knoxville Transcript.

ment discrimination has been a long-standing concern of the Commission's State Advisory Committees, and this report represents their cooperative effort to inform the Commission of the promises and perceptions held by a variety of people across the country regarding Federal efforts to deal with discrimination of this kind.

General Observations

In many respects the concept of affirmative action and the mechanisms for its implementation are still being created and refined. In this report an overview is presented of the Federal civil rights enforcement machinery as it pertains to equal employment opportunity, and the perceptions of a wide variety of affected and involved persons are shared. This has been done rather uncritically, since the limited purpose was to describe and inform.

The picture presented is nonetheless complex, not simple. From numerous and uncoordinated laws, from volumes of Federal regulations and guidelines, from countless pages of comments by enforcement officials, employers, and other individuals there emerges, somewhat surprisingly, a rather consistent and coherent theme. That theme indicates that the problem of employment discrimination is still with us; it is widely recognized and thought to deserve continuing attention and relentless opposition; and the desire for its eventual eradication is strong.

It is noteworthy that in the course of conducting this nationwide study the Advisory Committees did not encounter government officials who are ignorant of their responsibilities, unwilling to hear and consider the criticism of affected parties, or resistant to the possibility of streamlining their procedures and improving coordination with their counterparts in other agencies. Nor were employers encountered who were diametrically opposed to Federal laws and requirements or committed to the perpetuation of discrimination.

Michigan Advisory Committee, Detroit, Mich., May 1-2, 1980. The transcript is cited as Detroit Transcript. Oklahoma Advisory Committee, Oklahoma City, Okla., Mar. 27-28, 1980. The transcript is cited as Oklahoma City Transcript. Missouri Advisory Committee, Kansas City, Mo., Mar. 20, 1980. The transcript is cited as Kansas City Transcript. Colorado Advisory Committee, Denver, Colo., Mar. 14, 1980. The transcript is cited as Denver Transcript. California Advisory Committee, Los Angeles, Calif., Mar. 21, 1980. The transcript is cited as Los Angeles Transcript. Washington Advisory Committee, Seattle, Wash., Apr. 18, 1980. The transcript is cited as Seattle Transcript.

On the contrary, government officials were candid about their limitations and failures, and employers appeared eager to enhance equal employment opportunity and obey the laws. Community groups, though critical of progress to date, seemed eager to assist constructively in the achievement of equal opportunity for all. In this context, some observations might be useful and suggest matters requiring further study and consideration.

One obvious step toward improvement lies in the recognition that problems do exist. In this report, several problems were noted by virtually all parties affected by the policies and practices of Federal agencies responsible for enforcing equal employment opportunity and affirmative action requirements. Perceiving many regulations to be overly burdensome, employers expressed particular concern about what they believed to be excessive and pointless data requirements, duplication and contradiction among Federal agency requirements despite regulations that call for coordination among agencies, and uncooperative attitudes of some compliance officials.

Minority and women's groups were primarily concerned with what they perceived as the general ineffectiveness of Federal enforcement agencies. They criticized, in particular, inadequate resources and questionable commitment to perform effectively and a lack of comprehensible, jargon-free information about Federal requirements and procedures that, in turn, hinders local groups in fighting employment discrimination within their own communities.

Enforcement officials acknowledged that some agency requirements may be duplicative and that some data reporting requirements may be cumbersome, but they maintained that such duplication generally reflects the legitimate, diverse responsibilities of Federal agencies. Complaints about data requirements, they said, frequently constitute efforts

to cover up poor performance in the area of affirmative action.

It was also noted that Federal agencies are taking at least some concrete actions to remedy problems that have been identified in their enforcement efforts. For example, OFCCP is currently attempting to develop needed data and to refine data requirements for government contractors, and OFCCP and EEOC have negotiated a memorandum of understanding to improve coordination of their activities.

Although the foregoing problems and allegations must be studied further and resolved, the focus should not be on problems of process alone. The fundamental issue does not lie in the excesses of affirmative action, whether measured in terms of zealous enforcement or burdensome reporting, but in the persistence of employment discrimination.

The need exists for a thorough and widespread understanding of the problem of discrimination in American life today and of the specific ways in which affirmative action measures will serve as remedies to that deep-seated problem in its various manifestations. The reader's attention is invited once again to an attempt by the Commission to initiate dialogue and public debate in this connection.¹⁵

On the basis of enlarged understanding, continuing discussion, and effective action, problems of process and policy can be resolved. Although the roles of Federal and State government are significant, local initiative and leadership in the private sector are indispensable in the quest for equal employment opportunity. We are beginning to see the formation of community coalitions dedicated to this outcome, and we commend those who are exploring new ways to dismantle the process of employment discrimination. It is hoped that this report will play a role in conveying information conducive to that end.

¹⁵ U.S., Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*.

The Office of Federal Contract Compliance Programs

Perhaps the most direct effect that the Federal Government has in eliminating private sector employment discrimination rests in its relationships with those firms that enter into contracts with Federal agencies. These agencies can and do establish various requirements for contractors, including equal employment opportunity and affirmative action requirements. According to one estimate, approximately 40 percent of the civilian work force is employed by companies that receive Federal contracts.¹ The Federal agency that is responsible for ensuring equal employment opportunity by Federal contractors is the Office of Federal Contract Compliance Programs (OFCCP) of the U.S. Department of Labor.

Law and Official Policy

Generally, firms that contract with the Federal Government to provide goods, services, or real property, and construction contractors whose work is paid in whole or in part by Federal funds, must make a written contractual commitment not to

discriminate against applicants or employees because of their race, color, religion, sex, or national origin and to take affirmative action to eliminate such discrimination and to ensure equal employment opportunity for all applicants and employees.² In addition, contractors must take affirmative action to employ and promote qualified handicapped persons,³ as well as qualified disabled veterans and Vietnam veterans.⁴ These provisions mean that the right to receive Federal monies for doing business with the Federal Government is contingent upon compliance with explicit equal employment opportunity and affirmative action requirements.

The basic equal employment opportunity requirements for government contractors and federally assisted construction contractors are set forth in Executive Order 11246, as amended,⁵ in the Rehabilitation Act of 1973, as amended,⁶ and in the Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended.⁷ An Executive order such as 11246 has

¹ Victor Perlo, *Economics of Racism USA* (New York: International Publishers, 1976), p. 225.

² Exec. Order No. 11246, 3 C.F.R. 339 (1964-1965 Comp.), and 30 Fed. Reg. 12319 (1965), as amended by Exec. Order No. 11375, 3 C.F.R. 684 (1966-70 Comp.), 32 Fed. Reg. 14303 (1967), and as amended by Exec. Order 12086, 3 C.F.R. 230 (1978 Comp.), 43 Fed. Reg. 46501 (1978), hereafter cited as Exec. Order No. 11246, as amended. For exceptions see 41 C.F.R. §60-1.4 (1980).

³ Section 503 of the Rehabilitation Act of 1973, Pub. L. 93-1112, 29 U.S.C. §793 (1976), as amended by Pub. L. 93-516, 29 U.S.C. §706 and Exec. Order No. 11758. See also 41 C.F.R. §60-741 *et seq.* (1980).

⁴ Section 402 of the Vietnam Era Veterans Readjustment Act of 1974, 38 U.S.C. §2012 (1976). See also 41 C.F.R. §60-250 *et seq.* (1980).

⁵ Exec. Order No. 11246, as amended.

⁶ 29 U.S.C. §793 (1976).

⁷ 38 U.S.C. §2012 (1976). Regulations amending a limited number of provisions under Executive Order 11246, as amended, section 402 of the Vietnam Era Veterans Readjustment Act of 1973, as amended, and section 503 of the Rehabilitation Act of 1973 were published as a final rule at 45 Fed. Reg. 86216 (1980). These regulations were to take effect on Jan. 29, 1981. On Jan. 28, 1981, the effective date of the regulations was deferred until Apr. 29, 1981, to allow the Department of Labor to review fully the regulations, 46 Fed. Reg. 9084 (1981). On Apr. 28, 1981, the effective date of OFCCP's Dec. 30, 1980, regulations was further deferred until June 29, 1981. These proposed regulations may, therefore, undergo further revisions.

the same legal force and effect as a statute enacted by Congress.⁸

Under its authority, the Department of Labor has established the OFCCP. The enforcement responsibilities for Executive Order 11246 were consolidated in OFCCP by Executive Order 12086.⁹ The OFCCP has issued and enforces a series of regulations and orders, discussed below, to implement the provisions of Executive Order 11246, as amended,¹⁰ section 503 of the Rehabilitation Act of 1973, as amended,¹¹ and section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended.¹²

Certain contractors are exempt by statute, by regulation, and by order from the provisions of the foregoing equal opportunity requirements. Most contractors and subcontractors whose individual contracts with the Federal Government or contracts aggregated over a 12-month period total \$10,000 or less, or whose federally assisted construction contracts are below that amount, are exempt from the requirements of Executive Order 11246 and its implementing regulations and orders.¹³ However, depositories of Federal funds, financial institutions issuing United States savings bonds and notes, and holders of government bills of lading for freight shipments are not exempt, regardless of the size of their financial dealings with the Federal Government.¹⁴ Other exemptions include contracts and subcontracts to be performed outside the United States by employees recruited from outside the country.¹⁵ A contractor whose contract with the Federal Government is \$2,500 or less is not covered by the affirmative action requirements for qualified handicapped applicants and employees.¹⁶ A Federal contractor whose contract is less than \$10,000 is not covered by the affirmative action obligation with respect to veterans.¹⁷

Certain other nonconstruction contractors must develop written affirmative action programs to attempt to eliminate the underutilization of members of minority groups and women protected by Execu-

tive Order 11246 and to correct problems in their work forces regarding treatment of minorities and women.¹⁸ Under current regulations, all nonconstruction contractors and subcontractors with the Federal Government who employ more than 50 workers and who have a nonconstruction contract or subcontract for at least \$50,000, or who hold \$50,000 or more in bills of lading for freight shipments in a 12-month period, or who are a depository of Federal funds in any amount, or who are issuing or paying agents for United States savings bonds or notes in any amount are required to develop and implement written affirmative action programs for each establishment.¹⁹ State and local government agencies other than schools and hospitals are specifically exempted from that requirement,²⁰ although other regulations require written plans of them, as indicated in chapter 4.

The written affirmative action program must be developed by a nonconstruction contractor for each of its establishments within 120 days from the beginning of the contract.²¹ The aim of the program is to eliminate discriminatory practices and to promote equal employment opportunity by determining the extent to which minorities and women are underutilized by the contractor and by then developing and implementing affirmative steps to eliminate the problem.²² To accomplish this goal, a contractor must analyze its existing work force by job title based upon such factors as duties and rates of pay.²³ Utilization of minority groups and women within the total work force of the contractor must be analyzed for each major job group.²⁴ In addition, hiring practices, including recruitment and testing, as well as upgrading, transfer, and promotion of

⁸ *Farkas v. Texas Instruments Inc.*, 375 F.2d 629 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967); *See also*, *Letter Carriers v. Austin*, 418 U.S. 264, 273 (1973); *Contractors Assn. of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3rd Cir. 1971), *cert. granted*, 404 U.S. 854; *United States v. New Orleans Public Service, Inc.*, 553 F.2d 459 (5th Cir. 1977), *cert. denied, vacated and remanded for reconsideration on other grounds*, 436 U.S. 942 (1978), *decision reaffirmed after reconsideration but remanded on other grounds*, 638 F.2d 899 (5th Cir. 1981); *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

⁹ Exec. Order No. 12086, 3 C.F.R. 230 (1978 Comp.).

¹⁰ E.g., 41 C.F.R. §§60-1, 60-2, 60-3, 60-4, 60-20, 60-50 (1979).

¹¹ 41 C.F.R. §§60-741.1-60-741.54 (1980).

¹² 41 C.F.R. §§60-250.1-60-250.23 (1980).

¹³ 41 C.F.R. §60-1.5(a)(1) (1980).

¹⁴ *Id.*

¹⁵ 41 C.F.R. §60-1.5(a)(3) (1980).

¹⁶ 29 U.S.C. §793(a) (1976).

¹⁷ 38 U.S.C. §2012(a) (1976). *See also* 41 C.F.R. §60-250.1 (1980).

¹⁸ 41 C.F.R. §60-1.2(a) (1980).

¹⁹ 41 C.F.R. §60-1.40(a) (1980).

²⁰ 41 C.F.R. §60-1.5(a)(4) (1980).

²¹ 41 C.F.R. §60-1.40(a) (1980), and 41 C.F.R. §60-2 (1980).

²² *Id.*

²³ *Id.*

²⁴ 41 C.F.R. §60-1.40(b) (1980), and 41 C.F.R. §§60-2.10-2.15 (1980).

existing employees must be reviewed on an annual basis.²⁵ (See appendix A for a more complete list of OFCCP affirmative action requirements.)

These general requirements for affirmative action programs are developed more fully for nonexempt nonconstruction contractors in OFCCP Revised Order No. 4.²⁶ Affirmative action requirements for construction contractors are described in other regulations.²⁷ According to Revised Order No. 4, "an affirmative action program is a set of specific and result-oriented procedures" that includes an analysis of areas where the contractor is underutilizing minorities and women, as well as goals and timetables to correct any deficiencies revealed by the self-analysis.²⁸ Underutilization is defined as "having fewer minorities or women in a particular job group than would reasonably be expected by their availability."²⁹ To perform an availability analysis, an employer must separately determine the percentage of minorities and women in each job group and compare it to the percentage of minority and female representation in the relevant labor area from which the contractor hires its employees.³⁰ OFCCP has prescribed eight specific factors for estimating the availability of minorities and women in the area labor force.³¹ For minorities these factors are:

- (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

²⁵ *Id.* See also Uniform Guidelines on Employee Selection Procedures, which were adopted in 1978 by the EEOC, 29 C.F.R. §1607(1979), the Civil Service Commission, 5 C.F.R. §300.103(c) 1979, the Department of Justice, 28 C.F.R. §50.14 (1979), and OFCCP, 41 C.F.R. §60-3 (1980).

²⁶ 41 C.F.R. §§60-2.1-60-2.32 (1980).

²⁷ See e.g., 41 C.F.R. §§60-4.1-60-4.9 (1980).

²⁸ 41 C.F.R. §60-2.10 (1980).

²⁹ 41 C.F.R. §60-2.11(b) (1980).

³⁰ *Id.* See also U.S., Department of Labor, Office of Federal Contract Compliance Programs, *Federal Contract Compliance Manual* (1979), ch. 2, sec. 160, hereafter cited as OFCCP, *Federal Contract Compliance Manual*.

³¹ The eight availability factors for women are slightly different than those

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.³²

(For a more complete summary of Revised Order No. 4 see appendix B.)

When a contractor determines that women or minorities are being underutilized in its work force, the contractor must develop goals and timetables for ending the underutilization.³³ In addition, the contractor is required to remedy deficiencies.³⁴ The goals and timetables must be specific and reasonably capable of attainment.³⁵ By regulation, the affirmative action program must be signed by an executive-level official of the contractor.³⁶ In addition, it is recommended that an executive of the contractor be appointed as director or manager of the company's equal employment opportunity programs.³⁷ His or her specific duties as set forth in the regulations are intended to ensure that problems are identified, effective solutions are proposed and implemented, information is disseminated up and down the line of command, regular liaison with community groups is maintained, and that any other steps necessary to assure success of the program are taken.³⁸

Construction contractors, both those contracting directly with the Federal Government and those receiving Federal monies for the performance of contracts with State and local public and private agencies, are also subject to affirmative action standards.³⁹ Such contractors are required to take affirmative measures such as steps to provide a working environment free of harassment, maintain a current file of minority and female job applicants as well as action taken by the contractor on those applications, notify the Director of OFCCP whenever a union with which the contractor has an agreement impedes the ability of the contractor to comply with equal employment opportunity requirements, develop on-the-job training and apprenticeship programs to upgrade women and minorities, review and disseminate equal employment informa-

for minorities. For the factors applicable to female availability estimates, see 41 C.F.R. §60-2.11(b)(2) (1980).

³² 41 C.F.R. §60-2.11(b)(1) (1980). See OFCCP, *Federal Contract Compliance Manual*, ch. 2, sec. 160.

³³ 41 C.F.R. §1.40(a) (1980) and 41 C.F.R. §60-2.12 (1980).

³⁴ 41 C.F.R. §60-2.10 (1980).

³⁵ 41 C.F.R. §60-2.12(a) (1980).

³⁶ 41 C.F.R. §60-1.40 (1980).

³⁷ 41 C.F.R. §60-2.22 (1980).

³⁸ *Id.*

³⁹ 41 C.F.R. §60-4.1-60-4.9 (1980).

tion in advertisements and within the contractor's establishments, and validate selection criteria.⁴⁰

To implement Executive Order 11246, OFCCP has approved several cooperative plans such as the "Hometown Plan."⁴¹ (Hometown Plans are agreements among local contractors, unions, and minority groups to increase minority and female employment in the construction industry.) In addition, OFCCP issues goals and timetables for minority employment by geographical areas and for female employment on a nationwide basis as often as is deemed necessary.⁴² Thus, unlike nonconstruction contractors who develop their own goals and timetables, goals and timetables for construction contractors to end the underutilization of minorities and women are determined by OFCCP unless the contractor is working under an approved Hometown Plan.⁴³

Each nonconstruction contractor who is required to develop a written affirmative action program is also required to maintain data necessary to support its affirmative action program.⁴⁴ These data include progression line charts, applicant flow, seniority rosters, and applicant rejection ratios indicating minority and sex status.⁴⁵

OFCCP evaluates these data through the compliance review process.⁴⁶ With nonconstruction contracts in excess of \$1 million, where a review has not been conducted within 12 months, a preaward compliance review is mandatory.⁴⁷ With all other contracts subject to OFCCP regulations, however, review is not a precondition to the award of a contract, but may occur during the life of a contract. The compliance review process as set forth in regulations, orders, and the comprehensive OFCCP *Contract Compliance Manual* consists of three phases: desk audit, onsite review, and offsite analysis.⁴⁸ Although not every nonconstruction contractor reviewed is subjected to all three phases, all nonexempt contractors must maintain the data essential to permit such a comprehensive review.⁴⁹

Construction contractors are also subject to compliance reviews. They are required to document their affirmative actions to achieve equal employ-

ment opportunity and to keep comprehensive, identifiable, and easily retrievable records of personnel actions and of their work force for evaluation by OFCCP.⁵⁰

Individual complaints of employment discrimination against contractors are normally referred by OFCCP to the Equal Employment Opportunity Commission (EEOC) for processing under Title VII rather than under Executive Order 11246, the authority under which OFCCP functions.⁵¹ If OFCCP does elect to proceed under its authority, it will thoroughly investigate the complaint and develop a complete case record.⁵² OFCCP generally retains and investigates class type complaints of employment discrimination.

If OFCCP determines in a compliance review or complaint investigation that a contractor is in violation of Executive Order 11246, it can move in several directions to secure compliance. In all cases, however, informal means of resolving violations of equal employment opportunity requirements are preferred over formal enforcement proceedings.⁵³ That is, OFCCP is expressly encouraged to rely on conciliation and persuasion to secure compliance as opposed to instituting formal enforcement procedures.⁵⁴ If, however, OFCCP has reason to believe a contractor is violating its responsibilities and if the agency is unable to resolve the matter informally, it will issue a show cause notice that offers the contractor the opportunity to demonstrate why it should not be subject to enforcement proceedings.⁵⁵ If conciliation does not result in compliance or if a contractor continues to violate a conciliation agreement after being notified of its conduct, OFCCP may request the Office of the Solicitor, Department of Labor, to institute administrative enforcement proceedings.⁵⁶ OFCCP may also elect to refer the matter to the Department of Justice for judicial proceedings.⁵⁷ There are no procedural prerequisites (e.g., completion of a compliance review or issuance

⁴⁰ 41 C.F.R. §60-4.3 (1980), Equal Employment Opportunity Construction Contract Specifications, §§7(a)-(p) (1980).

⁴¹ 41 C.F.R. §§60-4.4., §60-4.5(1980); OFCCP, *Federal Contract Compliance Manual*, ch. 4, sec. 40.3.

⁴² 41 C.F.R. §60-4.6 (1980).

⁴³ Compare 41 C.F.R. §60-2.12 (1980) with 41 C.F.R. §60-4.6 (1980).

⁴⁴ 41 C.F.R. §60-2.12(m) (1980).

⁴⁵ *Id.*

⁴⁶ Revised Order No. 14, 41 C.F.R. §§60-60.1-60.8 (1980).

⁴⁷ 41 C.F.R. §60-1.20(d) (1979).

⁴⁸ Revised Order No. 14, 41 C.F.R. §60-60.3(a), (b), (c), (d) (1980), OFCCP, *Federal Contract Compliance Manual*.

⁴⁹ See e.g., 41 C.F.R. §60-1.43, §60-1.7, and §60-2.12(m) (1980).

⁵⁰ 41 C.F.R. §60-4.3 Standard Federal Equal Employment Opportunity Construction Contract Specifications, §7, (1980).

⁵¹ Exec. Order No. 11246 §209(a) (3); 41 C.F.R. §60-1.24(a) (1980).

⁵² 41 C.F.R. §60-1.24(b) (1980).

⁵³ 41 C.F.R. §60-1.24(c)(2) (1980).

⁵⁴ Exec. Order No. 11246 §209(b); 41 C.F.R. §60-1.20(b) (1980).

⁵⁵ 41 C.F.R. §60-1.28 (1980).

⁵⁶ 41 C.F.R. §60-1.26(a)(2) (1980).

⁵⁷ *Id.*

of a show cause notice) to a referral to the Department of Justice.⁵⁸ In addition, the Department of Justice may, subject to approval by the Director of OFCCP, independently initiate its own investigation of contractors it believes to be violating equal employment opportunity requirements.⁵⁹

Where administrative or judicial proceedings against a contractor result in a determination that Executive Order 11246 has been violated, sanctions may be imposed and remedies required. Sanctions include both injunction of the conduct that constitutes the violation and cancellation of, or debarment from, future government contracts.⁶⁰ Remedies include assistance to victims of violations such as the award of back pay and retroactive seniority.⁶¹ If debarred, which is the ultimate sanction, a contractor must request reinstatement and demonstrate its compliance with the requirements of equal employment opportunity as established by Executive Order 11246.⁶² A list of debarred or otherwise ineligible contractors and subcontractors is periodically updated and circulated to all Federal agencies and departments.⁶³

Implementation Procedures

The principal steps OFCCP takes to fulfill its responsibility of assuring equal employment opportunity among Federal contractors are: (1) selection of contractors for review; (2) preaward reviews; (3) normal compliance reviews involving desk audits, onsite reviews, and where necessary conciliation and use of sanctions; (4) followup; and (5) processing of complaints.

The initial step, of course, is to select those contractors to be reviewed. OFCCP's national office establishes certain guidelines for selecting contractors to be reviewed, and the regional offices exercise some discretion to allow for industrial and other variations from region to region.

Discretion in selection of contractors is limited to some extent by the requirement to conduct preaward reviews of bidders being awarded contracts in excess of \$1 million and by conciliation agreements or court decrees that must be monitored. These constraints on selecting contractors for review were

mentioned by William Raymond, representing OFCCP Region II (New York), who said:

Some of our work is mandated; I mean the priorities are mandated by either court decrees or consent decrees. Other facets of our work are mandated by our preaward regulations which say we must do certain things when a contract is about to be awarded of a million dollars or more.⁶⁴

Generally, however, the criteria utilized to select contractors include: (1) size of establishments, with larger contractors more likely to be reviewed; (2) availability of employment and career opportunities, with more attention paid to those establishments that afford greater likelihood of significant hiring and advancement to higher paid positions; (3) availability of minorities and women in the labor force, with those establishments located in areas containing large concentrations of these workers given higher priority; (4) contractors' previous record, with greater attention paid to those who have exhibited poor performance in the past in the area of equal employment opportunity; and (5) complaints, including allegations of discrimination against large classes of employees or applicants, with priority given to those contractors which are the source of a relatively high number of complaints.⁶⁵

Certain specific industries were targeted on a national basis for increasing scrutiny in 1980, including banking, insurance, coal, and oil. Nationally, the percentages of resources scheduled to be devoted to selected industries were as follows: banking, 15.8 percent; insurance, 11.0 percent; coal and oil, 6.4 percent; steel, 1.4 percent; trucking, 1.1 percent; higher education, 5.1 percent; preaward reviews in other industries, 17.4 percent; discretionary reviews selected by regional officials, 23.7 percent; construction, 7.9 percent; Executive Order complaints, 3.9 percent; handicapped complaints, 6.1 percent; and veterans' complaints, 1.1 percent. These figures represent planned allocation of resources, not percentages of planned actions.⁶⁶

Regional priorities varied according to the concentration of particular industries within particular regions. For example, according to Leonard Biermann, OFCCP Assistant Regional Administrator in Boston, while nationally approximately 20 to 30

⁵⁸ *Id.*

⁵⁹ 41 C.F.R. §60-1.26(f) (1980).

⁶⁰ Exec. Order No. 11246 §209; 41 C.F.R. §60-1.26(f); 41 C.F.R. §60-30.30; 41 C.F.R. §60-1.26(a)(2)(e) (1980).

⁶¹ 41 C.F.R. §60-1.26(d) (1980).

⁶² 41 C.F.R. §60-1.31 (1980).

⁶³ 41 C.F.R. §60-1.30 (1980).

⁶⁴ Newark Transcript, vol. I, p. 74.

⁶⁵ Kansas City Transcript, p. 209; Boston Transcript, pp. 419-20 and 433. Also see Weldon J. Rougeau, "Enforcing a National Mandate"; Janet Regan and John M. Heneghan, "The Compliance Review and Beyond"; and Edward E. Mitchell, "A Year of Accomplishment," in *Journal of Intergroup Relations*, November 1979.

⁶⁶ OFCCP table, "Proposed Adjustments to FY 1980 National Program Plan, Work Units, Compliance Actions by Region and by Industry or Program," undated.

percent of the agency's resources are committed to banking and insurance, in New England this figure reaches 40 percent.⁶⁷

Other regional officials of OFCCP also commented on their plans for selecting contractors and apportioning resources to conduct reviews. Irene Mee of Region III (Philadelphia) indicated that targeting efforts are based on the types of industries in a region and the kinds of problems known to exist in those industries.⁶⁸ William Raymond of Region II (New York) said about 25 percent of that region's program plan is allocated for discretionary reviews.⁶⁹

Once contractors have been identified for review, the initial step in the actual review process is a desk audit. At this stage the compliance officer reviews documents submitted by the contractors to make an initial evaluation of the affirmative action program and to identify the existence of any deficiencies for indepth examination during the onsite review. The reviewer checks such things as the work force analysis, availability analysis, whether jobs are properly grouped, whether or not deficiencies are properly identified, goals and timetables, evidence of adverse impact or disparate treatment caused by selection practices, evidence of good faith to meet all requirements, and other information.⁷⁰ During the desk audit, the compliance officer is instructed not to focus on those job groups where acceptable goals are being met or are within 5 percent of being met.⁷¹ The compliance officer cannot normally conclude from the desk audit alone whether or not there are compliance problems, but a desk audit can be useful in helping to determine problem areas to focus on during the onsite review.⁷²

If the desk audit suggests a need for additional information to demonstrate conclusively a contractor's compliance or noncompliance, an onsite review is conducted.⁷³ Among the items examined at this stage are the following:

1. EEO policies and procedures;
2. Contractor records to determine sufficiency and whether those records support what was stated in the affirmative action report;

⁶⁷ Boston Transcript, pp. 404-05.

⁶⁸ Philadelphia Transcript, pp. 198-99.

⁶⁹ Newark Transcript, vol. I, p. 74.

⁷⁰ OFCCP, *Federal Contract Compliance Manual*, ch. 2, sec. 50.

⁷¹ *Ibid.*, ch. 2, sec. 30.4.

⁷² *Ibid.*, ch. 2, sec. 50.

⁷³ *Ibid.*, ch. 2, sec. 300.2-2g.

3. Personnel practices to determine if there is evidence of possible adverse impact or disparate treatment;
4. Recruitment, hiring, promotion, transfer, layoff, and recall procedures;
5. Grievance, disciplinary, and termination procedures;
6. Compliance with guidelines on discrimination because of religion or national origin;
7. Compliance with guidelines on handicapped persons and veterans;
8. Compliance with technical requirements (such as posting EEO employer poster); and
9. Whether on the basis of the above analysis there are systemic discrimination or affected class problems.⁷⁴

Donald Webster of Region IV (Atlanta) told the Tennessee Advisory Committee that each compliance review had "different complexities and there are some that take a short period of time and some reviews that take longer. You heard the gentlemen from the University of Tennessee saying the people in Memphis were in his office over a year."⁷⁵

Bennie Daugherty of Region VIII (Denver) reported:

I like to think that all the compliance reviews we conduct are indepth reviews. If we find minor deficiencies, a review, depending upon the size of the company, could be completed in 80 hours. That's a basic standard for us.

Reviews of companies of 5,000 to 6,000 people would take longer. Also, if we find an affected class of minorities or females, that would delay the review somewhat. We don't say that we're going to complete a review specifically in so many hours regardless of the deficiencies that we might find.⁷⁶

Entrance and exit interviews are conducted with the contractor as part of the review.⁷⁷ If no deficiencies are found, OFCCP issues a letter indicating the contractor's affirmative action program is accepted.⁷⁸ Where minor violations are found, a letter of commitment from the contractor to remedy the violations is sufficient for OFCCP to make a similar finding that the contractor's affirmative action plan is acceptable.⁷⁹

If the deficiencies are major, however, a conciliation agreement must be negotiated to find the affirmative action program acceptable. This agree-

⁷⁴ *Ibid.*, ch. 3.

⁷⁵ Knoxville Transcript, vol. V, p. 46.

⁷⁶ Denver Transcript, pp. 303-04.

⁷⁷ OFCCP, *Federal Contract Compliance Manual*, ch. 3, secs. 60 and 180.

⁷⁸ *Ibid.*, ch. 3, sec. 43.

⁷⁹ 41 C.F.R. §60-1.20(b) (1980).

ment spells out the problem areas and the corrective action to be taken.⁸⁰ As Leonard Biermann of Region I (Boston) pointed out:

One of the things that we do not accept in those conciliation agreements are plans to write a plan. We don't say that the contractor can write an affirmative action plan by a later date. He must have affirmative action plans in place in order to be found in compliance.⁸¹

Though negotiated at the area office, conciliation agreements must be approved by the regional and national offices.⁸² According to Jay Sauls of Region V (Chicago):

OFCCP prefers the conciliation route for resolving EEO and affirmative action shortcomings of contractors, since it means that the contractors can continue doing business with the government and their employees receive uninterrupted protection under the contract compliance program.⁸³

Bennie L. Daugherty of the Denver office concurred:

We try to conciliate most of our cases on an informal basis. If we find major deficiencies and the contractor is notified, we then attempt to conciliate through a series of meetings. . . to explain what we feel is necessary to correct these deficiencies and if they agree, then that's when we end up with a binding agreement.⁸⁴

If, however, conciliation efforts at this stage are unsuccessful, OFCCP may issue a show cause notice giving the contractor 30 days to indicate why sanctions should not be sought against it.⁸⁵ Although OFCCP prefers to resolve deficiencies through conciliation, according to Jay Sauls, OFCCP will not hesitate to invoke (after a hearing) such actions as fund termination and debarment from future government contracts if conciliation efforts fail.⁸⁶ His stand was reaffirmed by John Yuasa of OFCCP headquarters who stated, "OFCCP will discuss and explain various means of implementing various remedial and corrective actions, but we will not negotiate [away] the rights of protected group members."⁸⁷

Where conciliation agreements are successfully negotiated, OFCCP may then monitor those agreements. Followup activities vary according to the severity of the deficiency. In some cases no reports

are required of the contractor, while in others it may have to file quarterly or semiannual reports.⁸⁸ When the identified deficiencies are corrected, no further reports are required.⁸⁹

The Regional Director of OFCCP Region VI (Dallas) was asked to describe this process:

There may not be a requirement to report if the contractor had a reasonable profile. We may not require them to send us quarterly reports.

But if we enter into a conciliation agreement and we feel that we need to monitor as part of the conciliation agreement, then they must submit to us reports, whether it is a quarterly basis or a 6-month basis, in order for us to make a determination as to whether they are fulfilling those commitments.⁹⁰

Thomas Bush of the Philadelphia office told the Pennsylvania Advisory Committee of a process he uses to review monitoring reports:

I directed that. . . one day be established per month for reviewing whatever reports are engendered as a result of letters of commitment or conciliation agreements. [The day varies]. . . depending upon the individual workload or the time of the month that the report comes in, but one day a month—[we] take up all the reports that have been engendered by conciliation agreements. . . to evaluate them and—to see if they are acceptable to us.⁹¹

OFCCP does receive complaints from individuals.⁹² When possible, regional offices have been instructed by headquarters to combine complaint investigations and compliance reviews.⁹³ However, complaints may be referred to the Equal Employment Opportunity Commission. According to Mr. Biermann, a complaint that does not allege a pattern or practice of discrimination is generally referred to the EEOC, but if a pattern or practice of discrimination is alleged, usually it would be investigated by OFCCP as part of a compliance review.⁹⁴ Specifically, Mr. Biermann said:

All those complaints are recorded. Notations are made of the fact they have been filed, the company against which it has been filed, and so forth. If it is not alleging a pattern or practice of discrimination, the complaint is filed with the Equal Employment Opportunity Commission under a memorandum of understanding, and they investigate that complaint along with other complaints that they have.

⁸⁰ 41 C.F.R. §60-1.33 (1980).

⁸¹ Boston Transcript, p. 407.

⁸² John Yuasa, Deputy Director, OFCCP, letter to USCCR staff, June 20, 1980; Philadelphia Transcript, pp. 241-42; Kansas City Transcript, pp. 211-12; Oklahoma City Transcript, pp. 59-60; Boston Transcript, pp. 406-07; Robert Campbell, interview in Tulsa, Jan. 22, 1980; Oswald Jordan, interview in Boston, Dec. 27, 1979.

⁸³ Detroit Transcript, p. 443.

⁸⁴ Denver Transcript, p. 304.

⁸⁵ 41 C.F.R. §60-1.28 (1980).

⁸⁶ Detroit Transcript, p. 444.

⁸⁷ Letter to USCCR staff, June 20, 1980.

⁸⁸ Jose Montoya of OFCCP's Dallas Office, Oklahoma City Transcript, p. 58.

⁸⁹ Bennie L. Daugherty of OFCCP's Denver Office, Denver Transcript, p. 305.

⁹⁰ Jose Montoya, Oklahoma City Transcript, p. 58.

⁹¹ Philadelphia Transcript, p. 243.

⁹² 41 C.F.R. §§60-1.21-1.23 (1980).

⁹³ OFCCP, *FY 1979 4th Quarter Review and Analysis Report*, Dec. 26, 1979, p. 18.

⁹⁴ Boston Transcript, p. 433.

If it is a pattern and practice complaint, the complaint is sent to the OFCCP area office and it is investigated, normally as part of a compliance review.

The issues that are raised in the complaint are considered when a compliance review is investigated. The reason for that distinction is that we feel that with the staff we have and the work we have to do, it is more profitable to conduct pattern and practice complaints than it is individual complaints. . . .⁹⁵

The New York Regional Office described its handling of complaints in similar terms.⁹⁶ It was pointed out that OFCCP has sole authority to investigate complaints involving discrimination by Federal contractors based on handicap or against veterans.⁹⁷

Perceptions and Problems

Most parties affected by OFCCP practices, including OFCCP officials, identified problems with current requirements and procedures. Most of the complaints identified can be categorized into one of two basic groups: those typically and predictably expressed by employers against government in general that find OFCCP regulations to be too burdensome; and those on the part of community groups that, in equally characteristic fashion, find the agency not effective enough in accomplishing its stated objectives. Among the former group, the complaints centered around difficulties in responding to data requirements, duplication and conflict in regulations enforced by OFCCP and other Federal agencies, lack of technical assistance, and uncooperative and occasionally hostile behavior by enforcement officials. Among the latter group were complaints of ineffective monitoring of contractors, lack of comprehensible information about the compliance effort in general, and basic concern that those who are supposed to benefit from OFCCP enforcement activities simply do not.

Among those who found OFCCP regulations overly burdensome, the issue of data requirements was a major concern. A frequent observation was that the data requirements are simply pointless and the data required are often not available.⁹⁸ The eight-factor formula for determining the availability of minorities and women was noted in particular.⁹⁹

L.M. Wells, equal employment opportunity coordinator of Northwestern Bell Telephone Company in Omaha, stated that, "the eight-step criteria for arriving at availability. . . are virtually useless."¹⁰⁰ A critical problem in dealing with the eight-step criteria, according to Robert Planansky of the Mountain States Employers Council, is that "The statistics the employers must rely on, in even compiling those eight statistical factors, are terribly inadequate."¹⁰¹ While recognizing the need for adequate data to permit evaluations of progress and to identify trouble spots, one employer maintained that data requirements could be far more selective and, therefore, more manageable.¹⁰² The observations of Harold Page of Polaroid summed up the feelings of many private employers: "The amount of data that they want to look at is excessive. It is hard for me to believe that they are going to be able to sort through all of it."¹⁰³ One consequence of a perceived overemphasis on statistics, according to several employers, was that needless data gathering took time away from developing and implementing effective affirmative action programs.¹⁰⁴

The extent to which such complaints reflect resistance on the part of contractors to "outside interference" and increasingly effective enforcement is open to question, but recognizing the problems created by data requirements, and particularly the eight-factor measure for determining availability, William Gladden of OFCCP's San Francisco office noted that the agency recently set aside several million dollars for a study that will determine how to get the appropriate data into the hands of the contractor community.¹⁰⁵

A closely related problem noted by many observers was duplication between OFCCP requirements and those of other Federal agencies, and a lack of coordination among these agencies. Seemingly unnecessary differences in the format of required reports and contradictory definitions of such terms as "applicant" and "labor force" create needless paperwork as basically similar information must be aggregated in various ways.¹⁰⁶ One factfinding meeting participant complained of "turf battles" among

⁹⁵ *Ibid.*, p. 433.

⁹⁶ Richard Levin, Newark Transcript, vol. I, p. 77.

⁹⁷ Leonard Biermann, Boston Transcript, p. 434.

⁹⁸ Denver Transcript, p. 36; Oklahoma City Transcript, pp. 506-07.

⁹⁹ Denver Transcript, pp. 175-76; Kansas City Transcript, pp. 70-71; Roger Schwabauer, interview in Kansas City, Mo., Dec. 6, 1979.

¹⁰⁰ Kansas City Transcript, pp. 70-71.

¹⁰¹ Denver Transcript, pp. 175-76.

¹⁰² Oklahoma City Transcript, p. 505.

¹⁰³ Boston Transcript, p. 536.

¹⁰⁴ Oklahoma City Transcript, pp. 506-07; Boston Transcript, p. 547; Peggy O'Neal, interviews in Oklahoma City, Jan. 23 and Feb. 29, 1980; Los Angeles Transcript, pp. 19, 107-08, and 112.

¹⁰⁵ Los Angeles Transcript, pp. 312-13.

¹⁰⁶ Oklahoma City Transcript, pp. 464-67 and 508-11; Larry Blume, telephone interview, Apr. 17, 1980; Seattle Transcript, pp. 222, 229-30, and 243-45.

agencies that minimized coordination and weakened the entire Federal monitoring process.¹⁰⁷ Development of uniform guidelines on affirmative action that would enable employers to prepare a single report on equal employment opportunity and affirmative action concerns for all agencies was recommended by an employer.¹⁰⁸

Arrangements to avoid duplication and contradictions have been attempted periodically by various Federal agencies. Whether they are formal, written agreements or informal efforts, most cooperative efforts involve basically a sharing of information¹⁰⁹ and in some cases coordinated review and complaint investigation activities.¹¹⁰

Although this report was not designed to measure the validity of such perceptions and allegations, fairness demands an observation that uniformity is virtually impossible given currently prescribed missions and mandates that do differ significantly among the responsible Federal agencies.¹¹¹ In spite of the legal constraints, however, OFCCP and others are aware of existing room for improvement and are taking steps in promising directions as indicated in some of the following observations.

Complaints heard at the factfinding meetings about duplication and the need for coordination focus primarily on OFCCP and EEOC. Recognizing these concerns, these two agencies signed a Memorandum of Understanding in January 1981 stating:

Consistent and effective standards and procedures in this important area are clearly in the best interest of the public. Even though the Federal Government is often perceived as a single entity by those whom it regulates and serves, in reality the government necessarily implements related Federal policies through a number of separate agencies. In many areas artificial barriers may result. This Memorandum of Understanding seeks to eliminate or reduce such barriers to the extent possible and, as required by Executive Order 12067, to have the Federal Government function—in its dealings with citizens, beneficiaries, State and local governments, and regulated groups—as an efficient and coordinated entity.¹¹²

This memorandum requires OFCCP and EEOC to keep each other advised regarding the progress of cases and to consult with each other on prospective duplicative reviews. It calls for coordination committees at the national and regional levels and specifies that OFCCP will generally handle complaints of a systemic or class nature.¹¹³

Implementation of this memorandum represents a step in the direction many employers want OFCCP and other Federal agencies to take. David Boyd, affirmative action program administrator in the Washington State Department of Personnel, expressed the sentiments of many when he urged “that all of the agencies at the Federal level get together and meet each other and shake hands and get in a room and get locked up and come out with one affirmative action program. . .so everyone will know what they’re doing.”¹¹⁴

OFCCP publishes a manual to help contractors understand how their contractual obligations for affirmative action can be met. In addition to publishing its manual and regulations, the agency conducts seminars and provides individual consulting services when requested. But employers differ in their assessments of the value of such assistance.

At least some contractors have found the technical assistance available to be quite valuable.¹¹⁵ A representative of the Kerr-McGee Corporation stated, “the equal opportunity specialist was very helpful to us in helping us understand the new guidelines so we could develop our programs last year.”¹¹⁶ Others expressed a far different point of view.¹¹⁷ Robert Planansky of the Mountain States Employers’ Council reflected the thoughts of several when he asserted:

The programs that the OFCCP has put on are woefully inadequate in terms of practical assistance, particularly for people who are new to the affirmative action area. . . .The typical program involves four or five compliance officers standing up reading the regulations, and almost every employer I’ve talked to has viewed that 2-day program or 3-day program as a complete waste of time in terms of practical assistance.¹¹⁸

Bennie L. Daugherty of Region VIII told staff that while he believes in technical assistance, OFCCP, as an enforcement agency, should place the emphasis on compliance. In too many instances, he said, OFCCP still finds contractors who have had contracts for 4 or 5 years, but no affirmative action plans. In such a situation, Mr. Daugherty said, OFCCP does not see its role as leading the contrac-

¹⁰⁷ Seattle Transcript, pp. 97-98.

¹⁰⁸ Ibid., pp. 225 and 230.

¹⁰⁹ Ibid., p. 316; Oklahoma City Transcript, pp. 70 and 105-07; Boston Transcript, pp. 409-10.

¹¹⁰ Boston Transcript, p. 441; Kansas City Transcript, pp. 213-14.

¹¹¹ See 42 U.S.C. §2000e-5(1976); Exec. Order No. 11246, as amended.

¹¹² See 45 Fed. Reg. 27072 (1980).

¹¹³ 2 Empl. Prac. Guide (CCH) para. 3780 (1981).

¹¹⁴ Seattle Transcript, p. 230.

¹¹⁵ Kansas City Transcript, pp. 37 and 62; Detroit Transcript, p. 267.

¹¹⁶ Imogene Carter, Oklahoma City Transcript, p. 561.

¹¹⁷ E.g., Lawrence E. Sanford, telephone interview, Apr. 15, 1980; Tom Sloan, telephone interview, Apr. 10, 1980.

¹¹⁸ Denver Transcript, pp. 174-75.

tor through the process of developing an affirmative action plan.¹¹⁹

In addition to charges about inadequate technical assistance, some contractors complained about what they viewed as the adversarial and hostile posture of OFCCP officials.¹²⁰ Muriel Sears, coordinator of affirmative action for the Washington Public Power Supply System, argued, "I have found and I know other employers have found that it's more of an intimidation. It's kind of a 'I'm going to get you no matter what'."¹²¹

Under the second general category of complaints, i.e., assertions that OFCCP is not effective enough in accomplishing its stated objectives, some persons felt that not enough contractors are monitored often enough¹²² and that certain issues like religious discrimination do not receive adequate attention.¹²³ Part of the problem, according to some regional OFCCP officials, is that current data are inadequate to identify properly the universe of Federal contractors. Some companies simply do not report that they are Federal contractors on the EEO-1 report, which is one source of information OFCCP uses to develop its targets.¹²⁴ Another problem is the fact that the status of particular companies changes from month to month as some complete projects and are no longer contractors, while others receive contracts but may not be listed as contractors on current rosters.¹²⁵

Lack of information about the rules and regulations pertaining to equal employment opportunity and affirmative action and about the procedures through which citizens can make these programs work for them was cited as a particularly critical problem in reference to OFCCP and Federal agencies in general.¹²⁶ Mike Morado, IMAGE (Incorporated Mexican American Government Employees) regional director in Kansas City, said that not only is more information needed, but it must be made available in a concise, jargon-free manner so that community groups can effectively use the information.¹²⁷ A particular problem identified was the lack

of sufficient bilingual information so that those lacking English-language proficiency, particularly some Hispanics and Asian Americans, can understand Federal agency programs.¹²⁸ Among the kinds of information that one community leader said would be useful are the following:

- A specific list of what is legal and what is not legal with respect to nondiscrimination in employment;
- A list of alternative actions available to individuals who may be victims of employment discrimination;
- A list of specific steps an individual should take after being discriminated against;
- Assistance to community groups so they can provide better service to people who contact them for help.¹²⁹

One consequence of this lack of basic information is that many people who have either an individual or a pattern and practice complaint do not know where to go within the Federal bureaucracy if they want to file a complaint, according to Richard Berkman, co-chair of the Committee on Civil Liberties and Education of the American Jewish Committee in Philadelphia.¹³⁰ Of course, the resolution of this problem is not the responsibility of OFCCP alone, and in this connection the reader may find it helpful to consult a handbook published by the U.S. Commission on Civil Rights.¹³¹

A fundamental concern raised by several community groups was that the intended beneficiaries do not benefit. Inadequate staff and resources to do a proper job were identified by several as a central part of the problem,¹³² while some pointed to a lack of commitment on the part of the Federal Government.¹³³ The leader of one women's organization alleged that many women are forced out of their jobs as retaliation for filing complaints and as a warning to others who might consider similar action.¹³⁴ As for minorities, Jim Rowe of the Tulsa Urban League stated:

¹¹⁹ Interview in Denver, Jan. 24, 1980.

¹²⁰ Dave Burks, interview in Lenexa, Kans., Dec. 14, 1979; Lawrence E. Sanford, telephone interview, Apr. 15, 1980.

¹²¹ Seattle Transcript, p. 149.

¹²² Niel Thomas, statement to the Washington Advisory Committee, May 2, 1980; Joseph Trim, telephone interview, Apr. 8, 1980.

¹²³ Leonard Zakim, statement to the Massachusetts Advisory Committee, Mar. 26, 1980.

¹²⁴ Los Angeles Transcript, pp. 290-92.

¹²⁵ Denver Transcript, p. 295.

¹²⁶ Seattle Transcript, pp. 222-25, 229-30, and 243-45; Detroit Transcript, pp. 62-63.

¹²⁷ Kansas City Transcript, pp. 134-35.

¹²⁸ Seattle Transcript, pp. 39-40.

¹²⁹ Kansas City Transcript, pp. 133-34.

¹³⁰ Philadelphia Transcript, p. 32. However, see 41 C.F.R. §60-1.42 (1980).

¹³¹ U.S., Commission on Civil Rights, *Getting Uncle Sam to Enforce Your Civil Rights* (1980).

¹³² Oklahoma City Transcript, p. 267; Seattle Transcript, p. 29; Los Angeles Transcript, pp. 30-37; Newark Transcript, vol. II, p. 10.

¹³³ Stanley E. McFarlane, statement to Boston NAACP, Mar. 25, 1980 (hereafter cited as McFarlane Statement); Julia Hill, interview in Kansas City, Mo., Dec. 6, 1979.

¹³⁴ Kansas City Transcript, p. 120.

Time and time again over the last 5-1/2 years we have seen people come to the Urban League who have been forced out of their jobs because they had filed a grievance. . . . We can't prove that that is what is happening. But all the evidence would suggest that—that it is an unwritten agenda that once you file a case against a company and you find yourself on the outside looking in, nobody else will hire you because they call you a troublemaker. Companies don't like black people that talk up, particularly black men.¹³⁵

Denny Yasuhara, representing the Spokane chapter of the Japanese American Citizens League, argued that goals are not set high enough to eliminate an underutilization of minorities.¹³⁶ Spuriell White, executive director of the Seattle Urban League, contended that EEOC and OFCCP allow employers to get away with “phony excuses such as claims that there are no qualified people” in underutilized groups.¹³⁷

The fact that Executive Order 11246 applies to contractors but not unions was mentioned as a problem. After citing a 1976 recommendation of the U.S. Commission on Civil Rights that unions be included under the Executive order, Tom Storey of the Metropolitan Detroit Plumbing and Mechanical Contractors Association stated:

If the building trades unions were made equally responsible with contractors for affirmative action under Executive Order 11246, the unions would take decisive steps to ensure that the Office of Federal Contract Compliance Programs and the Michigan Civil Rights Department goals and timetables for minorities and women were fulfilled. . . . Affirmative action should not be negotiable. It should be the law, a law that both unions and contractors must comply with. The proposed amendments to the Executive order are the most clearcut, permanently effective way to accomplish this goal.¹³⁸

Many community representatives complained that enforcement agencies failed to interact with community groups that are knowledgeable and concerned about affirmative action. Such complaints were heard from the Boston¹³⁹ and Oak Ridge branches of the NAACP,¹⁴⁰ the New England regional director of IMAGE,¹⁴¹ the Los Angeles Urban League,¹⁴² and the Kansas City Urban League.¹⁴³ Leonard Zakim, northeast regional civil rights director of the Anti-Defamation League of B'nai Brith, contended:

If there is a perception out there by any minority group, or majority group, that the laws are not being enforced to protect their interests as provided for in the Constitution, then it is the responsibility of that agency, I think, to take whatever steps are

necessary to go into the black community, to go into the Hispanic community, to contact Jewish community organizations, to ensure that recruitment is conducted in those minority communities by contacting minority newspapers, by meeting with minority groups on campuses, by using whatever community means there is available to make sure that people understand that the law is there for everyone, and that it will be enforced for everyone.¹⁴⁴

Lawrence Borom, president of the Urban League of Metropolitan Denver, told the Colorado Advisory Committee:

I would propose to you that another initial effort that needs to be made is that those agencies that have affirmative action responsibilities, responsibilities for enforcement, need to become more visible and available to organizations within the community or to individuals within the community that have problems. I think, and again recognizing the lack of resources that are employed in this whole endeavor, that still the kind of visibility or the type of visibility that could be achieved—as an example, if we were to move out of our government towers and to have regular workshops, regular contacts with community groups who are concerned about these kinds of problems, that would be an advantageous type of move on the part of agencies that have enforcement responsibilities.¹⁴⁵

Of the three enforcement agencies covered in this report, only OFCCP requires staff contact with community groups for information about the contractor's equal employment posture.¹⁴⁶ Responding to complaints about lack of community contact on behalf of OFCCP nationwide, John Yuasa, Deputy Director of OFCCP, told Commission staff: “Generally, community groups are interviewed with each compliance review. All types of information are obtained during interviews. Types and amount of referrals and EEOC deputation are examples.”¹⁴⁷

Summary

With certain exceptions, employers wishing to do business with the Federal Government must, as part of their contractual obligations, not discriminate and must take affirmative action to eliminate any employment discrimination against minorities, women, handicapped veterans, and Vietnam-era veterans. Generally, Federal contractors must make a good faith effort to implement policies and practices that will result in the employment of minorities and women in each job category in proportions comparable to their availability in the labor force from which contractors hire their employees.

¹³⁵ Oklahoma City Transcript, pp. 268–69.

¹³⁶ Telephone interview, Apr. 9, 1980.

¹³⁷ Telephone interview, Apr. 9, 1980.

¹³⁸ Detroit Transcript, pp. 276–78. See also Exec. Order No. 11246, as amended §207 and 41 C.F.R. 60–1.26(e)(5) (1980).

¹³⁹ McFarlane Statement.

¹⁴⁰ Knoxville Transcript, vol. II, p. 17.

¹⁴¹ Diane Cosme, Boston Transcript, p. 666.

¹⁴² Los Angeles Transcript, p. 14.

¹⁴³ Kansas City Transcript, p. 128.

¹⁴⁴ Boston Transcript, pp. 679–80.

¹⁴⁵ Denver Transcript, p. 43.

¹⁴⁶ OFCCP, *Federal Contract Compliance Manual*, ch. 3, sec. 50.

¹⁴⁷ John Yuasa, letter to staff, June 20, 1980.

OFCCP, the Federal agency responsible for ensuring compliance with equal opportunity and affirmative action requirements by Federal contractors, has issued regulations advising contractors and the general public what is required for compliance. These requirements include preparation of reports detailing the minority and sex composition of the current work force, their availability in the labor market, selection and promotion practices, specific result-oriented actions and procedures to ensure equal employment opportunity, and a variety of other information pertaining to personnel administration. When deficiencies are found from desk audits, onsite reviews, and other compliance activities, OFCCP prefers to negotiate a conciliation agreement with the contractor, but has authority to take other actions that may result in debarment from future Federal contracts.

Several problems have been noted by virtually all parties affected by OFCCP practices. Contractor complaints centered on the burdensome tasks of complying with all the regulations. Many contractors were particularly critical of what they perceived to be excessive and pointless data requirements (which, they argue, divert attention from

implementation of effective affirmative action), duplication and contradictions among OFCCP and other Federal agency requirements, and the uncooperative posture of compliance officers. Representatives of minority and women's groups cited ineffectiveness of OFCCP and other Federal agencies as the critical problem. Inadequate monitoring, lack of readily available and comprehensible information about Federal requirements and procedures, and a general failure to "deliver the goods" to those who are supposed to benefit from these programs were cited by several as deficiencies in the performance of OFCCP and other agencies.

OFCCP is aware of these concerns, and in fact the agency has taken steps to resolve them. Currently, OFCCP is attempting to improve guidance for contractors and to streamline data requirements in general. In addition, the recent Memorandum of Understanding between OFCCP and EEOC represents a commitment to improve coordination of the activities of these two agencies. Such actions are being taken in hopes of improving the overall effectiveness of equal employment opportunity and affirmative action enforcement efforts of OFCCP in particular and the Federal Government in general.

The Equal Employment Opportunity Commission

The single most far-reaching law ever enacted by the Federal Government to eliminate employment discrimination is Title VII of the Civil Rights Act of 1964.¹ The agency primarily responsible for enforcing Title VII is the Equal Employment Opportunity Commission (EEOC).

This chapter examines EEOC's responsibilities under Title VII pertaining to the private sector. An attempt is made to acquaint the reader with the full range of EEOC's responsibilities in handling complaints of employment discrimination, not just its role in providing guidelines for the voluntary development of affirmative action plans. Within the total framework of affirmative action, EEOC is perceived as an agency that requires employers to take a variety of affirmative measures to eliminate the present effects of past discrimination and avoid its recurrence in the future. Another view of EEOC is that since it processes complaints and exacts remedies where employment discrimination has been found, and unlike OFCCP does not mandate the development of affirmative action plans, it is not crucially involved in the business of affirmative action. This chapter seeks to dispel this view and indicate that even within the realm of "complaint processing," and especially within its "systemic process," EEOC's remedies obtained for employ-

ment discrimination often cause major affirmative action efforts by respondents.

Law and Official Policy

Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination by employers, employment agencies, and labor organizations on the basis of race, color, religion, sex, or national origin.² It applies to discrimination in all aspects of employment, including recruitment, hiring, promotion, discharge, classification, training, compensation, and other terms, privileges, and conditions of employment.³ As amended in 1972, Title VII covers most Federal, State, and local governmental employers and educational institutions as well as private firms.⁴

Certain employers are exempt from the equal opportunity requirements of Title VII: employers who regularly employ fewer than 15 persons;⁵ a tax-exempt *bona fide* private membership club;⁶ a corporation wholly owned by the Government of the United States;⁷ State or local elected officials, their personal staffs, policy-level appointees, and their immediate legal advisers;⁸ Indian tribes;⁹ and any business located on or near an Indian reservation that gives Indians living on or near a reservation preferential treatment;¹⁰ employers, with respect to

¹ The Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, 78 Stat. 253.

² 42 U.S.C. §2000e-2(a)-(d) (1976).

³ *Id.*

⁴ 42 U.S.C. §§2000e(a)-(b), 2000e-16(a) (1974 & Supp. 4, 1980).

⁵ 42 U.S.C. §2000e(b) (1976).

⁶ 42 U.S.C. §2000e(b)(2) (1976).

⁷ 42 U.S.C. §2000e(b) (1976).

⁸ 42 U.S.C. §2000e(f) (1976).

⁹ 42 U.S.C. §2000e(b) (1976).

¹⁰ 42 U.S.C. §2000e-2(i) (1976).

the employment of aliens outside the United States and specified American territories and protectorates;¹¹ and religious organizations that employ individuals to perform work connected with the carrying out of the religion.¹²

In addition to the foregoing employers who are specifically exempted from coverage, certain employment practices of covered employers are exempt from attack as unlawful employment practices under Title VII. These include such things as *bona fide* seniority and merit systems as well as *bona fide* occupational qualifications.¹³

The EEOC, an independent executive Federal agency created by the Civil Rights Act of 1964, as amended, is charged with enforcing the provisions of Title VII.¹⁴ As the result of several major transfers of authority in 1978 and 1979, pursuant to the President's Reorganization Plan No. 1 of 1978,¹⁵ EEOC is now established as the lead Federal agency for achieving equal employment opportunity in the public as well as the private sector.¹⁶ Under the President's reorganization, the interagency equal employment coordination function previously vested with the Equal Employment Opportunity Coordinating Council was shifted to EEOC.¹⁷ The President then issued Executive Order No. 12067 that gave EEOC responsibility for eliminating duplication, conflict, and inconsistencies in Federal equal employment opportunity programs and activities.¹⁸ EEOC was also given authority for the enforcement of equal employment opportunity within the Federal Government.¹⁹ This EEOC responsibility is discussed in chapter 5. Effective July 1, 1979, administration and enforcement of the Equal Pay Act of 1963 (EPA)²⁰ and the Age Discrimination in Employment Act of 1967 (ADEA),²¹ as amended, were

transferred to the EEOC from the Wage and Hour Division, U.S. Department of Labor.²² The EPA, enacted as an amendment to the Fair Labor Standards Act of 1938,²³ prohibits wage discrimination based on sex.²⁴ The ADEA contains a broad prohibition against discrimination based on age in all aspects of employment.²⁵

Under Title VII, employers, employment agencies, and labor organizations are prohibited from engaging in unlawful employment practices that discriminate against applicants and employees on the basis of race, color, religion, sex, or national origin.²⁶ Unlike OFCCP, EEOC does not have authority to require development of affirmative action plans. Affirmative action can be required only by a court and only as a remedy for a specific violation of Title VII.²⁷ However, EEOC may play a facilitative role in encouraging employers, through conciliation efforts or threat of litigation, to develop affirmative action plans. That is, EEOC may encourage those covered by Title VII to comply voluntarily, and that voluntary compliance may include affirmative action plans, as well as specific affirmative measures, that further the purposes of Title VII to eliminate present discrimination and the present effects of past discrimination.²⁸

Title VII permits the EEOC to provide technical assistance upon request to assist persons subject to the act to comply with its provisions or with any order issued under its authority.²⁹ EEOC may also conduct studies and publicize the results in order to carry out the purposes of Title VII.³⁰

In addition, under its authority to pursue the purposes and goals of Title VII, EEOC issued, in January 1979, "Guidelines on Affirmative Action."³¹ EEOC issued these guidelines³² in part to protect

¹¹ 42 U.S.C. §2000e-1 (1976).

¹² *Id.*

¹³ 42 U.S.C. §2000e-2(h) (1976).

¹⁴ 42 U.S.C. §2000e-5(a) (1976).

¹⁵ Reorg. Plan No. 1 of 1978, 3 C.F.R. §321 (1978 Comp.), reprinted in 5 U.S.C. app., at 355 (Supp. III 1979), as modified and implemented by Exec. Order No. 12106, 44 Fed. Reg. 1053 (1978) and Exec. Order No. 12144, 3 C.F.R. §404 (1980). Hereafter cited as Reorg. Plan No. 1 of 1978.

¹⁶ Exec. Order No. 12067, §1-201, 43 Fed. Reg. 28967 (1978).

¹⁷ Reorg. Plan No. 1 of 1978 §6.

¹⁸ Exec. Order No. 12067, §1-201, 43 Fed. Reg. 28967 (1978).

¹⁹ Reorg. Plan No. 1 of 1978, §3-4.

²⁰ 29 U.S.C. §206(d) (1976).

²¹ 29 U.S.C. §§621-634 (1976 and Supp. III 1979).

²² Reorg. Plan No. 1 of 1978, §1-2. The U.S. Civil Service Commission's (now OPM) responsibility for enforcement of both acts was transferred to EEOC effective Jan. 1, 1979. *Id.*

²³ 29 U.S.C. §201 *et seq.* (1976).

²⁴ The EPA mandates that both sexes receive equal pay for work requiring equal skill, effort, and responsibility under similar working conditions

except where the differential is due to a seniority system, a merit program, or a system that measures earnings by quantity or quality or production or any other factor other than sex. 29 U.S.C. §206(d) (1976).

²⁵ The ADEA prohibits age discrimination against persons between 40 to 70 years old. 29 U.S.C. §631(a) (Supp. III 1979). It excludes differentiation in terms and conditions of employment based on a *bona fide* occupational qualification or reasonable factors other than age, *id.* §623(a)(2); under some circumstances, a *bona fide* seniority system or employee benefit plan, *id.* §623f(2); or certain *bona fide* executive or high policymaking employees, *id.* §631(c)(1). Also excluded are employees employed under a contract of unlimited tenure at an institution of higher education (this exception applies until July 1, 1982) *id.* §631(d).

²⁶ 42 U.S.C. §2000e-2(a)-(d) (1976).

²⁷ 42 U.S.C. §2000e-5(b)-(g) (1976).

²⁸ 29 C.F.R. §1608 (1980).

²⁹ 42 U.S.C. §2000e-4(g)(3) (1976).

³⁰ 42 U.S.C. §2000e-4(g)(5) (1976).

³¹ 29 C.F.R. §1608 (1980).

³² *Id.* These guidelines encourage those covered by Title VII (public and private employers, unions, and employment agencies) to engage in a three-

employers and labor organizations who take appropriate voluntary affirmative action against claims that their efforts constitute "reverse" discrimination under Title VII, noting that "Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement."³³ The guidelines are also EEOC's response to a Fifth Circuit Court's decision in *Weber v. Kaiser Aluminum Corporation*, which was subsequently overturned by the Supreme Court in *United Steelworkers v. Weber*.³⁴ EEOC interpreted the Supreme Court's decision as judicially reinforcing its affirmative action guidelines.³⁵

The guidelines define affirmative action as "actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity."³⁶ Further, they outline permissible voluntary steps employers may take, without an admission or formal finding of a Title VII violation, to correct present and past discriminatory employment patterns.³⁷ Those steps include establishment of numerical goals and timetables that may recognize the race, sex, or national origin of employees or applicants; recruitment programs aimed at increasing the number of minorities and women; redesigning of jobs to facilitate entry into and progression within careers; changing unvalidated selection procedures that screen out minorities and women; and provision of formal on-the-job training.³⁸ Voluntary affirmative action steps taken by employers and found in conformity with the guidelines by EEOC are protected from subsequent charges of "reverse" discrimination.³⁹

Title VII requires employers, employment agencies, and labor organizations to maintain such records as are necessary for EEOC to determine whether unlawful discriminatory employment practices have been committed.⁴⁰ Under this authority, EEOC has promulgated a comprehensive set of

step process (§1608.4) in implementing an affirmative action plan: (1) to undertake a "reasonable self-analysis" (§1608.4(a)) to identify discriminatory practices; (2) to determine if a "reasonable basis for concluding action is appropriate" exists (§1608.4(b)); and, if such a basis is found then (3) to take "reasonable action," including the adoption of practices that recognize the race, sex, or national origin of applicants or employees (§1608.4(c)). If such procedures are followed and the plan is challenged as violating Title VII, the EEOC can certify the plan under the title (§1608.10). Such certification effectively insulates the plan from "reverse discrimination" claims.

³³ 29 C.F.R. §1608.1(a) (1980).

³⁴ 44 Fed. Reg. 4422, 4425 (1979); *Weber v. Kaiser Aluminum Corp.*, 563 F.2d 216 (5th Cir. 1977), *rev'd sub nom.*, *United States Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

³⁵ EEOC, *News*, June 29, 1979.

³⁶ 29 C.F.R. §1608.1(c) (1980).

³⁷ *Id.* §1608.4 (1980).

³⁸ 29 C.F.R. §1608.4(c)(1) (1980).

regulations detailing what data must be maintained, what data must be regularly provided to EEOC, and the form in which the data must be provided.⁴¹ Certain reports containing data on the makeup of each occupational group must be forwarded to the EEOC on an annual basis by specified employers.⁴²

The principal purpose of EEOC is to enforce the provisions of Title VII, to ensure equal opportunity in employment without regard to race, color, religion, sex, or national origin.⁴³ Individuals who believe they have been subjected to discrimination on such bases may file complaints with EEOC.⁴⁴ After deferral to appropriate State or local agencies, EEOC will assume jurisdiction of the complaint if the allegations include unlawfully discriminatory employment practices and certain other conditions are met.⁴⁵ The EEOC has broad investigatory powers, including the power to subpoena witnesses and documents.⁴⁶ If EEOC determines that there is no reasonable basis for believing that an unlawful employment practice has been committed, it will dismiss the charge and issue the complainant a "right to sue" letter, which permits the complainant to file his or her own lawsuit in Federal district court.⁴⁷ Right to sue letters can be issued under other circumstances as well.⁴⁸

EEOC has developed a series of procedural rules that govern its work.⁴⁹ As part of these rules, a national uniform charge processing system has been developed to expedite the processing of all complaints presented to EEOC and to prevent a backlog of stale charges.⁵⁰ These procedures are discussed later in this chapter.

If data and information submitted to or discovered by EEOC indicate that a covered individual or organization is believed to be violating the provisions of Title VII, any Commissioner of EEOC may file a formal charge against the offending party.⁵¹ If, as a result of the investigation of a charge, EEOC

³⁹ *Id.* §1608.10 (1980).

⁴⁰ 42 U.S.C. §2000e-8(c) (1976).

⁴¹ 29 C.F.R., §§1602.1-.55 (1979).

⁴² 29 C.F.R. §§1602.7, 15, 22, 32, 41, 50 (1979).

⁴³ 42 U.S.C. §2000e-5(a); EEOC Order No. 10, ch. 1 (May 3, 1978) 2 *Empl. Prac. Guide* (CCH), para. 3920.01, at 2175.

⁴⁴ 42 U.S.C. §2000e-5(b) (1976); 29 C.F.R. §1601.7 (1979).

⁴⁵ 29 C.F.R. §1601.13 (1980).

⁴⁶ 42 U.S.C. §2000e-9 (1976).

⁴⁷ 42 U.S.C. §2000e-5(b), 5(f)(1) (1976); 29 C.F.R. §§1601.19, .28(b)(3) (1980), as revised by 45 Fed. Reg. 46614 (1980) (interim) (to be codified in 29 C.F.R. §1601.21(b), .21(d), .28(d)).

⁴⁸ 29 C.F.R. §1601.28 (1980).

⁴⁹ 29 C.F.R. §§1601.1-.74 (1979) and subsequent amendments, deletions, and revisions published in the *Federal Register*.

⁵⁰ 2 *Empl. Prac. Guide* (CCH), para. 5030, at 3107.

⁵¹ 42 U.S.C. §2000e-5(b) (1976); 29 C.F.R. §1601.11 (1979).

determines that there is reason to believe that a violation of Title VII has occurred, EEOC must first attempt to resolve the matter through informal methods by conference and conciliation.⁵² If conciliation is successful, the terms of the agreement must be put into writing and signed by a representative of the EEOC and by each of the parties.⁵³ No case that is resolved by conciliation may be closed until the EEOC has proof of compliance with the terms of the agreement.⁵⁴

Where conciliation efforts fail to resolve allegations of unlawful discrimination, EEOC is empowered to bring a civil action against the offending private party.⁵⁵ If the party is a State or local governmental unit or political subdivision, EEOC must refer the matter to the Department of Justice for enforcement.⁵⁶

Both EEOC and the Department of Justice may, in appropriate cases, seek preliminary relief to prevent the offending party from doing irreparable harm pending resolution of the charge.⁵⁷ Upon finding that an employer has violated Title VII, a court may impose certain remedies, including hiring, reinstatement, promotion, awards of back pay, retroactive seniority, and whatever other equitable relief the court determines to be appropriate.⁵⁸ Such equitable relief may include, in appropriate circumstances such as a proven company-wide pattern and practice of unlawful employment discrimination, a court-imposed affirmative action plan.⁵⁹ However, as with all equitable remedies, the nature and scope of the remedy is limited by the nature and scope of the violation.⁶⁰ In addition, through its "Guidelines on Affirmative Action," EEOC has indicated its support for voluntary affirmative action, which it views both as implementing "the clear Congressional intent" behind Title VII and as a means of avoiding unnecessary litigation.⁶¹

Thus, Title VII of the Civil Rights Act is an important tool, having been interpreted to embody two significant purposes: "to make persons whole

for injuries suffered on account of unlawful employment discrimination"⁶² and to "provide the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."⁶³

The following section provides information gathered from EEOC officials across the country on the manner in which they implement Title VII and discharge their varied responsibilities.

Implementation Procedures

According to the Equal Employment Opportunity Commission's District Office Directors quoted in this section, the central focus of EEOC's enforcement effort is the swift and equitable resolution of complaints that have been filed with the Commission's district and area offices. This mandate, in their opinion, is to be accomplished through three interlocking processes: the rapid charge processing system, the early litigation identification program (ELI), and the systemic process. Each of these systems is designed to move a charge or an investigation as quickly as possible to resolution.

EEOC's *Compliance Manual*, described "as a source of policy, procedures and standards for the enforcement effort of the Commission," contains procedures designed to correct certain perceived deficiencies in EEOC's processing of complaints and supervision of compliance with Title VII of the Civil Rights Act of 1964, as amended.⁶⁴ The changes include the institution of the rapid charge processing system; a separation of "backlog cases" from "new" cases; establishment of a systemic discrimination program; integration of the litigation, investigation, and conciliation functions by placing attorneys in the new district field offices; and institution of a new management accountability and information system.⁶⁵ In addition, the compliance manual establishes an administrative standard for determining what acts

⁵² 42 U.S.C. §2000e-5(b) (1976); 29 C.F.R. §1601.24(a) (1980). EEOC may also assist the complainant and respondent in coming to a mutually agreeable settlement prior to any agency determination of reasonable cause to believe a violation of Title VII has occurred. 29 C.F.R. §1601.20 (1980).

⁵³ 29 C.F.R. §1601.24(a) (1979). A successful conciliation must include the respondent's agreement to cease the unlawful practice and provide affirmative relief.

⁵⁴ 29 C.F.R. §1601.24(c) (1979).

⁵⁵ 42 U.S.C. §2000e-5(f)(1) (1976).

⁵⁶ *Id.*

⁵⁷ 42 U.S.C. §2000e-5(f)(2) (1976); 29 C.F.R. §1601.23 (1979).

⁵⁸ 42 U.S.C. §2000e-5(g) (1976); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

⁵⁹ See e.g., *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950 (1972). *Allen v. City of Mobile*, 331 F. Supp. 1134 (3.0 Ala. 1971), aff'd per curiam, 466 F.2d 122 (5th Cir. 1972), cert. denied, 412 U.S. 904 (1973).

⁶⁰ See e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974).

⁶¹ 29 C.F.R. §1608.1(a) (1979).

⁶² *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

⁶³ *Id.* at 417-18, quoting *United States v. N.L. Indus. Inc.*, 479 F.2d 354, 379 (8th Cir. 1973).

⁶⁴ EEOC Order No. 915 (Jan. 26, 1979).

⁶⁵ *EEOC Compliance Manual* (CCH), para. 50.10 (May 1979).

constitute a probable violation of Title VII justifying further legal action by EEOC.⁶⁶ This standard is considered to be as strict as that required to justify a lawsuit.⁶⁷

Individual and group complaints are processed by the EEOC in two ways, as indicated in chart 3.1 The "rapid charge processing system" is illustrated on the right-hand side. The emphasis is upon speedy resolution of the individual's complaints by providing a remedy acceptable to both parties. The outcome, a negotiated settlement, is indicated at the bottom of the right-hand column.

While a rapid charge is the procedure used for processing individual complaints, a complaint that is targeted for the early litigation program (illustrated on the left-hand side of chart 3.1) may have broader implications and according to John Butler, Philadelphia District Director, can be considered:

virtually class in nature. There are some issues that by their very nature impact or affect large groups of people. . . . We tend to view an employer with less than 500 employees in the context of an ELI and an employer with more than 500 employees in the context of our systemic operation.⁶⁸

The purpose of the ELI (early litigation identification) is to provide a procedural structure within which district offices can identify and investigate charges that warrant expansion of the scope of an investigation beyond the discriminatory practices directly affecting the aggrieved person who filed the charge.⁶⁹ An ELI charge may be pursued because of the nature of the charge or the identity of the respondent, according to Roscoe Jones, Deputy Director of EEOC's Los Angeles district office. He indicated that certain respondents are targeted for ELI processing because the particular respondent has been the subject of many complaints or the issues alleged in the complaint might be ELI issues based upon their multiplicity.⁷⁰

Each district office usually maintains an ELI respondent list.⁷¹ This list of private employers is constructed on the basis of one or more of the following considerations.

1. EEO-1 data that show low overall representation of protected classes as compared to the avail-

able labor pool, or low representation in a particular employment category when compared to the total work force.

2. Information is supplied by another Federal agency (OFCCP or State or local agency) alleging discriminatory policies and/or practices.

3. Information is supplied by organizations representing protected classes alleging discriminatory policies and/or practices.

4. The employer falls within a generalized industry category where there have been numerous complaints of discriminatory policies and/or practices.⁷²

An ELI case may involve an individual complainant or multiple complainants. When an individual complaint is lodged against an employer on the ELI respondent list, the charging party is advised of the ELI process and asked whether he or she wants the charge handled individually or is willing to wait and have it handled along with other similar charges for which classwide remedies may be sought.⁷³ The charge is also reviewed by a district office top management committee (consisting of the district director, deputy director, and regional attorney) to determine the potential for effective litigation.⁷⁴ If the charge proceeds under the ELI system, attorney and investigator work together to ensure that the evidence is assembled in a form suitable for litigation.⁷⁵ At a predetermination interview with the respondent, an attempt is made by EEOC to settle the issues in a comprehensive fashion.⁷⁶ If there is no settlement at this stage, a letter of determination of reasonable cause of discrimination is issued.⁷⁷ Respondents are warned that the matter is considered by the Commission to be litigable.⁷⁸ If conciliation fails, litigation is recommended.⁷⁹

The systemic process is outlined in chart 3.2. While a systemic case may be generated in part by public complaints, it is initiated by the Commissioners through the systemic unit of a district office.⁸⁰ Each district office usually maintains a list of potential systemic respondents prepared by the Office of Systemic Programs in Washington.⁸¹ Companies may appear on such a list when they:

⁶⁶ *Ibid.*, para. 1061.

⁶⁷ U.S., Commission on Civil Rights, "Post Reorganization Developments at EEOC and OFCCP, a Status Report" (May 13, 1980, unpublished), p. 12.

⁶⁸ Philadelphia Transcript, pp. 184-85.

⁶⁹ *EEOC Compliance Manual* (CCH), para. 461 (May 1979).

⁷⁰ Los Angeles Transcript, p. 248.

⁷¹ *EEOC Compliance Manual* (CCH), para. 462 (May 1979).

⁷² *Ibid.*, para. 463.

⁷³ Los Angeles Transcript, p. 275; *EEOC Compliance Manual* (CCH), para. 465 (May 1979).

⁷⁴ *EEOC Compliance Manual* (CCH), para. 468 (May 1979).

⁷⁵ *Ibid.*, para. 471.

⁷⁶ *Ibid.*, para. 472.

⁷⁷ *Ibid.*, para. 473.

⁷⁸ *Ibid.*, para. 474.

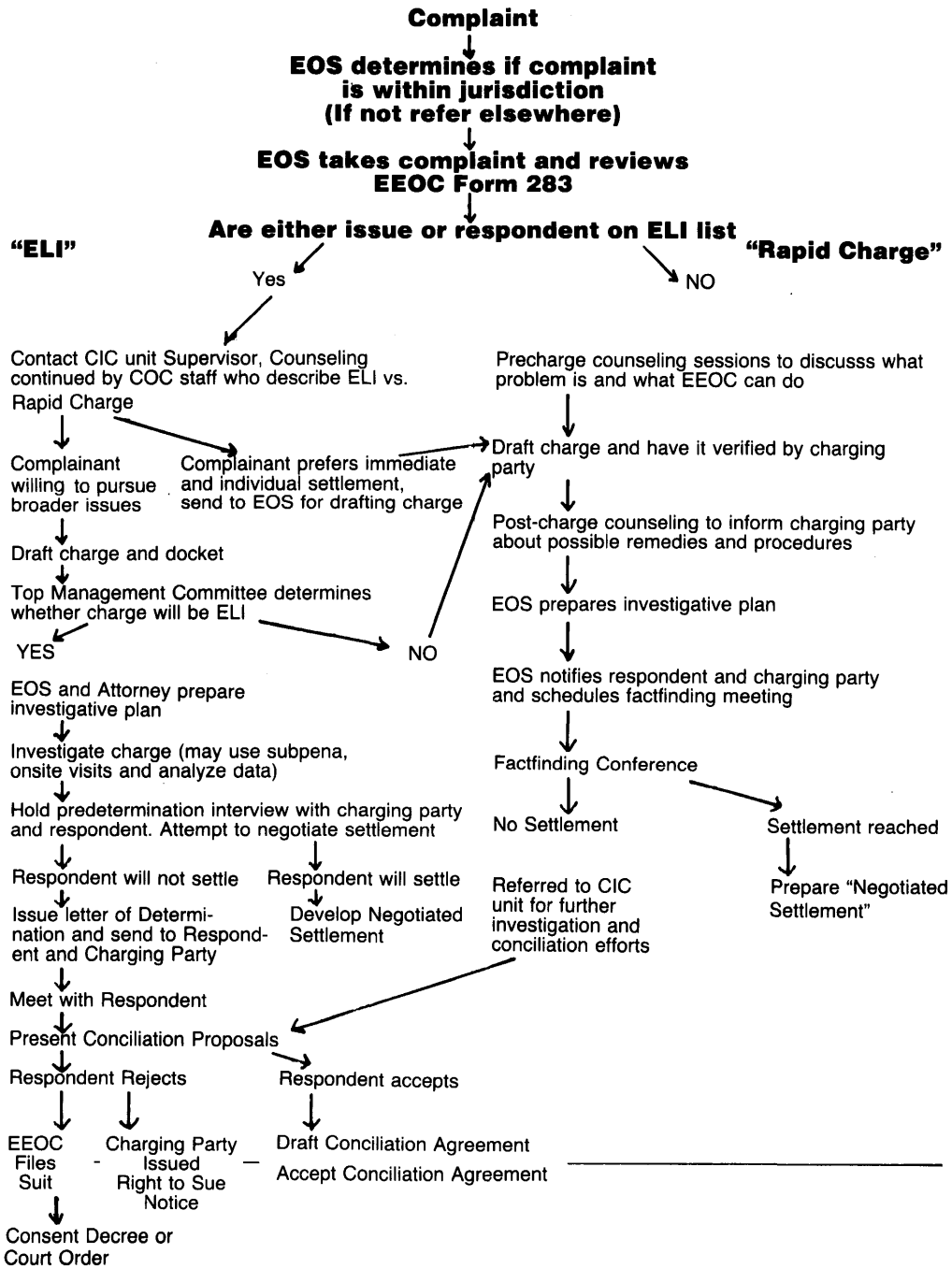
⁷⁹ *Ibid.*, para. 475.

⁸⁰ *Ibid.*, para. 563.

⁸¹ *Ibid.*

CHART 3.1

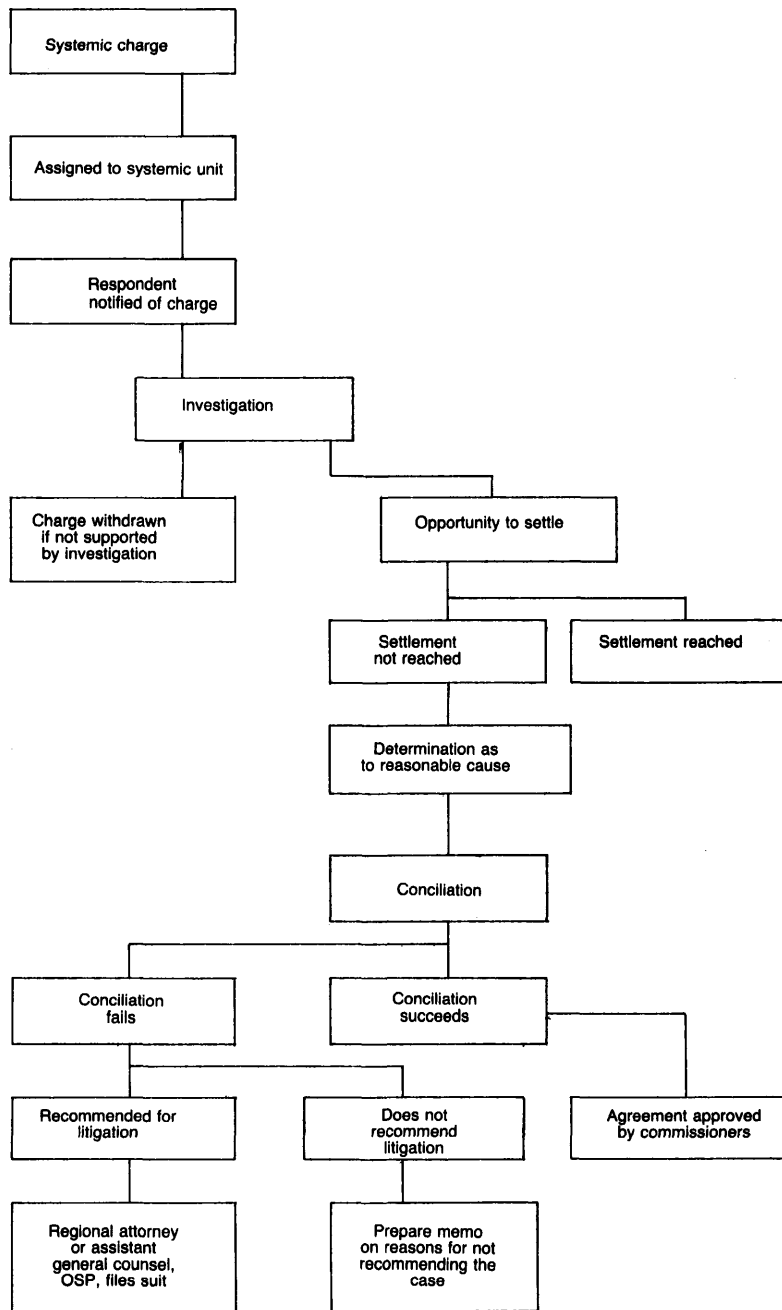
New Charge Processing System



Source: Constructed by staff from material contained in EEOC Compliance Manual (CCH) §§1, 2, 4, 6, 7, 8, 10, 12, 14, 15, 40, 60, 63, & 66.

CHART 3.2

Systemic Charge Process



Source: *EEOC Compliance Manual* (CCH) §16.

Note: Under some circumstances individual charges can be consolidated with a systemic case. After a systemic case is assigned for investigation, all future and pending charges are examined with a view towards possible consolidation. (CCH Compliance Manual §16.8 para. 568).

1. Continue in effect policies and practices that result in low utilization of available minorities or women;
2. Employ a substantially smaller proportion of minorities or women than other employers in the same labor market who employ persons with the same general level of skills;
3. Employ a substantially smaller proportion of minorities or women in their higher paid job categories than in lower paid categories;
4. Maintain specific policies and practices that have an adverse effect;
5. Have practices that have had the effect of restricting or excluding available minorities or women from opportunities and are likely to be models for other employers in the area; and
6. Have substantial numbers of potential jobs and may not provide fair access to those jobs.⁸²

In defining the purpose and goals of the systemic program, W. Ed Mansfield, St. Louis District Director, said, "In this program, we seek to identify employers which historically have maintained policies and practices which had a disparate impact on groups protected under Title VII."⁸³

Clearly, the concept of the systemic unit is to provide large-scale relief in companies or industries that have had a significant history of discriminatory practices.⁸⁴ Given this concept, the systemic unit could be considered the most powerful of the tools that EEOC has to affect private employment practices and to encourage affirmative action. According to EEOC Executive Director Preston David, the heart of EEOC's attack on discrimination is the systemic process, which is expected to generate systemic remedies.⁸⁵

When EEOC finds violations of Title VII, the agency must first attempt to negotiate a conciliation agreement.⁸⁶ Among the kinds of remedies that may be included in such an agreement are the following:

1. Procedural changes in recruiting and hiring, and hiring charging party with back pay and benefits.
2. Assignment, transfer, lines of progression changes, back pay, and benefits for the charging party.
3. Promotion for charging party, back pay, and changes in procedures that brought about the failure to promote.

4. Reinstatement and back pay to remedy discharge or disciplinary action, and procedural changes that will prevent such problems in the future.

5. Procedural changes, immediate recall of charging party, and appropriate back pay, seniority, and fringe benefits to the charging party that will remedy discriminatory layoff or recall.

6. Readmission or reinstatement of charging party to union membership, revision of procedures that resulted in discrimination by the union, and maintenance of records to prove nondiscrimination.

7. In the case of employment agencies that discriminate, changes of classification or other practices that discriminate, placement of applicants on preferred lists under affirmative action programs, validation of all tests, an ending of taking job orders and referring on discriminatory basis, elimination of other discriminatory practices, and computation of appropriate back pay.

8. Equalization of retirement age for males and females, medical standards for disabilities, and payments into retirement and insurance; assurance of equality of access to survivor benefits; elimination of differences in benefits under insurance plans based on sex or marital status; equality of leave procedures.

9. Back pay to charging party for overtime denied, elimination of specific factors that brought about discrepancy in overtime, and changes in assignment of overtime to allow for religious affiliation.

10. Prevention of retaliation.

11. End of segregated facilities and social activities.

12. Elimination of discriminatory tests and validation of tests, submitting those studies to EEOC before implementation; hiring, promoting, restoring back pay, benefits, etc., to remedy the effects of discriminatory testing.

13. Calculation by EEOC of interest, at the then current legal rate, to determine the full amount of back pay.

14. Elimination of any practice based on sex unless such practice is shown to be a *bona fide* occupational qualification as approved by Commission; provision of immediate employment to the charging party or employment in the next vacancy with appropriate back pay; granting of retroactive seniority and fringe

⁸² Ibid., para. 562.

⁸³ Kansas City Transcript, pp. 170-71.

⁸⁴ EEOC Compliance Manual (CCH), para. 561 (May 1979).

⁸⁵ Preston David, interview in Washington, D.C., June 20, 1980.

⁸⁶ 42 U.S.C. §2000e-5(b) (1976).

benefits; provision of training and merger of seniority systems.

15. Development of an affirmative action plan.

16. Recordkeeping and submission of reports by the respondent so that EEOC can verify compliance.⁸⁷

EEOC cannot require affirmative action programs of private employers subject to Title VII as OFCCP can require of certain Federal contractors under Executive Order 11246. One EEOC official even stated, "We're not in the affirmative action business. We're in the complaint processing business."⁸⁸ While several acknowledge they do not have authority simply to order employers to develop affirmative action plans, virtually all agree that a variety of affirmative remedies, including comprehensive affirmative action programs, would be appropriate remedial action in conciliation agreements if the violation required such action to remedy the discriminatory practice in question.⁸⁹ In fact, the agency has identified those items that should be included in an affirmative action plan. The items include the following:

- A statement of nondiscrimination policy;
- A plan for dissemination of the policy and plan;
- Identification of those in a respondent company responsible for implementation of policy and plan;
- Assignment of responsibility for selection and placement of employees;
- Assignment of responsibility for training of employees;
- Penalties for noncompliance with affirmative action plan;
- Goals and timetables;
- Procedures for hiring and assignment of new employees that would ensure both nondiscrimination and promote affirmative action; and
- Recruitment and hiring practices be specified that will promote affirmative action.⁹⁰

EEOC staff offered a variety of comments on the use of these affirmative action plan standards as a remedy. A representative of the Denver district office, James Stone, told the Colorado Advisory Committee:

⁸⁷ *EEOC Compliance Manual* (CCH), paras. 7305-8967 (May 1979).

⁸⁸ Seattle Transcript, pp. 327-28.

⁸⁹ Denver Transcript, p. 275; Knoxville Transcript, vol. V, p. 77; Boston Transcript, vol. II, p. 438.

⁹⁰ *EEOC Compliance Manual* (CCH), para. 8951 (May 1979).

⁹¹ Denver Transcript, p. 275.

⁹² Sam Bell, Knoxville Transcript, vol. V, p. 77; Boston Transcript, vol. II, p. 438.

In the investigation and resolution of a complaint of discrimination, if it became apparent that a remedy to that situation might mean an affirmative action program, it would be suggested as one of the possible ways of correcting this particular situation.

It would be, though, a part of a conciliation agreement or a part of a consent decree, either of which would be voluntary.⁹¹

Mr. Stone's colleagues from Memphis (Sam Bell) and New York (Edward Mercado) echoed his views.⁹² Others, such as W. Ed Mansfield of St. Louis, were careful to point out that EEOC seldom asks for an affirmative action plan as a remedy. He stated that to his knowledge his office had never negotiated a consent decree or conciliation agreement that required development and implementation of an affirmative action plan.⁹³

Lorenzo Ramirez, District Director of EEOC's Dallas office, told the Advisory Committee:

we deal only in affirmative remedies. We do not get involved in the development of affirmative action plans in the private sector. However, the Equal Employment Opportunity Commission headquarters is currently working with the other Federal agencies in this regard. Neither Title VII or EEOC require an employer to have an affirmative action plan.⁹⁴

Once the conciliation agreement or consent decree has been agreed upon, regardless of content, monitoring begins.⁹⁵ A form is utilized by EEOC to note when reports are due and show when action is to begin if the report is late.⁹⁶ The reviewing officer is instructed to:

1. Analyze the original charge, decisions, reports, and agreement;
2. Obtain the latest statistical report and information on any new charge against the employer;
3. Interview the charging party and representatives of affected class on changes that have occurred;
4. Report conciliation benefits;
5. Prepare a report reflecting deficiencies, any breach of agreement, or adherence to agreement;
6. Recommend whether onsite review is necessary;
7. Indicate compliance has occurred and close case.⁹⁷

If onsite review is done and the facts document continued violation of the agreement or consent decree, the investigator is to attempt to negotiate a settlement based on proposals he or she makes. If

⁹³ Kansas City Transcript, p. 192.

⁹⁴ Oklahoma City Transcript, p. 86.

⁹⁵ *EEOC Compliance Manual* (CCH), para. 1672 (May 1979).

⁹⁶ *Ibid.*, para. 1674.

⁹⁷ *Ibid.*, para. 1677.

onsite reviews show no violation, this is reported also.⁹⁸

If further efforts at conciliation fail, the matter is referred to the District Director through the supervisor of conciliations. If conciliation cannot be achieved after the District Director meets with the respondent in a further attempt to achieve conciliation, the matter is referred for litigation.⁹⁹

Perceptions and Problems

As in the case of OFCCP, familiar complaints were expressed about EEOC. It is difficult to determine whether some complaints are legitimate and well-founded, or understandable reactions to increasingly effective enforcement efforts. Some are clearly based on faulty conceptions of EEOC's role and responsibilities.

A particular concern expressed by some in the latter category was the claim that EEOC would not consider their affirmative action plans as relevant information in complaint investigations.¹⁰⁰ Peggy O'Neal, personnel manager for Telex Computer Products, expressed the sentiments of many when she observed, "They [EEOC] don't give two whip switches about that affirmative action plan. Not one."¹⁰¹

The Advisory Committees do not consider the foregoing an indictment of EEOC. As an enforcement agency examining complaints of employment discrimination under its Title VII responsibilities, EEOC should not focus its investigation upon what an existing plan may *say*, but upon what an employer actually *does*. If alleged discriminatory practices are found, EEOC must seek to eliminate those practices through appropriate conciliation agreements or consent decrees. The existence of an affirmative action plan, however excellent, does not excuse unlawful discriminatory behavior.¹⁰²

Some observers questioned the adequacy of technical assistance available from EEOC, although the conclusions regarding such assistance overall were mixed. At least two public agencies, the Washington Human Rights Commission and the Los Angeles County Human Rights Commission, found the EEOC's regulations and guidelines quite helpful.¹⁰³

⁹⁸ Ibid., para. 1680.

⁹⁹ Ibid., para. 1682.

¹⁰⁰ Oklahoma City Transcript, p. 512; Detroit Transcript, pp. 62-63.

¹⁰¹ Oklahoma City Transcript, p. 512.

¹⁰² 29 C.F.R. §1608.11 (1980).

¹⁰³ Seattle Transcript, p. 206; Carl Martin, interview in Los Angeles, Calif., Mar. 4, 1980.

But other private employers expressed a belief that the agency had neither the interest nor the ability to provide technical assistance.¹⁰⁴

EEOC officials had the following comments on the current availability of technical assistance. Donald W. Muse, District Director of the Seattle office, stated that:

The EEOC does not provide technical assistance for affirmative action plans, nor does any other Federal agency unless it is done in conjunction with Federal contracts. Employers who inquire are sent copies of our guidelines on employee selection procedures and our guidelines on how to develop an affirmative action plan according to the latest U.S. Supreme Court decision.¹⁰⁵

Lorenzo Ramirez, District Director of the Dallas office, told the Oklahoma Advisory Committee: "We do not provide technical assistance except in the context of construction of affirmative remedies."¹⁰⁶ Roscoe Jones, Deputy Director of the Los Angeles District Office, told the California Advisory Committee: "Under EEOC's total reorganization the regional office [technical assistance divisions] have been abolished; there have been no provisions for that function in the respective district offices. . . ."¹⁰⁷ He added, "We do not have a procedure for setting up affirmative action plans for private employers."¹⁰⁸ The Deputy Director of the Philadelphia Office, Thomas Hadfield, told the New Jersey Advisory Committee:

We do not have the resources in the field to offer the employer technical assistance in a long-term way. I will get telephone calls from an employer through his developing a new application form. I will discuss that form at his request over the telephone. But I think technical assistance in the way you are using it, we do not engage in that. We do not have that capability or responsibility in the field.¹⁰⁹

One district office said it did not provide technical assistance because it had not been asked for it. The District Director of the Memphis district office told the Tennessee Advisory Committee:

The time of my staff is so completely consumed with resolving many of our backlog cases and keeping current with new charges, we are simply not staffed and geared to be able to provide technical assistance directly nor have we received referrals or requests for referrals to people who could provide such assistance.

¹⁰⁴ Denver Transcript, p. 174; Los Angeles Transcript, pp. 53, 64-65.

¹⁰⁵ Statement to the Washington Advisory Committee, Apr. 17, 1980.

¹⁰⁶ Oklahoma City Transcript, p. 86.

¹⁰⁷ Los Angeles Transcript, p. 262.

¹⁰⁸ Ibid., p. 264.

¹⁰⁹ Newark Transcript, vol. I, pp. 50-51.

To my knowledge, since I have been in the district, I have received or heard of no requests from employers to provide technical assistance for affirmative action planning purposes.¹¹⁰

The Mexican American Legal Defense and Education Fund's project director and staff attorney in Los Angeles described one EEOC-funded effort to provide technical assistance:

The ABAR project is the Area Bar Assistance Region project of the EEOC, which was instituted last July on a one-year basis across the country. As the name denotes, it is a project to provide assistance to the bar, that is, to private attorneys who are involved in handling employment discrimination matters on behalf of plaintiffs and charging parties.¹¹¹

Observations of several EEOC officials suggested that the agency may not be able to provide the assistance it would like. Many stated, basically, that the field offices attempt to respond to questions which can be handled quickly over the phone but that extensive assistance, like putting together an affirmative action plan with an employer, could not be done with the resources available.¹¹² As St. Louis District Director W. Ed Mansfield commented:

There are some limited services that we might provide but we don't make a big billboard of that because we're really not in the business of providing technical assistance to attorneys or others. But to the extent that we can answer your question on our OD [officer of the day] telephone line or be of some significant help to you that doesn't erode the time, we will be very happy to do that.¹¹³

The Advisory Committees believe that EEOC should not be expected to launch massive programs of technical assistance. The primary mission of the agency is enforcement. This places it clearly in the role of adversary rather than neutral advisor and makes it unlikely, therefore, that private employers will actively seek assistance from an agency that may subject them to enforcement procedures. In an era of shrinking resources, EEOC cannot afford to engage in expanded assistance efforts at the expense of diluting its enforcement effectiveness.

Several facets of EEOC operations were criticized by those who perceive the agency to be less effective than it might otherwise be. A Los Angeles attorney with the Center for Law in the Public

Interest criticized the limited resources being devoted to the systemic unit and concluded:

the percentage of resources being put into that systemic unit is relatively small, 5 or 10 percent of the office's actual effort. Yet, that's where the real problem is and that's where the real hope is for making progress in eliminating our segregated work forces.¹¹⁴

In an interview with the Executive Director of the EEOC, staff learned that he, too, sees the real future and significance of the agency in terms of its continuing efforts to reduce the backlog of individual charge cases and shift resources now used for this purpose to the systemic program.¹¹⁵

Citing what they considered to be a very small number of Title VII cases filed in the courts in recent years and the small percentage of those that were handled by EEOC, some observers were critical of what they viewed as overall inactivity by the agency.¹¹⁶ Lack of resources and the poor quality of investigative staff, perhaps suggesting that EEOC and the Federal Government in general are not serious about affirmative action, are additional concerns raised by community leaders.¹¹⁷ For example, the executive director of the Seattle Urban League contended that both EEOC and OFCCP allow employers to get away with "phony excuses such as claims that there are no qualified people" in underutilized groups.¹¹⁸ Other respondents doubted EEOC's effectiveness in monitoring conciliation agreements and assessing periodic reports. For example, a representative of the Home Savings Association of Kansas City told the Missouri Advisory Committee that although his association had submitted semiannual reports on its compliance with a conciliation agreement, it had never been told whether the reports were acceptable, and merely assumed so because it had not heard otherwise.¹¹⁹

Another complaint expressed about EEOC and other Federal agencies was the lack of jargon-free information that community groups need to improve their own monitoring activities.¹²⁰ As indicated in the previous chapter, several community leaders expressed a need for broader dissemination of understandable information about the rules and regulations pertaining to equal employment oppor-

¹¹⁰ Sam Bell, Memphis District Director, EEOC, Knoxville Transcript, vol. V, p. 74.

¹¹¹ Los Angeles Transcript, p. 80.

¹¹² Alfredo Mathews, Director, Office of Government Employment, Washington, D.C., Newark Transcript, vol. I, pp. 50-51; Sam Bell, Memphis District Director, EEOC, Knoxville Transcript, vol. V, pp. 74-75.

¹¹³ Kansas City Transcript, p. 182.

¹¹⁴ Los Angeles Transcript, pp. 77-78.

¹¹⁵ Preston David, interview in Washington, D.C., June 20, 1980.

¹¹⁶ Los Angeles Transcript, pp. 88-89.

¹¹⁷ Seattle Transcript, p. 29; Los Angeles Transcript, pp. 30-34; Oklahoma City Transcript, p. 267.

¹¹⁸ Spuriell White, telephone interview, Apr. 9, 1980.

¹¹⁹ Richard Clifton, vice president, Kansas City Transcript, pp. 38-41, pp. 69-70.

¹²⁰ Philadelphia Transcript, pp. 16-17; Julia Hill, interview in Kansas City, Mo., Dec. 6, 1979.

tunity and affirmative action, as well as assistance on the procedures available to citizens to help in monitoring activities and other efforts to fight employment discrimination in their communities.

Summary

No law has had a greater impact on the Federal Government's efforts to eliminate employment discrimination than Title VII of the Civil Rights Act of 1964. That act prohibits employment discrimination by employers, employment agencies, and unions on the basis of race, color, religion, sex, or national origin. The lead agency in the Federal effort to enforce that law and eliminate employment discrimination is EEOC. Where violations of Title VII are found, EEOC will try to get the employer to agree to take remedial action. If the employer refuses, EEOC may take the matter to court, and the court may impose appropriate equitable remedies. Thus, EEOC acts as a "spur" or "catalyst" in that, through the threat of enforcement and possible EEOC or private litigation, employers are encouraged to comply with Title VII voluntarily. That voluntary compliance, EEOC explains in its guidelines on affirmative action,¹²¹ includes affirmative action plans, as well as specific affirmative measures, that further the purposes of Title VII to eliminate present discrimination and the present effects of past discrimination. Among the items that can be included in voluntary affirmative action plans are goals and timetables, affirmative recruitment efforts, changes in selection practices, and job training.

Although EEOC requires major employers to submit annual reports detailing their minority and female utilization, its enforcement actions are generally triggered by complaints filed by private citizens or by the Commissioners themselves. EEOC does not conduct a compliance review program comparable to that of OFCCP and other agencies which provide Federal funds through contracts or grants.

When EEOC receives a complaint, the agency may process it through the "rapid charge processing system" in order to resolve the individual's concern as quickly as possible through a negotiated settlement or conciliation agreement. A complaint may also be handled through the "early litigation program," in which the complaint could be combined

with others as part of a class complaint, with the objective of obtaining changes in employment practices rather than just resolution of an individual problem. Also, with approval of the Commissioners, a complaint might be handled through the "systemic unit" in efforts to obtain extensive changes in entire employment systems.

Those affected by EEOC activities identified problems similar to those attributed to OFCCP. Duplication and conflicts between EEOC and other agency requirements were cited by private employers. Some referred to inadequate technical assistance as part of the difficulty in meeting EEOC requirements although this role is acknowledged as a difficult and questionable one for an enforcement agency. Community leaders expressed disappointment in the extent of EEOC's emphasis on systemic issues, inactivity in general in terms of the number of Title VII lawsuits brought by the agency, and inadequate resources available for EEOC to do its job. In addition, several cited EEOC's failure to provide adequate information for community groups to educate themselves about agency requirements and procedures, and how such groups can participate in monitoring and other activities aimed at eliminating employment discrimination in their communities.

EEOC has long been one of the most visible Federal civil rights enforcement agencies. Many of the concerns raised here have been raised in the past and some are due, no doubt, to misconceptions of the agency's primary enforcement role. As continuing attempts are made to strengthen that role, complaints from recalcitrant employers may increase as well. However, it is also important for EEOC, as part of its broad coordinative and leadership responsibilities, to interpret its mission to the general public in order to defuse much of the criticism that is based on misunderstanding and confusion. With the additional jurisdiction recently granted EEOC, it will continue, no doubt, to be a source of controversy. Hopefully, according to the views of persons encountered in the course of this study, EEOC will also continue to seek ways to improve its operation and, despite criticism, strengthen its crucial enforcement role.

¹²¹ 29 C.F.R. §1608 (1980).

The Office of Personnel Management: State and Local Responsibilities

The Office of Personnel Management (OPM), formerly the U.S. Civil Service Commission, has two important objectives related to equal employment opportunity: to promote merit standards as a feature of government personnel administration and to foster affirmative action. This chapter examines OPM's responsibilities pertaining to State and local government, focusing on the Intergovernmental Personnel Act (IPA) of 1970. The following chapter discusses OPM's role with respect to the Federal Government.

Law and Official Policy

The Intergovernmental Personnel Act of 1970, as amended,¹ was enacted by Congress to permit the Federal Government to provide financial and technical assistance to State and local governments to improve their personnel administration. Many governmental activities administered at the State or local level are financed at least in part with Federal funds and are related to national purposes. Congress, therefore, determined that requiring State and local recipients of Federal funds to adhere to merit personnel principles as a condition of funding in

¹ 42 U.S.C. §§4701-4772 (1976 and Supp. II 1979). The Civil Service Reform Act of 1978 amended the Intergovernmental Personnel Act by abolishing all statutory personnel requirements established as a condition of State and local government eligibility for Federal grants-in-aid. 42 U.S.C. §4728(h) (Supp. II 1978). Notable exceptions to this are requirements for merit system principles and requirements that generally prohibit employment discrimination or mandate equal employment opportunity. In addition, the Civil Service Reform Act authorized all Federal grantor agencies to impose personnel requirements consistent with the merit standards on State and local governments seeking to obtain Federal financial assistance. *Id.* §4728(b).

² 42 U.S.C. §4701 (1976 and Supp. II 1979).

certain grant programs would serve the national interest.²

State and local governments that receive funds under certain assistance programs of Federal agencies and departments³ are subject to the provisions of the merit system standards.⁴ Certain employees and employment practices of governmental recipients, however, are exempt from these requirements, and other recipients may request a waiver. Persons and activities not covered by the standards include teaching personnel in public school systems, personnel actions in regard to individual employees of State or local governments, and union activities affecting the conditions of employment.⁵ A waiver may be requested by a State or local government for up to 2 years for an experimental project to improve a merit system⁶ and by local governments with fewer than 25 employees.⁷

Federal funding of State and local governments under various grant statutes may be contingent upon adherence to the following six requirements, which closely parallel the six merit principles in the IPA.⁸

1. Recruiting, selecting, and advancing employees will be on the basis of their relative ability, knowledge, and skills.

³ Certain Federal grant-in-aid programs funded by agencies other than OPM are subject to OPM's "Standards for a Merit System of Personnel Administration." They are listed in 5 C.F.R. §900(F), app. A (1980). Familiar examples include the food stamp program, Title XX grants for social services, and the Comprehensive Employment and Training Act program.

⁴ 42 U.S.C. §§4701-4772 (1976 and Supp. II 1979).

⁵ 42 U.S.C. §§4728(g)(2), (1), and (3) (Supp. II 1979).

⁶ 5 C.F.R. §900.610 3 (1980).

⁷ 5 C.F.R. §900.610 2 (1980).

⁸ 42 U.S.C. §4728(b)(1) (Supp. II 1979).

2. Equitable and adequate compensation will be provided.
3. Employees will be trained as needed to assure high-quality performance.
4. Employees will be retained on the basis of the adequacy of their performance, and provision will be made for correcting inadequate performance and separating employees whose inadequate performance cannot be corrected.
5. Fair treatment of applicants and employees will be assured in all aspects of personnel administration without regard to race, color, sex, religion, national origin, political affiliation, age, handicap, or other nonmerit factors and with proper regard for their privacy and constitutional rights.
6. State and local governments will inform employees of their political rights and prohibited practices under the Hatch Act.⁹

To comply with merit principle 5, State and local recipients of Federal funds must take affirmative action to overcome the effects of past or present practices and policies that impede equal employment opportunity for minorities and women.¹⁰ Affirmative action programs may include outreach recruitment to eliminate any underrepresentation of women or minorities in the grantee's work force and removal of artificial barriers that prevent their appointment and promotion.¹¹

An affirmative action program under merit principle 5 must be based upon an analysis of the percentages of minorities and women in each job category of the State or local governmental work force compared with the available labor force possessing relevant job skills.¹² Where the self-analysis determines that minorities and women are being underutilized, the governmental agency is to determine the cause¹³ and then develop flexible goals and timetables that include numerical targets and the steps to correct any substantial disparities or problems identified in the process.¹⁴ Section 900.602 of the standards requires that the use of testing and selection procedures for applicants and employees accord with the uniform guidelines on employee selection procedures that were adopted by OPM

along with other Federal agencies and departments.¹⁵ Evaluation procedures for handicapped applicants must reflect their job-related knowledge, skills, and abilities as opposed to impairments.¹⁶

Under the Intergovernmental Personnel Act of 1970, OPM provides technical assistance to State and local governments to help improve their personnel systems or enable them to comply with the act, including its affirmative action requirements.¹⁷ One responsibility of OPM is to provide technical assistance.¹⁸ Such assistance may be provided on a reimbursable basis, or the cost may be borne by OPM.¹⁹

In cooperation with a Federal agency that is providing funds to a State or local government, OPM may conduct compliance reviews.²⁰ Such reviews include analysis of reports that must be submitted to OPM by the State or local government as well as mandatory onsite examinations.²¹ Each State or local agency is required to permit OPM to review its books and records during normal business hours.²² However, the IPA does not permit OPM or any other Federal agency to exercise authority over personnel actions involving individual employees.²³

The regulations that OPM has issued to carry out the intent of the IPA state expressly that when deviations from the "standards" are found, negotiation and technical assistance are the preferred means for ensuring that State and local governments make the necessary corrections to achieve compliance.²⁴ However, if corrective action is required and these methods fail to bring the recipient into compliance, OPM may submit its findings to the Federal agency that has been providing funds with a recommendation that funding be terminated or that other appropriate action be initiated.²⁵

If OPM is itself providing funds, it may proceed to terminate funding after giving reasonable notice and an opportunity for a hearing to the noncompliant State or local government.²⁶ OPM may also continue to fund the noncompliant recipient in whole or

⁹ 42 U.S.C. §4701 (1976 and Supp. II 1979).

¹⁰ 5 C.F.R. §900.607-1(a) (1980).

¹¹ *Id.*

¹² 5 C.F.R. §900.607-1(a)(2) (1980).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 5 C.F.R. §900.601(h) (1980).

¹⁶ 5 C.F.R. §900.607-1(b)(4) (1980).

¹⁷ 42 U.S.C. §4725 (1976).

¹⁸ 5 C.F.R. §900.601(k) (1979).

¹⁹ 42 U.S.C. §4725 (1976).

²⁰ 5 C.F.R. §900.610-5(a) (1979).

²¹ *Id.*; 5 C.F.R. §900.609.5(a) (1979).

²² 5 C.F.R. §900.609-5(a)(2) (1979).

²³ 42 U.S.C. §4728(g)(1) (Supp. II 1978).

²⁴ 5 C.F.R. §900.601(j) (1979).

²⁵ 5 C.F.R. §900.610-6(3) (1979).

²⁶ 42 C.F.R. §900.104 (1980).

in those parts of the program that are not involved in the noncompliance.²⁷ The sanction of fund termination applies to failures to adopt or implement adequate affirmative action programs to the same extent as failures to comply with other merit principles and standards.

Implementation Procedures

During the course of this study, OPM officials in each of the 10 Federal regions presented their descriptions of the procedures used to implement the foregoing provisions of law and official policy. This section provides a sampling of their perceptions of the implementation process and the nature of their work across the country.

The Office of Intergovernmental Personnel Programs (IPP) is the organization within OPM that carries out the agency's responsibilities with regard to State and local government.²⁸ Its activities are built upon the two strategies that Congress stated in the IPA to promote merit as the basis for State and local personnel administration. First, Congress linked State and local adherence to merit principles with eligibility for various grant-in-aid programs.²⁹ Second, Congress authorized and has funded technical and financial assistance activities to be carried out by OPM.³⁰

The centrality of affirmative action to OPM's concept of merit principles is apparent in its revised regulations, "Standards for a Merit System of Personnel Administration," which require that "affirmative action programs consistent with merit principles will be developed and implemented for personnel services provided to and personnel administration within the grant-aided agencies."³¹ The agencies subject to this requirement are State government agencies administering certain grant-in-aid or other federally assisted programs, including health, welfare, employment security, and civil defense.³² The affirmative action requirement also applies to personnel services that State and local merit system agencies provide to the grant-aided agencies.³³

This perception of affirmative action seems to have taken root in OPM's regional operation as well.

For example, Joseph S. Patti, Special Assistant for OPM Regional Operations, stated: "In devoting resources to the merit standards activity, affirmative action is always a top priority for the resources available."³⁴ James Wilson, Chief of Affirmative Employment Programs Office in Region VI (Dallas), said that the emphasis of the IPA program is "on initiatives to overcome any serious underrepresentation of minorities and women in employment,"³⁵ and Francis Yanak, Regional Director of Region IX (Los Angeles), said:

My agency is responsible for assessing the extent to which the jurisdictions covered by the standards have an affirmative action plan, what its components are, and how well it meets the criteria that we have published for State and local [governments].³⁶

During the period 1977 to 1980, there were, nationwide, 56 State merit system agencies and 313 grant-aided agencies (or parts of them) as well as many local agencies subject to review.³⁷

OPM's regulations require grant-aided agencies to have "affirmative action programs," one element of which is to be a "systematic action plan" with "goals and timetables."³⁸ The plans are to be aimed at removing any artificial barriers to employment the agency identifies and correcting the effects of any employment procedures that have been unfairly exclusionary. Substantial disparities between the proportions of minorities or women working for the agency and those proportions in the respective labor market are to be taken as warning signs that a problem exists.³⁹

Thomas McCarthy, Chief, Management Assistance Division of OPM, Region I (Boston), said that the plans now required, containing specific goals and timetables, will supplant plans that had been largely narrative in character.⁴⁰

George Murphy, Administrator of Intergovernmental Personnel Programs, OPM Region IV (Atlanta), explained that although agencies must have affirmative action plans, they are not required to submit those plans to OPM. In some instances, however, grantor agencies have required that plans be submitted to them.⁴¹

²⁷ 5 C.F.R. §900(f) app. A (1980).

²⁸ 5 C.F.R. §4767 (1976).

²⁹ *Id.*

³⁰ 42 U.S.C. §4701 (1976 and Supp. II 1979).

³¹ 5 C.F.R. §900.601 (1980).

³² 5 C.F.R. §900(f) app. A (1980).

³³ 5 C.F.R. §900.607-1(a)(2) (1980). See also 5 C.F.R. §900.609-1(a)(1980).

³⁴ Joseph S. Patti, Special Assistant for Regional Operations, OPM, letter to USCCR staff, July 1, 1980.

³⁵ Oklahoma City Transcript, p. 143.

³⁶ Los Angeles Transcript, p. 182.

³⁷ Donald Acree, OPM, letter to USCCR staff, June 25, 1980.

³⁸ 5 C.F.R. §900.607-1(a)(2) (1980).

³⁹ *Id.*

⁴⁰ Boston Transcript, pp. 475-76.

⁴¹ Knoxville Transcript, vol. V, p. 53.

OPM attempts to review each State merit system agency at least once every 4 years.⁴² In Region IV (Atlanta), IPP Chief George Murphy said individual State agencies are evaluated more than once a year.⁴³

In reviewing whether State and local grant-aided agencies and merit systems agencies are operating according to merit principles, OPM looks for "substantial conformity"⁴⁴ with the merit standards. Region VII (St. Louis) OPM Director Gerald Hinch said that total conformity is desirable but not required.⁴⁵

The process for determining whether a given merit system is in substantial conformity with the standards involves the following steps:

1. A review by OPM of basic written documents (laws, rules, regulations, affirmative action plans, etc.) and information on personnel operations gathered through onsite reviews, comparing all these to the standards;
2. Consulting with Federal grantor agencies to get their perspective on personnel conditions under a particular merit system and determining jointly with them any followup action needed to secure compliance.⁴⁶

Though review procedures may vary somewhat from region to region, they generally involve an analysis of statistical data pertaining to minority and female utilization, interviews with management personnel and affirmative action officials, an examination of regulations, a review of the affirmative action plan and its implementation, and a sampling of various personnel operations.⁴⁷ Among the grantee activities which OPM field officials review is the monitoring that grant recipients perform to assure compliance on the part of subgrantees and subcontractors who are public employers. Cooperation with other Federal grantor agencies is considered critical by at least some OPM officials, and in fact

reviews are often conducted jointly by these various agencies.⁴⁸

When agencies are found to be in noncompliance, OPM initially attempts to negotiate changes with the agency in question.⁴⁹ Deficiencies discovered during the review process frequently involve inadequate affirmative action plans, underrepresentation of minorities and women, inadequate recruiting measures, questionable selection techniques, and inadequate data gathering for equal employment opportunity purposes.⁵⁰ OPM often tries to work directly with grantees, sometimes during the review itself, to amend the affirmative action plan or make whatever changes are necessary.⁵¹ As Earl Ziegler of OPM in Oklahoma City put it, "Normally, we do whatever the Governor asks us to do without a lot of fanfare. We try and work with them to get them to improve their system and take care of whatever problem we have identified."⁵²

Regional officials were consistent in describing the sanctions at OPM's disposal. Where negotiations are not successful and the project in question has been funded by OPM itself, even though the merit standards do not apply in such circumstances, OPM's options include refusal to award further funds, suspension of a grant project, voluntary withdrawal, and formal termination.⁵³ For those grant programs where the merit standards do apply and OPM is not the granting agency, its options are more limited. In those cases, according to field personnel, the next step is to involve the granting agency in efforts to obtain compliance. If the granting agency does not take what OPM considers appropriate action at the regional level, OPM's headquarters office may approach the headquarters office of that granting agency to resolve the matter at the national level.⁵⁴ Because funds generally do

⁴² U.S., Civil Service Commission, Bureau of Intergovernmental Personnel Programs, *Evaluating State and Local Personnel Systems* (undated), p. 4.2.

⁴³ Knoxville Transcript, vol. V, p. 53.

⁴⁴ The General Accounting Office has reported that a great deal of uncertainty exists concerning what constitutes "substantial conformity" with the merit standards. It recommended that OPM develop more specific guidance on this matter. U.S., Comptroller General, *Equal Employment Opportunity in State and Local Governments: Improving the Federal Role* (June 1980), chap. 3. This report is recommended to the reader interested in a critical evaluation of OPM's performance in the area of equal employment opportunity. See also 5 C.F.R. 900.610-6 (1980).

⁴⁵ Statement to Missouri Advisory Committee, Mar. 20, 1980, p. 29.

⁴⁶ *Ibid.* These steps are also contained in "Evaluating State and Local Personnel Systems, An Orientation in the Quantitative Evaluation Program," U.S. Civil Service Commission, pp. 1-4 (undated).

⁴⁷ Los Angeles Transcript, p. 187; Ernest Wright, interview in Dallas, Tex., Mar. 6, 1980.

⁴⁸ Statement to Michigan Advisory Committee, May 2, 1980, pp. 14-16; Sally Wright, interview in New York, Jan. 1, 1980; Gerald Hinch, statement to Missouri Advisory Committee, Mar. 20, 1980, pp. 32-34; Newark Transcript, vol. II, pp. 73-74.

⁴⁹ Knoxville Transcript, vol. V, p. 53; Oklahoma City Transcript, p. 171.

⁵⁰ Knoxville Transcript, vol. V, p. 53.

⁵¹ Keith Roelofs, statement to Michigan Advisory Committee, May 2, 1980, pp. 14-16.

⁵² Oklahoma City Transcript, p. 171.

⁵³ 5 C.F.R. §900.510 (1980).

⁵⁴ Los Angeles Transcript, p. 194; Newark Transcript, pp. 73-74. See also 5 C.F.R. §610-6 (1980).

come from another agency, OPM's enforcement powers are limited.⁵⁵

A variety of technical assistance is provided by OPM, including publications and other information services, consulting with State and local administrators, grant aid for State and local administrators, and grant aid for State and local government projects aimed at improving merit practices.

The following comments describe the various kinds of technical assistance provided by OPM. OPM's Regional Director in Boston itemized some of those services provided by his office:

We provide the State government agencies and local governments in Massachusetts with numerous guidance materials on EEO and affirmative action planning. We have as well provided grants to these same jurisdictions for EEO planning and/or for training of supervisors and managers in their EEO responsibilities. We currently fund a grant to develop an EEO Newsletter to be published by the State's EEO Office for the State agencies. In addition, we assisted the State in the development of an affirmative action program for the handicapped. As the result of difficulties resulting from citations issued by the Office of Revenue Sharing, we assisted several communities in eastern Massachusetts in developing affirmative action programs which would meet Office of Revenue Sharing's requirements.⁵⁶

The Regional Director of OPM in Region IV (Atlanta), David Caldwell, described the thrust of technical assistance in his region:

Our strategy has been to work with the agencies, to provide technical assistance in order to find ways in which the selection devices, the training techniques, and the recruitment methods might be enhanced to provide greater input into the work force. . . .

I think it's apparent that we have, in addition to the formal reviews, fairly frequent contact with State officials, with the view in mind to help them to work out solutions to problems, to discuss with them the possibility of using IPA grant funds to improve the system, by validating their selection instruments, by providing training programs to help managers and supervisors to better understand what their responsibilities are, and by assisting in the development of appraisal processes which hold people accountable for the result. . . .

We have started, in the last 2 or 3 years, organizing EEO committees or groups in the local community comprised of the representatives of the Federal agencies, as well as members of the minority groups, to improve communication and understanding of what affirmative action is about and to be able to tap those sources for potential recruitment later on.⁵⁷

Regional Director Gerald Hinch discussed the technical assistance provided in Region VII (Kansas City):

⁵⁵ Robert Dunn, statement to Colorado Advisory Committee, Mar. 14, 1980, p. 3.

⁵⁶ Statement to Massachusetts Advisory Committee, Mar. 26, 1980, p. 1.

⁵⁷ Knoxville Transcript, vol. V, pp. 51, 58-60.

For instance, we have provided customer-tailored advice and training onsite to public managers on such topics as:

1. principles of EEO,
2. evaluating personnel policies and practices to identify artificial barriers,
3. designing and implementing affirmative action plans and upward mobility programs,
4. analyzing jobs,
5. designing valid selection procedures,
6. establishing structured interview procedures,
7. establishing job-related classification and pay plans,
8. conducting job-related employee performance appraisals.

We have also designed and successfully carried out more than 20 major, long-term technical assistance projects that improved the capacity of public managers to meet their EEO responsibilities. We have awarded more than \$2 million in IPA grants for projects that support EEO. We provide continuous support to major public interest groups who in turn give advice daily to those State and local government executives responsible for managing more than 500,000 employees in a fair and equitable manner.⁵⁸

OPM has at least one satisfied client. Ruth Kinder, a personnel officer with the Missouri Department of Consumer Affairs, told the Missouri Advisory Committee that OPM had provided a:

wealth of telephone information, pertinent articles, copies of rules and regulations, pounds of *Federal Register* reports, all already neatly underlined in red, and just general fresh information. . . . As far as Consumer Affairs is concerned, they all wear Superman outfits, they all wear white hats.⁵⁹

Perceptions and Problems

Although technical assistance seems to take many forms and to pervade OPM's efforts to promote, review, and improve affirmative action, some observers called for substantially more of these types of services. The affirmative action officer of the Idaho Department of Employment, Rudy Pena, described his agency's needs:

Affirmative action currently is being approached from a compliance standpoint. In other words, the reason the Federal agencies are there to come talk to us is to look for violations. It makes it very difficult for affirmative action officers to try to implement any kind of an affirmative action program with that kind of attitude.

I think if we approach it more from a technical assistance standpoint, instead of an enforcement standpoint, we would make a lot more headway than we do now.⁶⁰

Thomas D. McCarthy, Region I (Boston) Chief of OPM's Management Assistance Division, acknowledged that at the regional level the agency could not

⁵⁸ Statement to Missouri Advisory Committee, Mar. 20, 1980, pp. 36-37.

⁵⁹ Kansas City Transcript, p. 151.

⁶⁰ Seattle Transcript, p. 224.

provide very sophisticated assistance in the area of data collection and labor market analysis.⁶¹ According to another OPM official, David Wynne in Region III (Philadelphia), poor demographic data create one barrier to compliance with Federal affirmative action requirements.⁶²

As indicated earlier, inconsistency among Federal agencies in reporting requirements is a concern for many employers, including State and local governments. According to Thomas G. McCarthy, Regional Director of OPM's Seattle office, Federal agencies could be more consistent. He noted, "There is really no basis for differences, for example, on statistical reporting. The differences are arbitrary and could be resolved in one set of guidelines."⁶³ Yet Francis Yanak of the Los Angeles office argued that such differences often result from the different responsibilities of the agencies:

There are some differences in the statutes that mandate what a Federal agency can do. For example, if we talk to our colleagues in HEW, and they are concerned about employment in schools of higher education, and they collect data and make comparisons of data, faculty to student body, they collect data in one kind of way. Another Federal agency also concerned with employment wouldn't be that particularized, and so the Federal agency would call for data in another kind of way. The institution would collect it in both kinds of ways and have to report it in both kinds of ways.⁶⁴

Summary

Two of OPM's principal responsibilities are to assure merit-based personnel practices in government agencies and to promote equal employment opportunity and affirmative action. Under the Intergovernmental Personnel Act of 1970, OPM provides funds to State and local governments to assist them in improving their personnel administration. OPM also administers merit system standards that apply to recipients of funding under certain other Federal assistance programs, which also require affirmative action to eliminate the effects of past or present discriminatory practices. If recipients fail to take affirmative action, OPM can terminate funding (where the funding came from OPM) or recommend that the granting agency take such action. However, OPM prefers to resolve these matters through informal negotiation and the provision of technical assistance whenever possible.

⁶¹ Boston Transcript, vol. 2, p. 486.

⁶² Interview in Philadelphia, May 19, 1980.

⁶³ Seattle Transcript, p. 279.

⁶⁴ Los Angeles Transcript, pp. 185-86.

⁶⁵ "Phaseout of IPA Currently Underway," *Intergovernmental Personnel*

OPM reviews are often done jointly with other Federal agencies. Consistent with its expressed preference for resolving violations through negotiation and technical assistance, OPM provides grantees with a variety of informational services. Employers expressed varying opinions on the utility of technical assistance available from Federal agencies in general, including OPM.

Inconsistency in Federal requirements was acknowledged by some OPM officials as a problem for employers. At least one admitted some of the inconsistencies were arbitrary and could be eliminated, but another defended at least some of the differences citing the diverse responsibilities of Federal agencies.

Postscript

During the final stages of preparation of this report for publication, the President's revised 1981 and 1982 budgets called for a phased reduction and eventual elimination of most IPA programs. These actions were announced as being "consistent with two Administration priorities: reducing Federal expenditures and eliminating Federal involvement in areas that are viewed as essentially State and local Government concerns."⁶⁵

Legislation to abolish the Intergovernmental Personnel Act (Senate Bill 1042) was introduced at the administration's request by Senator William Roth of Delaware on April 29, 1981.⁶⁶ OPM immediately initiated an "orderly phase out" of IPA programs, even though the fate of Senate Bill 1042 was unknown and remains so as of the publication of this report.

The Advisory Committees to the U.S. Commission on Civil Rights are deeply concerned about the impending demise of authority under IPA to ensure conformance with merit standards (including specific affirmative action dimensions as explained in this chapter) as an eligibility condition for more than 20 Federal grant-in-aid programs.

Should this initiative succeed, the foregoing chapter may serve merely to meet a historical interest in abandoned Federal affirmative action enforcement activities.

Notes, March-April 1981, p. 1 (a publication of the Office of Personnel Management pertaining to administration of the Intergovernmental Personnel Act).

⁶⁶ *Congressional Record*, Apr. 29, 1981, pp. S 4139-41.

Affirmative Action in Federal Employment: EEOC and OPM Requirements

The Nation's single largest employer is the Federal Government. This fact, coupled with the belief held by many that the Federal Government is the Nation's watchdog when it comes to rooting out employment discrimination, makes it imperative that the Federal Government strive to be a model of equal employment opportunity. Towards that end, part of President Carter's 1978 civil rights agency reorganization provided for the EEOC (Equal Employment Opportunity Commission) to assume principal responsibility for equal employment opportunity and affirmative action in Federal employment.¹ In his message accompanying the reorganization plan, Mr. Carter said these changes were made to ensure that:

1. Federal employees have the same rights and remedies as those in the private sector and in State and local government;
2. Federal agencies meet the same standards as are required of other employers; and
3. Potential conflicts between an agency's equal employment opportunity and personnel management functions are minimized.²

OPM (Office of Personnel Management) also plays a significant role in helping the Federal Government to meet its equal employment opportunity obligations through a recruitment program known as the Federal Equal Opportunity Recruitment Program .

¹ President's Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1978 Comp.), hereafter cited as Reorg. Plan No. 1 of 1978.

² President's Message to Congress Transmitting Reorganization Plan No. 1 of 1978, [1978] U.S. Code Cong. & Ad. News 9795, 9797.

³ Reorg. Plan No. 1 of 1978, §1-4, 6.

This chapter examines the early efforts of these two agencies to meet their Federal responsibilities.

Law and Official Policy

The Equal Employment Opportunity Commission was given principal responsibility for enforcing equal employment opportunity in the Federal Government under the President's Reorganization Plan No. 1 of 1978.³ The legal authority under which the principal responsibility is discharged is Title VII of the Civil Rights Act of 1964, as amended, which mandates affirmative action programs for each Federal department and agency.⁴ The EEOC has issued comprehensive regulations⁵ covering military departments, executive agencies, the Postal Service, and those positions in the legislative and judicial branches of Government in the competitive service.⁶

Under its responsibility to ensure equal employment opportunity in Federal employment, the Office of Personnel Management (formerly the U.S. Civil Service Commission) has issued regulations requiring all Federal agencies with positions covered by the General Schedule or prevailing wage systems to conduct a continuing recruitment program for minorities and women.⁷ The resultant recruitment program is known popularly as FEORP (Federal Equal Opportunity Recruitment Program).

⁴ 42 U.S.C. §2000(e)-16(b) (1976).

⁵ 29 C.F.R. §§1613.201-1613.806 (1980).

⁶ 29 C.F.R. §1613.201(b) (1980).

⁷ Civil Service Reform Act of 1978, 5 U.S.C. §7201 (1979); 5 C.F.R. 720.101-.901 (1980).

EEOC requires all covered agencies to develop and carry out a "continuing affirmative program" for the "employment, development, advancement, and treatment of employees."⁸ Each Federal agency must devote sufficient resources to administer an effective equal employment opportunity program; utilize and develop the skills of incumbent employees, which may include redesigning jobs; establish a system for periodically evaluating the effectiveness of the agency's effort; provide counseling on equal employment opportunity matters to employees; designate an equal employment opportunity officer for the agency; and develop and implement a system for the prompt investigation of complaints of discrimination.⁹

In its Management Directive 702,¹⁰ EEOC set forth a systematic planning process for the transition years 1980 and 1981 that each agency was to undertake to comply with official affirmative action policy. The process required continuing evaluation of relevant data and included the following elements:

1. Preparation of a work force profile of all occupational series and grade levels in the agency, by race, sex, and ethnic origin;
2. Examination of the six most populous job categories for underrepresentation of minorities and women;
3. Targeting of at least four occupations for hiring during 1980;
4. Analysis of agency policies and procedures that may create barriers to employing members of the target groups; and
5. Identification of alternatives to current selection procedures and recruiting sources, if adverse impact is found from the analysis;
6. Identification of qualified and qualifiable applicants;
7. Establishment of affirmative action goals;
8. Description of staffing and recruitment strategies; and
9. The affirmative action plan for targeted occupations.¹¹

⁸ Reorg. Plan No. 1 of 1978; 29 C.F.R. §1613.203 (1980).

⁹ 29 C.F.R. §1613.203 (1980).

¹⁰ EEOC Management Directive 702, Dec. 11, 1979.

¹¹ *Id.*

¹² This description of multiyear plan requirements was provided by EEOC Acting Chair J. Clay Smith, Jr., in response to a request for comments on the draft of this report. The material was submitted under cover of a letter dated June 5, 1981, to Louis Nunez, Staff Director of USCCR.

On January 23, 1981, EEOC issued Management Directive 707. This directive, "Instructions For Affirmative Action (Equal Employment Opportunity Program Plans for Minorities and Women for Fiscal Years 1982-1986)" modified some elements of the transition year program to adapt them to multiyear plan (MYP) requirements and to clarify ambiguities or issues that were pointed out in Federal agency comments. The MYP instructions:

- Provide new guidance and flexibility for determining the organizational levels at which MYPs will be developed in order to accommodate structural differences among Federal agencies, to ensure greatest accountability in plan development, and to ensure meaningful affirmative action goals. Agencies may suggest and use, with the approval of EEOC, modified organizational levels for MYP development that more closely conform with the agencies' own internal structure, personnel hiring authority delegations, or management accountability systems.
- Generally require the use of local civilian labor force data for determining underrepresentation and setting affirmative action goals.
- Clarify the relationship between FEORP determinations of underrepresentation and the section 717 determinations of underrepresentation.
- Provide new guidance for defining employment categories by grouping occupational series and levels for purposes of determining underrepresentation and for the establishment, assignment, and reporting of affirmative action goals.
- Distinguish the limited barrier analysis required in Year One of the MYP and the more extensive analyses required by the *Uniform Guidelines on Employee Selection Procedures*. EEOC and OPM will develop further guidance for agencies and require the UGESP analyses to be conducted in Year Two of the MYP.
- Provide reductions in data submissions and revised formats for agency program plan submissions.¹²

Under the Civil Service Reform Act of 1978¹³ and the EEOC guidelines,¹⁴ OPM must issue regulations requiring Federal agencies to conduct continuing affirmative recruitment programs (FEORPs) to implement equal employment opportunity in Federal employment. The EEOC guidelines require OPM to "develop and/or ensure the development of uniform, coherent and effective standards for administration and enforcement of all Federal antidiscrimination and equal employment opportunity laws, policies, and programs, and to ensure the elimination of duplication and inconsistency in such programs."¹⁵ The guidelines promulgated by EEOC reaffirm the first merit principle of the Civil Service Reform Act of 1978 that recruitment should be aimed at achieving a Federal work force drawn from "all segments of society."¹⁶ The 1978 act further provides that underrepresentation of minorities and women (which is measured by comparing an agency's employment of a particular group to the same group's representation in the national or local labor force for various grades and occupations)¹⁷ must be eliminated. Within a FEORP, recruitment is considered one process whereby such underrepresentation is to be eliminated.¹⁸

Under its statutory authority¹⁹ and as required by the EEOC guidelines,²⁰ OPM has issued regulations requiring affirmative recruitment programs of Federal agencies.²¹ Each agency must develop an FEORP plan for internal and external recruitment to eliminate underrepresentation of minorities and women in each category of employment.²² These plans must reflect an analysis of minority and female recruitment sources, describe proposed recruitment methods, contain goals and priorities for eliminating underrepresentation, and identify training and job development programs.²³

¹³ 5 U.S.C. §7201 (1979). This provision of law, often referred to as the Garcia amendment, calls on each Federal agency to conduct a continuing program "for the recruitment of members of minorities for positions in the agency. . . in a manner designed to eliminate underrepresentation of minorities in the various categories of civil service employment." While the law gave primary responsibility for ensuring implementation of recruitment programs to OPM, it gave responsibility to EEOC to make initial determinations of underrepresentation based on overall government employment and to establish guidelines for OPM and the agencies to use in setting up their recruitment programs (at §7201(c)(1)).

¹⁴ Guidelines for the Development of a Federal Recruitment Program to Implement 5 U.S.C. §7201, as amended, 5 C.F.R. §720 app. (1980), hereafter cited as Guidelines to Implement 5 U.S.C. §7201.

¹⁵ *Id.* at §1B.

¹⁶ *Id.* at §1C.

¹⁷ 5 U.S.C. §7201(a)(1) and 2(c)(1) (1980).

¹⁸ 5 C.F.R. §720.202(e) (1980).

¹⁹ 5 U.S.C. §7201 (1980).

Through the Affirmative Action Unit of each of its 10 district offices, EEOC provides technical assistance to field offices of Federal agencies in the development of affirmative action plans for minorities and women.²⁴ In addition, the Affirmative Action Units review plans and recommend their approval to EEOC and provide training for and coordination of affirmative action plans.²⁵

OPM is required by the Civil Service Reform Act of 1978²⁶ and by EEOC guidelines²⁷ to provide assistance to Federal agencies carrying out required affirmative recruitment programs. OPM prescribes and provides appropriate data to Federal agencies to help ensure government-wide consistency in determining underrepresentation of minorities and women.²⁸ That assistance includes identifying recruitment sources, examining personnel procedures to identify impediments to effective recruitment, and deciding whether applicant pools include adequate representation of minorities and women.²⁹

EEOC is required under its regulations to conduct periodic compliance reviews of Federal affirmative action plans.³⁰ If such a compliance review reveals that a Federal agency is not in accord with affirmative action requirements, EEOC must require such an agency to take appropriate corrective action.³¹

OPM is required by the Civil Service Reform Act of 1978³² and by EEOC guidelines³³ to monitor the compliance of Federal agencies with the requirements of the Federal Equal Opportunity Recruitment Program. Each Federal agency must submit a yearly report to OPM on the status of its program.³⁴ OPM must then report to the Congress, also on a yearly basis, an assessment of each agency's progress in meeting the objectives of FEORP.³⁵

²⁰ Guidelines to Implement 5 U.S.C. §7201.

²¹ 5 C.F.R. §§720.101-720.901 (1980).

²² *Id.* §720.204.

²³ *Id.* §720.205.

²⁴ EEOC Order No. 10, ch. 6, §II(4) (May 3, 1978), 2 Empl. Prac. Guide (CCH) para. 3920.07.

²⁵ *Id.*

²⁶ 5 U.S.C. §7201 (1980).

²⁷ Guidelines to Implement 5 U.S.C. §7201.

²⁸ 5 C.F.R. §720.203 (1980).

²⁹ 5 C.F.R. §720.203(b) (1980).

³⁰ 29 C.F.R. §1613.205 (1980).

³¹ *Id.*

³² 5 U.S.C. §7201 (1980).

³³ Guidelines to Implement 5 U.S.C. §7201.

³⁴ 5 C.F.R. §720.207 (1980).

³⁵ *Id.*

EEOC stipulates that each agency provide an equal employment opportunity (EEO) officer, counselor(s), and director.³⁶ A person who believes he or she has been unlawfully discriminated against must first consult with the counselor in an attempt to resolve the matter.³⁷ As soon as a complaint is received by the head of the agency or a designee, the EEO officer must be notified.³⁸ That officer in turn must notify the director, who then must arrange for prompt investigation of the complaint.³⁹ If a complaint is accepted and cannot be resolved through negotiation, a hearing before a complaint examiner from another agency may be held at the complainant's request.⁴⁰ If a complaint is rejected, or if an aggrieved person cannot support his or her claim to the satisfaction of the complaint examiner and thus loses on the merits, he or she may appeal to EEOC's Office of Review and Appeals.⁴¹ EEOC also has jurisdiction over petitions resulting from unsuccessful appeals from agency decisions to the Federal Merit Systems Protection Board based on complaints of unlawful discrimination.⁴²

EEOC regulations provide that where an applicant for employment or an employee has endured unlawful employment discrimination by a Federal agency, an appropriate remedy must be granted, including hiring, retroactive seniority, back pay, restoration of the employee, and expungement of unfavorable personnel actions.⁴³ Where, however, the Federal agency fails to comply generally with affirmative action requirements for Federal employment, no specific sanctions other than bringing its programs into compliance are set forth.⁴⁴ However, sanctions may be imposed upon the Federal employee or executive whose conduct has violated either statutory law or regulation.⁴⁵

Federal agencies are empowered to impose sanctions on personnel who are responsible for developing and implementing an affirmative recruitment program and who fail either to do so or to achieve reasonable results.⁴⁶ All agency officials who have responsibility for FEORP are to be evaluated on their "effectiveness in carrying . . . out as part of their periodic performance appraisals" the recruitment program for minorities and women.⁴⁷ In other

words, a Federal executive who fails to implement an FEORP designed to eliminate underrepresentation of minorities and women in his or her agency's covered employment could be punished by a poor rating that might lead to a denial of promotion or even of continued employment.

Implementation Procedures

Just as EEOC's and OPM's jurisdictions overlap to some extent, the procedures utilized by each agency overlap and are sometimes implemented in conjunction with each other. For example, EEOC and OPM have instructed agencies to incorporate their recruitment plans into the affirmative action plans required by the President's Reorganization No. 1 of 1978.⁴⁸ And, as indicated by Charles Maher, OPM's Region I Director (Boston), OPM considers equal employment opportunity and affirmative action as essential parts of the merit system principles with which Federal agencies must comply in their personnel management procedures under OPM regulations.⁴⁹

The actual calculations of underrepresentation required by OPM for its recruitment programs are identical to those required by EEOC, but the elements are somewhat different. As with EEOC, the categories of employment are professional, administrative, technical, clerical, and other. OPM recommends separate determinations of underrepresentation for each "mainstream" occupation, which it defines as highly populous occupations that tend to lead to higher level positions in the agency. Unlike EEOC, OPM states that agencies or components with 500 or fewer employees should combine grades when there are fewer than 100 in an occupational grouping. The only constraint put on this is that such aggregations should not conceal underrepresentation in higher grades by aggregating them with lower grades where there is overrepresentation. OPM provides a format for such aggregations with respect to use of national or SMSA labor force statistics (it permits the use of SMSA for grades one to four). Agencies are required to use employment categories that accurately reflect their own operations and staffing patterns. Based on these catego-

³⁶ 29 C.F.R. §1613.204(c) (1980).

³⁷ 29 C.F.R. §1613.213 (1980).

³⁸ 29 C.F.R. §1613.214 (1980).

³⁹ 29 C.F.R. §1613.216 (1980).

⁴⁰ 29 C.F.R. §1613.217-.218 (1980).

⁴¹ 29 C.F.R. §1613.231 (1980).

⁴² 5 C.F.R. §1201.158 (1980).

⁴³ 29 C.F.R. §1613.271 (1980).

⁴⁴ 29 C.F.R. §1613.205 (1980).

⁴⁵ 29 C.F.R. §1613.203 (1980).

⁴⁶ 5 C.F.R. §720.204(a) (1980).

⁴⁷ *Id.*

⁴⁸ 5 C.F.R. §720.205(a) and EEOC Management Directive 702, Dec. 11, 1979.

⁴⁹ Boston Transcript, p. 482.

ries, "priorities" for recruitment are to be developed.⁵⁰

EEOC and OPM have undertaken a number of cooperative efforts. At least in some regions these two agencies share results of reviews⁵¹ and other information.⁵² In some cases technical assistance is provided on a joint basis.⁵³

But the potential for turf battles is still present. Charles Maher, OPM's Regional Director in New England, told the Massachusetts Advisory Committee that "EEOC right now does not have real good capability to do investigations and we do." He anticipated that his agency might undertake complaint investigation efforts for EEOC on a reimbursable basis.⁵⁴ However, the EEOC Federal Affirmative Action Manager for New England stated that "EEOC has the ultimate responsibility. OPM is working under EEOC in that sense."⁵⁵

As each agency's role becomes more clearly defined, such cooperative efforts may become more prevalent. However, much ambiguity prevails among agency officials over precisely what their roles and responsibilities are.

Perceptions and Problems

As of early 1980 some staff members of Federal field offices indicated they had not yet received EEOC instructions on affirmative action planning and conducting compliance reviews.⁵⁶ Others claimed the instructions they had received were unclear, particularly in terms of the relationship between the affirmative action plan required by EEOC and the FEORP required by OPM.⁵⁷ Those who had received technical assistance from EEOC or OPM offered mixed reviews. Some found the services useful,⁵⁸ while others did not; one referred to the general philosophical nature of the assistance as less valuable than the specific technical information needed to carry out their programs effectively.⁵⁹

Varying opinions on the adequacy of existing sanctions were expressed by EEOC and OPM officials and by officials of other Federal agencies

that they regulate. Gerald Hinch, OPM Director in Region VII (Kansas City), stated that, "OPM's authority to apply sanctions against an agency or manager for failing to implement their plans is limited."⁶⁰ Suzanne Elder of the U.S. Department of Health and Human Services, Region VIII (Denver), expressed similar views when she indicated that EEOC's sanctions are not adequate to move recalcitrant agencies.⁶¹ Others, however, said the sanctions were adequate.⁶² One pointed to the fact that since pay raises for senior executive service officials now depend on performance evaluations, including evaluations of meeting affirmative action requirements, adequate incentives were in place to assure compliance. In other words, the threat of a small pay raise, or no raise at all, would be an adequate sanction.⁶³ OPM Region II (New York) Director John Lafferty also found sanctions to be adequate noting, "The ultimate sanction under Civil Service Rule V is a certification to the Comptroller General of the United States to withhold the salary of the official responsible for noncompliance."⁶⁴

Unavailability of necessary data and inadequacies in the data requirements were cited as problems by several Federal officials. Difficulty in obtaining current data was one problem identified.⁶⁵ According to a U.S. Mint Equal Opportunity Officer in Philadelphia, statistics upon which he had to base his agency's affirmative action and recruitment programs "were horribly out of date. . .Hispanics and blacks. . .are probably grossly underrepresented in troubled areas."⁶⁶ Some OPM and EEOC officials denied that this was a serious problem. According to an OPM official in Region IV (Atlanta), that agency instructs Federal employers on how to calculate underrepresentation; provides national, State, and SMSA civilian labor force figures; and maintains Federal agency work force and recruitment statistics by race and sex.⁶⁷ One EEOC official asserted that not only are adequate data available, but that this

⁵⁰ Office of Personnel Management, Federal Personnel Manual Letter, 720-2, on the Federal Equal Opportunity Recruitment Program, Mar. 26, 1980.

⁵¹ Newark Transcript, vol. I, p. 46; Denver Transcript, p. 75; Knoxville Transcript, vol. V, pp. 61-63.

⁵² Boston Transcript, pp. 482-83.

⁵³ Seattle Transcript, p. 287; Newark Transcript, vol. II, p. 27; Oklahoma City Transcript, p. 119; and Denver Transcript, p. 75.

⁵⁴ Boston Transcript, pp. 482-83.

⁵⁵ Ibid., p. 462.

⁵⁶ Ibid., p. 611.

⁵⁷ Ibid., pp. 609-10; Los Angeles Transcript, p. 165.

⁵⁸ Los Angeles Transcript, p. 170; Oklahoma City Transcript, p. 240.

⁵⁹ Denver Transcript, p. 53.

⁶⁰ Statement to the Missouri Advisory Committee, Mar. 20, 1980, p. 20.

⁶¹ Denver Transcript, p. 95.

⁶² Newark Transcript, vol. I, p. 30; Boston Transcript, p. 450; Philadelphia Transcript, pp. 222-23; C.A. Maher, statement to the Massachusetts Advisory Committee, Mar. 20, 1980.

⁶³ Philadelphia Transcript, pp. 209-10.

⁶⁴ Newark Transcript, vol. II, p. 46.

⁶⁵ Philadelphia Transcript, pp. 97-98, 103; Denver Transcript, p. 78.

⁶⁶ Philadelphia Transcript, pp. 97-98.

⁶⁷ Knoxville Transcript, vol. V, p. 69.

issue is frequently raised to cover shoddy performance by agencies in the area of affirmative action.⁶⁸

A related problem deals with the manner in which statistical data are utilized. Some claimed the various reporting requirements were too time consuming.⁶⁹ Another problem is that the determination of goals on the basis of an affirmative action plan developed on the national level can result in some particular groups available at regional or local levels being ignored altogether. As Suzanne Elder pointed out, if an agency's regional office expected something like three vacancies and computed a goal for American Indians on the basis of 1970 Bureau of Labor statistics reflecting the actual employment of American Indians, the goal for this group would compute out to zero because of their small numbers in the relevant labor market. This would be true even if regional officials had certain knowledge of the actual availability of American Indians to fill the anticipated vacancies. "Such a procedure ignores some groups year in and year out which the thrust of affirmative action is supposed to help," she said.⁷⁰

Summary

Under the President's 1978 reorganization of civil rights agencies, EEOC assumed the lead role in assuring equal employment opportunity in the Federal Government. OPM, formerly the U.S. Civil Service Commission, retained jurisdiction over recruitment. Because recruitment is a vital aspect of an affirmative action program, and because affirmative action is a vital part of the merit system principles, which OPM is mandated to assure in Federal personnel administration, some overlap exists in EEOC's and OPM's roles pertaining to Federal employment. Some efforts to coordinate activities have been made and some joint projects have been

implemented, but no formal memorandum of understanding has been reached. Perhaps in part because of this overlap, some confusion exists regarding equal employment opportunity and affirmative action requirements in Federal Government.

Federal agencies are required to take affirmative action, including the establishment of goals and timetables, to eliminate underrepresentation of minorities and women, and to assure equal employment opportunity. Some confusion exists among Federal agencies and within EEOC and OPM over precisely what is required and how regulations will be enforced. Another source of conflict is the question of sanctions. Some officials assert that existing sanctions are inadequate, while others point to denial of pay raises and withholding of salary as safeguards against poor affirmative action planning.

Federal agencies express particular concern over data requirements, citing unavailability of current statistics, the time-consuming nature of reporting requirements, and the self-defeating nature of certain goal-setting procedures. In response, some EEOC and OPM officials claim adequate data are readily available and that such complaints are raised to cover up poor performance in the area of affirmative action.

Programs implemented under the reorganization are relatively new. Indeed, much of the uncertainty and lack of clarity reported is due no doubt to the short period in which many procedures have been in effect. Nonetheless, there is a striking similarity between criticisms of Federal affirmative action and those voiced in other arenas—enough similarity to indicate that efforts must continue to be made to ensure increasingly rational and effective procedures.

⁶⁸ Los Angeles Transcript, pp. 214-15.

⁶⁹ Denver Transcript, p. 46; Oklahoma City Transcript, pp. 240-44.

⁷⁰ Denver Transcript, pp. 49-50.

Appendix A

OFCCP Affirmative Action Requirements¹

1. Submission of compliance reports.
2. Development of an affirmative action program which shall contain:
 - a. utilization analysis
 - b. goals and timetables
 - c. additional required ingredients of affirmative action programs—effective affirmative action programs shall contain, but not necessarily be limited to, the following ingredients:
 - (i) Development or reaffirmation of the contractor's equal employment opportunity policy in all personnel actions.
 - (ii) Formal internal and external dissemination of the contractor's policy.
 - (iii) Establishment of responsibilities for implementation of the contractor's affirmative action program.
 - (iv) Identification of problem areas (deficiencies) by organizational units and job group.
 - (v) Establishment of goals and objectives by organizational units and job groups, including timetables for completion.
 - (vi) Development and execution of action-oriented programs designed to eliminate problems

¹ Empl. Prac. Guide (CCH) para. 4320.01-4320.26. See also 41 C.F.R. §60-2 (1980).

and further designed to attain established goals and objectives.

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

(viii) Compliance of personnel policies and practices with the Sex Discrimination Guidelines (41 C.F.R Part 60-20).

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

(x) Consideration of minorities and women not currently in the work force having requisite skills who can be recruited through affirmative action measures.²

3. Appropriate employee selection procedures.
4. Prevention of discrimination based on sex.
5. Prevention of discrimination based on religion or national origin.
6. Affirmative action for disabled and Vietnam-era veterans.
7. Affirmative action for the handicapped.

² Empl. Prac. Guide (CCH) para. 4320.13.

Appendix B

Summary of Revised Order No. 4

Revised Order No. 4 requires that the contractor's chief executive officer publish a statement of support¹ and assign overall responsibility for developing and implementing a program.² The order provides for reporting and monitoring by the contractor of its own activities. Specific items to be included in the plan are mentioned. These include commitments 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 in 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) Ensure that promotion decisions are in accord with principles of equal employment opportunity by imposing only valid requirements for promotional opportunities.
- (4) Ensure 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.³

Contractors are required to ensure that the policy is fully disseminated to employees, unions, the general public, and all recruitment sources.⁴ The responsible official assigned to develop and implement the program is to have wide-ranging duties, including:

- (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:

- (a) Measure the effectiveness of the contractor's programs.
 - (b) Indicate the need for remedial action.
 - (c) 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 the latest developments in the entire equal opportunity area.

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 ensure that minorities and women are given full opportunities for transfers and promotions.
- (6) Career counseling for all employees.
- (7) Periodic audit to ensure that each location is in compliance in areas such as:
 - (a) Posters are properly displayed.
 - (b) All facilities, including company housing, which the contractor maintains for the use and benefit of its employees, are in fact desegregated, both in policy and use. If the contractor provides facilities such as dormitories, locker rooms and restrooms, they must be comparable for both sexes.

¹ 41 C.F.R. §60-2.20-2.21 (1980).

² 41 C.F.R. §60-2.20-2.22 (1980).

³ 41 C.F.R. §60-2.20 (1980).

⁴ 41 C.F.R. §60-2.21 (1980).

(c) 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.⁵

Contractors are required to identify the problem areas by organizational units and job groups. Among the responsibilities of the contractor are:

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

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

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

(c) 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.

(d) Transfer and promotion practices.

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

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

(g) Apprenticeship programs.

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

(i) Work force attitude.

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

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

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

(b) 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.

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

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

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

(f) Tests and other selection techniques not validated as required by the OFCC order on employee testing and other selection procedures.

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

(h) 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.

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

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

(k) 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.

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

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

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

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

(p) Lack of suitable transportation (public or private) to the workplace inhibits minority employment.

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

(r) Purchase orders do not contain EEO clause.

(s) Posters not on display.⁶

According to OFCCP, "each AAP must include those action-oriented programs necessary to eliminate the problems identified and ensure that goals are met. For underutilized job groups, the company should determine the employment practice(s) that created or perpetuated the underutilizations. Correc-

⁵ 41 C.F.R. §60-2.22 (1980).

⁶ 41 C.F.R. §60-2.23 (1980).

tive action programs must be developed and stated in the written AAP.”⁷ Development and execution of action-oriented programs are outlined in 41 C.F.R. §60-2.24. Finally, OFCCP regulations require that “the Internal Audit and Reporting System

⁷ OFCCP Regional Guide for Developing an Affirmative Action Program (October 1978), p. 34. See also 41 C.F.R. §60-2(B) (1980).

Section of the AAP should narratively describe and illustrate the scope, structure and content of the system used by the facility to monitor, analyze and report on AAP implementation and progress or lack of progress.”⁸

⁸ Ibid., p. 36.

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