UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C. 20425

STAFF DIRECTOR

April 1969

Dear Sir:

The Commission on Civil Rights is pleased to transmit to you the enclosed study on equal employment opportunity programs and activities of the Federal government. The study was prepared under the direction of Richard P. Nathan, then Research Assistant with the Brookings Institution, pursuant to contract between the Brookings Institution and the Commission.

In the course of its own hearings and studies the Commission has considered in depth several of the subjects discussed in the enclosed report. Among these is the enforcement of Executive Order 11246, Parts II and III, which forbids discrimination by government contractors, and which is the subject of a pending Commission study.

In the Commission's view, enforcement of the Executive Order has been seriously deficient, at high cost to the Federal civil rights effort. It is the judgment of the Commission that by continuing to contract with employers who practice discrimination, the Federal government not only fails to use a powerful, readily available mechanism to help end discrimination in private employment, but in addition spends public funds actually to subsidize such discrimination.

The enclosed report was prepared prior to the implementation of the rules and regulations under which the Federal contract compliance program now operates, and prior to the problems and criticism which have beset the program in recent months. Because of this, and because of the importance the Commission attaches to the program, I am enclosing for your consideration as well (1) a recent letter from Dr. John A. Hannah, former Chairman of this Commission, to Secretary of Labor George P. Shultz, presenting the views of the Commission on the Federal contract compliance program, (2) a supporting staff memorandum, and (3) a copy of the testimony of the Special Assistant to the Staff Director, Commission on Civil Rights, before an ad hoc Committee of the House of Representatives.

Sincerely yours,

Howard A. Glickstein
Acting

Enclosure

UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C. 20425

February 4, 1969

Honorable George P. Shultz
Secretary of Labor
Washington, D.C. 20210

Dear Mr. Secretary:

As you may know, it has been my privilege to serve as Chairman of the U.S. Commission on Civil Rights since the Commission's establishment in 1957. One of the major responsibilities of the Commission has been to appraise Federal programs and policies to determine whether they are contributing to the goal of equal opportunity. In carrying out this responsibility the Commission has maintained a continuing interest and concern in problems of racial discrimination and inequity in the operation of the important programs administered by the Department of Labor.

It seemed to me, at this point in time when you have assumed the responsibility of directing the Department, that it might be useful to share with you some of the concerns that our Commission has regarding one area of Department of Labor's responsibility that we have studied extensively over the years--the Contract Compliance program. I will outline in this letter some ways in which we believe the Department's performance can be improved.

As you know, Executive Order 11246 places responsibility for the administration of Part II (nondiscrimination in employment by government contractors and sub contractors) with the Secretary of Labor. Although contracting agencies are primarily responsible for obtaining compliance, they are required to follow the rules of the Secretary and to cooperate in every respect. It is this leadership role with which we are concerned.

The potential impact of the requirements of Executive Order 11246 as a force for equal employment opportunity has been and is now enormous since it has been estimated that nearly one third of the nation's labor force is employed by government contractors. A large proportion of the largest industrial employers are government contractors. It is well documented that the nonwhite labor force continues to face a serious disparity in the rate of unemployment, and, even where employment is available, promotional opportunities often are unequal. Vigorous implementation of the Executive Order will go a long way toward alleviating these problems.

In the past year the Office of Federal Contract Compliance has made several significant steps forward in this program. In May, OFCC resorted for the first time to the debarment sanction, commencing proceedings to debar five contractors from further government contracts for noncompliance with the Executive Order. Other important advances have been the requirement for written plans of affirmative action, and requirements for nondiscrimination in testing and other screening procedures. These policy advances should be implemented aggressively in the future.

OFCC's program, however, badly needs strengthening. The inadequacy of the contract compliance operations of the individual contracting agencies must be attributed, in significant part, to the failure of OFCC to set minimum standards for the agencies' programs with respect to staffing, enforcement procedures, and substantive requirements.

Staffing. In a Commission on Civil Rights hearing in Alabama last spring, we learned that the General Services Administration has one field investigator to cover contract compliance throughout its Southeast region. This is a hopeless task. While the Department of Defense provides eleven investigators to review compliance for a much larger number of contractors in substantially the same seven State area, the head of the Defense Department's compliance operation testified that he has informed his supervisors that he cannot do an adequate job without six to seven times his present staff. In a Southwest hearing held by the Commission last December in San Antonio, we learned that the Treasury Department has three staff persons responsible for compliance by 12,000 financial institutions. The central policy staffs which have overall responsibility for the compliance programs of the Department of Defense and the General Services Administration also are inadequate to provide effective control and leadership. It is the responsibility of OFCC to exercise its leadership by making clear its position on minimum staffing needs for effective agency compliance programs to contracting agencies and to follow up on this matter with the Bureau of the Budget.

Enforcement Procedures. In the Alabama hearing we found that in the two and one quarter years preceding the hearing, only 8 percent of Defense Department's contractors in the Southeast region had been subject even to a single on-site compliance review. The significance of this emerges from the fact that noncompliance was found in an estimated 85 percent of these reviews. In the great majority of reviews the investigator reported that a follow-up review, to check subsequent compliance, was necessary; yet in only 10 percent of these cases was any follow-up review in fact made. At the same time, we found that neither the Department of Defense nor the General Services Administration had any system in general use for monitoring current compliance through special periodic current activity reports from contractors. Even the system

for informing compliance officials of the contractor facilities for which they are responsible was found to be inadequate. We learned that, in its Southeast region alone, the Department of Defense contract compliance authorities have responsibility for thousands of subcontractor facilities which do not appear in their contractor listings. The General Services Administration, similarly, has an inadequate reporting system, with the result that facilities estimated to number in the thousands for which the General Services Administration has compliance responsibility are unknown to its compliance officials.

It appears to us, that if the Department of Labor is adequately to discharge its supervisory responsibilities, it should make clear its view of these deficiencies, and establish procedural standards for the agencies to follow.

Substantive Requirements. Though OFCC has required that contractors prepare written plans of affirmative action, no meaningful guidance has been given regarding their content. The failure of OFCC to provide guidance on the substance of affirmative action requirements has given rise to the use of vague or otherwise ineffectual standards by the contracting agencies. For example, a booklet recently published by the Defense Contract Administration Services, entitled "Nondiscrimination in Employment," which appears to be the principal Department statement on standards for compliance, fails to state any requirements at all. Instead, the booklet lists "actions or practices which a contractor might undertake in support of the equal employment opportunity program." Further, the booklet states that "the absence of any of these factors (including desegregated facilities and the elimination of other forms of discrimination) does not necessarily establish a condition of noncompliance." This uninformative and even misleading exposition of substantive compliance standards is an inadequate substitute for the guidance which it is OFCC's responsibility--perhaps its most important responsibility--to provide.

The Comptroller General has observed that companies cannot equitably be asked to bid on federally assisted construction contracts unless they are first informed about the affirmative action obligations which will run with the contract. Requirements for compliance in federally assisted construction should be standardized along the lines of the developing programs in Cleveland and Philadelphia.

In addition to the need for clear OFCC guidelines for the agencies' compliance programs, OFCC should continue to involve itself in specific compliance issues as it has done in the past. But here, too, OFCC activity needs strengthening.

For example, when the Commission's Alabama hearing last spring uncovered serious problems of discrimination in Alabama facilities of the American Can Company, a General Services Administration contractor, OFCC became involved in their resolution. But apparently by reason either of hesitance to exercise its supervisory authority, or of inadequate resources with which to do so, OFCC permitted GSA to adopt an enforcement course which was clearly inadequate.

In the same way, OFCC should be given the resources to monitor agency performance to ascertain how policies set out by OFCC are being implemented. For example, the Alabama hearing disclosed that OFCC's directive creating a program of preaward compliance reviews by the agencies -- potentially a most effective method for obtaining compliance--was not being carried out by the Department of Defense, in that 40 to 50 percent of the supposedly "preaward" compliance reviews in the Southeast region in fact were being conducted some days or weeks after award of the contract.

For all these reasons, it seems to us to be vital that OFCC assume its full responsibilities under the Executive Order and be given the resources which it needs to do so.

An effective compliance program will be possible only under the energetic leadership of OFCC. It is not likely to spring from the independent efforts of the contracting agencies themselves.

An OFCC Senior Compliance Officer told us at our Alabama hearing that, "ninety-five percent of the contracting agencies' staff and attention and desires are aimed at awarding contracts.... (It is therefore necessary) to overcome this built-in resistance that we find in every contracting agency." Federal agencies are loathe to upset their relations with contractors. Effective enforcement might result in the disqualification of low bidders or other preferred contractors, or cause delays in the letting or performance of contracts.

This is one more reason why a truly effective compliance program will be possible only when the Department of Labor fully discharges its leadership responsibilities arising under the Executive Order.

The other Commissioners and I, as well as the Commission's staff, are available to assist you in every possible way, within our limited resources, and I hope that you will call upon us.

Sincerely,

(signed) John A. Hannah

John A. Hannah
Chairman

UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C. 20425

STAFF MEMORANDUM

In support of the views expressed in Chairman Hannah's letter of February 4, 1969 to Secretary of Labor George P. Shultz regarding the Federal contract compliance program, this memorandum briefly outlines the basis in law and in public policy for the principal substantive requirement of the Federal contract compliance program -- that Federal contractors adopt plans of affirmative action which break down barriers to equal employment opportunity and achieve results in terms of fair and equal employment for minority persons.

I.

Executive Order 11246, [1/] issued by President Johnson on September 24, 1965 was the eighth in a series of Executive Orders which for the past 27 years have required Federal contractors to practice nondiscrimination in employment.

The requirements of this Order are essentially the same as those of its immediate predecessor, Executive Order 10925, [2/] issued by President Kennedy on March 6, 1961.

1/ 3 CFR 1964-65 Comp., p. 339.

2/ 3 CFR 1959-63 Comp., p. 448.

The Attorney General of the United States on September 26, 1961 issued an opinion upholding the authority of the President to issue Executive Order 10925. 3/

In his opinion, the Attorney General first noted the unbroken series of Executive Orders on this subject, and then went on to observe:

> It is well settled that, in the exercise of its power to "fix the terms and conditions under which the Government will permit goods to be sold to it" the United States may take into consideration, and implement, the public policies of the United States. 4/

With respect to the place of nondiscrimination in the public policy of the United States, the Attorney General stated:

> The public policy of opposition to discrimination because of race, creed, color, or national origin is fundamental in our constitutional system, and has been repeatedly applied by the courts and Congress. Discriminations based on race, religion, color, or national origin are contrary to the spirit of our institutions. 5/

Furthermore, the Attorney General noted:

> Executive Order 10925 also implements the public policy of the United States that there be the fullest and most effective use of the Nation's manpower resources. It does so by seeking to

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3/ 42 Op. Att'y Gen., No. 21 (1961).
4/ Page 5.
5/ Page 7.

> eliminate discriminatory practices which might tend to deprive the United States of the services of an important segment of the population in the performance of its contracts. 6/

II.

Executive Order 11246 requires inclusion in Federal contracts of a clause obligating the contractor to undertake "affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin." 7/ The same requirement appeared in Executive Order 10925. 8/

Regulations issued by the Secretary of Labor, as the Federal official responsible for supervising the Federal contract compliance program, require each Federal contractor which has 50 or more employees,

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6/ Page 9. The Attorney General also observed that the Comptroller General recently had upheld the authority of the Architect of the Capitol -- a part of the legislative branch, and accordingly not bound by Executive Order 10925 -- to insert a nondiscrimination clause in contracts he let. 40 Comp. Gen. 592 (1961). At least one Federal court has held that a government (there, the government of the state of Ohio) fails to discharge its constitutional obligations when it closes its eyes to discriminatory employment practices in work performed for it under contract. Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967). The Fourteenth Amendment forbids state and local governments to deny the equal protection of the laws to any person within their jurisdiction. The Supreme Court has held that the due process clause of the Fifth Amendment imposes upon the Federal government an equivalent prohibition against racial discrimination. Bolling v. Sharpe, 347 U.S. 497 (1954).

7/ Section 202.

8/ Section 301.

and a Federal contract of $50,000 or more, to develop for each of its establishments a written plan of affirmative action providing for "specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups ...". 9/

Much of the confusion that seems to exist concerning the meaning of the term "affirmative action" stems from the view that affirmative action means something more than the practice of nondiscrimination, that it means favoritism in the hiring or promotion of minority persons. In fact, affirmative action -- as used in the Federal contract compliance program -- is simply the course of action an employer must adopt in order to practice nondiscrimination in employment.

The need for affirmative action rests on the fact that an employer rarely can achieve nondiscrimination simply by refraining from deliberate acts of discrimination.

9/ 41 CFR 60-1.40(a).

Deliberate discrimination is but the tip of an iceberg. Existing racial and ethnic divisions in society have translated themselves into institutions which deny equal opportunity to minority persons. One of the most pervasive forms of employment discrimination is "systemic discrimination" -- discriminatory practices built into the systems and institutions which control access to employment opportunity.

The following are some common examples of these discriminatory barriers to equal employment opportunity.

> Particularly where an employer or union relies for recruitment mainly upon word-of-mouth contact, minority persons who have less access than non-minority persons to informal networks of employment information, such as through present employees or officials, are denied equal access to available opportunities.
>
> Recruitment carried out through schools or colleges with a predominantly nonminority makeup is discriminatory where comparable use is not made of predominantly minority institutions.
>
> Job qualifications which are not substantially related to the needs of the job unfairly penalize minority persons with limited education or job experience.
>
> Where minority employees have been assigned to "traditional" jobs or departments, which do not afford equal access to opportunities for training or advancement within the organization, this presents a continuing barrier to their equal enjoyment of employment opportunity.

Barriers to equal employment opportunity such as these persist until positive action is taken to correct them. Therefore, nondiscrimination in employment in most cases can be achieved only through an affirmative effort to assure that practices are genuinely

nondiscriminatory. For example, an employer can assure that his recruitment practices are nondiscriminatory only by taking affirmative steps to assure that potential minority applicants are reached as effectively as potential nonminority applicants. Similarly, an employer can assure nondiscrimination in the training and advancement of employees only by assuring that minority employees have not become locked into jobs or departments which do not afford equal opportunity for advancement within the organization.

Expressed above in terms applicable to industrial employment, the same principles apply equally to employment in the construction industry. Because minority persons widely have been excluded from construction trades by the discriminatory -- including nepotistic -- practices of construction labor unions, so a construction contractor, in order to avoid the use of a discriminatorily selected labor force, must take steps to assure fair minority representation in all trades on the job and in all phases of the work.

The duty to take affirmative action to assure equal opportunity for minorities often arises from the effects of prior employment discrimination, as in the case of past exclusion of minority persons from trade unions or the past relegation of minority persons to "dead end" jobs. The courts have made clear that there is a duty under the Executive Order, as under Title VII of the Civil Rights Act of 1964, 10/ to correct the effects of prior employment discrimination.

10/ Pub. L. No. 88-352 (July 2, 1964).

For example, in Quarles v. Philip Morris, Inc.,[11] a Federal District Court held that an employer's past discriminatory assignment of Negro employees to departments with limited advancement potential gave rise to present illegal restriction of their advancement opportunities. The court required the company to adopt a plan of interdepartmental transfer and promotion which would eliminate this disadvantage.[12]

Similarly, the Federal Court of Appeals for the Fifth Circuit, affirming the need to neutralize the present effects of past discrimination, upheld on appeal an order requiring a trade union which had discriminatorily excluded Negroes in the past to adopt a variety of corrective measures, including an interim system of alternating white and Negro referrals.[13]

11/ 279 F. Supp. 505 (E.D. Va. 1968).

12/ 279 F. Supp., at 520.

13/ Local 53, International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler, Civil No. 24865 (5th Cir., January 15, 1969). See also Dobbins v. Local 212, International Brotherhood of Electrical Workers, Civil No. 6421 (S.D. Ohio 1968). The courts have differed on the application of Title VII to the present effects of discrimination which occurred prior to the effective date of Title VII (July 2, 1965). Eg., compare Quarles v. Philip Morris, supra, with United States v. H.K. Porter, Inc., Civil No. 67-363 (N.D., Ala., December 1968).

The duty to neutralize the continuing effects of past discrimination has been recognized in other contexts as well. Indeed, it is a truism that the courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965). Thus, for example, the appropriate remedy for legally compelled school segregation is to dismantle the dual school system which the policy of segregation has created, Green v. County School Board of New Kent County, 391 U.S. 430, 437 (1968), and employees discriminatorily discharged must be rehired and compensated for lost salary or other damages, Smith v. Board of Education of Morrilton School District No. 32, 365 F. 2d 770, 784 (8th Cir. 1966).

The Department of Labor's Office of Federal Contract Compliance (OFCC) is taking action against the kind of discriminatory barriers to equal employment opportunity described above, by requiring the use of appropriate affirmative action. In addition, while not as yet giving effective general application to the principle, OFCC has recognized that the test of success in breaking down barriers to equal employment opportunity is the achievement of actual results, 14/ in terms of fair and equal employment for minority persons.

As Chairman Hannah indicated in his letter, the contract compliance program only recently has begun to make significant strides forward. The Federal government now faces a choice between, on the one hand, aggressively expanding these efforts and, on the other, continuing a Federal subsidy -- amounting to billions of dollars each year -- for those very barriers to equality of opportunity which have placed in jeopardy the well-being of the nation.

14/ While former OFCC Director Edward C. Sylvester, Jr., has described affirmative action as "anything you have to do to get results", Report of Plans for Progress Fifth National Conference, January 23-24, 1967, at 73, this principle has not been applied effectively outside the area of Federally assisted construction. The need for a results test of general application is demonstrated by the results requirement which is applicable to desegregation of schools under the Fourteenth Amendment. As the Federal Court of Appeals for the Fifth Circuit has observed, "[t]he only school desegregation plan that meets constitutional standards is one that works" (emphasis in original). United States v. Jefferson County Board of Education, 372 F.2d 836, 847 (5th Cir. 1966), aff'd on rehearing en banc, 380 F. 2d 385 (5th Cir. 1967), cert. denied, 389 U.S. 840 (1967).

TESTIMONY OF
MARTIN E. SLOANE, SPECIAL ASSISTANT TO THE STAFF DIRECTOR
U.S. COMMISSION ON CIVIL RIGHTS

BEFORE AN

AD HOC PANEL OF UNITED STATES CONGRESSMEN
TO INVESTIGATE
THE ENFORCEMENT OF EXECUTIVE ORDER 11246

December 4, 1968

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Mr. Chairman and Members of the Committee:

I am Martin E. Sloane, Special Assistant to the Staff Director of the U.S. Commission on Civil Rights. I appreciate the opportunity to present testimony concerning problems of employment discrimination, with particular reference to the enforcement of Executive Order 11246.

As you may know, the Commission on Civil Rights performs a unique function among the several Federal agencies charged with civil rights responsibilities. The Commission is not an enforcement agency, nor is it empowered to redress individual denials of civil rights. Rather, our principal function from the time of the Commission's establishment in 1957 has been to find facts relating to denials of equal protection of the laws and to report these facts to the

President, to the Congress, and to the Nation. Among our statutory duties is to appraise Federal policies relating to equal protection of the laws, and in carrying out this responsibility one of our primary concerns has been to evaluate the enforcement of Federal nondiscrimination requirements in employment. Through hearings and investigations, we have developed a good deal of knowledge about how these requirements are working. I would like to address myself this morning to what we have learned about the enforcement of Federal contract compliance requirements as they affect government contractors and federally assisted construction contractors.

It should be understood that these requirements are by no means of recent vintage. Since 1941, Federal agencies have been required by Presidential Executive Order to include in their contracts a provision assuring nondiscrimination in employment by government contractors. Thus these requirements have represented consistent and continuing Federal policy for a quarter of a century. The potential impact of these requirements as a force for equal employment opportunity has been and is now enormous. It has been

estimated that nearly one-third of the Nation's labor force is employed by government contractors. A large proportion of the biggest industrial employers are government contractors. We believe it is a misfortune of the first magnitude that the contract compliance program has failed to fulfill its potential.

Perhaps the main reason for this failure is that contractors have not had to take seriously the threat of sanctions for non-compliance. Though in isolated instances government contracts have been delayed for noncompliance, no contract has ever been terminated. Thus a major weapon necessary to establish the credibility of the Federal Government among government contractors never has been used.

Further, until May of this year, no proceedings had been instituted to debar contractors from future contracts. In May, the Office of Federal Contract Compliance (OFCC) commenced proceedings to debar five contractors from further government contracts, bringing into play for the first time the government's principal sanction for noncompliance. This is encouraging in that it symbolizes a movement on the part of OFCC towards effective enforcement of the Executive Order.

This present more forceful position of OFCC, however, is due, I think, at least in substantial part to the fact that court decisions have this year, for the first time, effectively enforced the requirements of the Executive Order and of Title VII of the Civil Rights Act of 1964. Here, as in other areas of civil rights, the judiciary has led the way. A Senior Compliance Officer of OFCC frankly admitted in testimony at the Commission's hearing last May in Montgomery, Alabama that by comparison with the Department of Justice, and indeed the courts, OFCC has been, in his words, "somewhat ... timid" in construing and applying the Executive Order.

But even this advance by OFCC has not been accompanied by a similar movement on the part of the Federal contracting agencies themselves. Though OFCC is responsible for setting policy and for overall supervision of enforcement, Executive Order 11246 places "primary responsibility" for contract compliance enforcement on the agencies. The orientation of the agencies still seems to be rooted in "voluntarism," and not enforcement, as the means for assuring equal employment opportunity.

"Voluntarism," which has characterized most of the life of contract compliance, means seeking to achieve compliance through persuasion and voluntary cooperation by employers. This approach is useful in its place, but if any one fact emerges clearly from the history of Federal contract compliance, and indeed, civil rights generally, it is that unless constructed upon a backbone of strict enforcement, voluntarism easily becomes an excuse for inaction.

I would like to describe to you some examples of the inadequacies of the contract compliance program which the Commission has uncovered in hearings held within the past year or so. Then I would like to suggest what we believe are some of the major defects in the program as conducted by both OFCC and the contracting agencies, which have contributed to its inadequacies.

In May, 1967, the Commission conducted a hearing in the Bay Area of San Francisco, California, inquiring into a broad range of issues affecting minorities there.

Employment discrimination was one of the main subjects of inquiry. We took a particularly hard look at one large federally-funded construction project, construction of the Bay Area Rapid Transit system. In this construction, the Commission was told, the Bay Area Rapid Transit Authority anticipated grants of up to $80 million in Federal funds and employment of about 8,000 people at peak construction times. As of May 1967, we found no Negroes among the electricians, ironworkers, or plumbers engaged on this construction.

The General Manager of the Transit Authority, B. R. Stokes, was asked in the course of his testimony before the Commission what he felt the contractors on the project could do to increase minority representation in job categories where the unions had few or no Negro members. Mr. Stokes replied:

> We can implore, we can plead, we can call to the attention, we can do all of these things. We can make these things stipulations in our contracts. Beyond this there is not much we can do, sir.

Mr. Stokes subsequently added:

> Our prime responsibility to the public which has voted this bond authority /for construction of the rapid transit system/ is to deliver the system as near like we promised it and as nearly on time as we possibly can ... There was not in that bond issue ... a social cost factor.

We also heard testimony from the Federal official responsible for coordinating all construction contract compliance in the San Francisco area. Ample evidence had appeared in the hearings that construction contract compliance was yielding remarkably little increase in the employment of minority workers in the Bay Area. Commissioner Erwin Griswold then asked him:

> Have the efforts of your office brought about the employment of one minority plumber in the San Francisco Bay area?

He replied:

> Not to my knowledge.

Following this hearing, in September 1967, the Commission addressed to the Office of Federal Contract Compliance a memorandum containing a number of questions and recommendations regarding Federal contract compliance in the construction industry in the San Francisco area. Nine months later we received a reply which candidly summarized the ineffectiveness of the construction contract compliance program in the San Francisco Bay area. OFCC's memorandum states:

> /The program/ has resulted in no known increase in membership in the mechanical trades. It was a causal factor in the development of a Department of Labor-funded training program for Operating Engineers, but it is not now clear that more than 50 Negro youths will enter this local, which has about 30,000 members and only 25 Negro members.

I would like to submit for the record a copy of the Commission's memorandum and of the reply from OFCC.

Further, in our September communication to OFCC we had criticized as totally inadequate an affirmative action program which was submitted by a large contractor on the Bay Area Rapid Transit project and accepted by the responsible government agency, the Department of Housing and Urban Development. In its affirmative action plan, the contractor had pledged itself merely to remind the unions of their equal opportunity obligations. In answer to this point, OFCC observed that "this inadequate affirmative action program indicate/s/ the limited resources and understanding of the Federal agencies charged under the Executive Order with the primary responsibility to assure contractor compliance." We agree with this conclusion, as far as it goes. Unfortunately, it does not go far enough. It does not suggest that OFCC, itself, might have exercised its own authority to require rejection or improvement of the plan.

It should be noted that in several other metropolitan areas, most notably in Cleveland and Philadelphia, Federal construction contract compliance has been operated on a more meaningful basis,

requiring specific results in terms of minority employment. The Commission has not yet fully appraised the operation of these programs. However, it appears that this approach is being applied in only a few metropolitan areas. Further, there is little to suggest that this program will be expanded. OFCC, in its reponse to us of last June, said of the Cleveland program that

> There are serious questions being raised as to whether this program exceeds the authority of the Executive Order in the specificity of its requirements.

We believe it is a matter of the utmost importance how these serious questions will be resolved.

In April and May of this year, the Commission held a five-day hearing in Montgomery, Alabama in which we examined problems affecting the economic security of Negroes in a predominantly rural 16-county area of Alabama. Negroes in this area--the population of which is 62 percent Negro--have been displaced from their former principal

role as sharecroppers or tenant farmers raising row crops such as cotton and corn. We saw that though the poverty which pervades the area as a whole is shocking, the disparity between whites and Negroes is equally shocking. In 1960, for example, income per unit member of white families in the area was five times that for nonwhite families. We found that Negroes had been largely excluded from the new industrial jobs created in the area; in 1967 reports to the Equal Employment Opportunity Commission from the area, Negroes accounted for only 22 percent of industrial jobs.

We found that government contractors in the area had done little to improve the situation for the area's Negroes, and that many had contributed significantly to patterns of segregation and oppression.

One large government contractor, with several facilities in the hearing area, is American Can Company. At its pulp and paper mill in Choctaw County, American Can had contracts with the General Services Administration in the first three quarters of fiscal 1968 for more than $1.7 million. We found that of 1,550 persons employed at this

mill, only 108, or 7 percent, were Negro, and that only "several" of these employees occupied skilled positions. This mill draws its employees from an area whose population is about 57 percent Negro.

On July 15, American Can Company submitted to the General Services Administration a purported plan for equal employment opportunity at this Mill. On September 6, OFCC rejected the plan, citing its failure to provide for evaluation of opportunities for utilization of minority personnel, and its failure to provide a remedy for employees previously discriminated against. On September 13, GSA informed OFCC that it was nonetheless accepting the plan as adequate compliance with the Executive Order. At last word, OFCC had not responded to GSA's letter.

Since 1960, American Can Company also has owned a company town in the hearing area, at Bellamy, Alabama. This town provided rental housing for employees of the company's nearby saw mill. We found the town to be totally segregated. We found that only 8 of the 123 Negro houses had running water and inside toilet facilities,

while every white-occupied house had running water and inside toilets. We found that there were several segregated churches, two segregated swimming pools, and a company-owned Negro school house. A Negro worker employed at the Bellamy saw mill for the past 24 years testified that the town was "just about in the same shape" when he first came there in 1943 as it is at present.

Finally, we found that while 270 of the 340 employees at American Can's Bellamy saw mill, work which is traditional for Negroes in the South, were Negro, the highest position held by any Negro employee was Assistant Supervisor, a position to which two Negro employees had been appointed just two weeks prior to our hearing.

Up to the time of our hearing, no General Services Administration contract compliance officer had ever made a compliance inspection at Bellamy.

In July and August of this year, American Can Company submitted to GSA a series of proposals for dealing with conditions in the town at Bellamy. None of these proposals were found acceptable by OFCC. On October 4, GSA accepted a modified version of the Company's first proposal. Both the original and the final versions of this proposal were based on a gift of the houses to occupants and a gift of the church buildings and swimming pools to the respective church congregations--in short, a perpetuation of the segregation which the company had maintained. One of the changes made in the proposal as first submitted was that approval by OFCC was no longer to be required. It appears that OFCC never sought to review this modified plan. This plan has now been put into effect.

On October 24, and again on November 14, we wrote to OFCC requesting it to explain its position and its proposed course of action in the Bellamy matter; to date we have received no reply.

Another government contractor in the hearing area, with a plant located at York, Alabama is McGregor Printing Corporation. This company does most of its printing work under contract with the Government Printing Office.

Testimony by company officials disclosed that local applicants for employment at McGregor were interviewed by the Mayor of York, Alabama. The company, we were told, received from the Mayor an "advisory evaluation" on the applicant's potential, ability, character, "and so on." The Mayor also is the owner of a clothing store in York which has been the target of demonstrations by members of the Negro community because of its failure to hire black persons. We have since been informed that the company has discontinued this interview policy. We also heard testimony that the Mayor and company officials tell Negro applicants for employment that they do not approve of persons engaging in civil rights demonstrations; an employee of the company testified that he knew of no McGregor employee who had participated in a civil rights demonstration.

Dan River Mills, another large government contractor in the hearing area, manufactures uniforms for the Armed Forces. At a Dan River Mills plant in Greenville, Alabama, we found that white employees used restroom facilities on the inside of the building while Negro employees used facilities on the outside. We asked a witness, a Negro formerly employed at the plant, whether he had been told not to use the inside facilities; he replied

> I was not told that I couldn't use any of the facilities. I was just pointed out the one to use.

The same witness testified that although there was a drinking fountain in the plant, he "was told that the other Negro employees always got a coke bottle to drink out of." The plant manager of the mill testified that he was unaware of any segregation in the plant.

We found that of approximately 200 employees at the Dan River Mills Greenville plant, only 3 were Negro--a watchman, a warehouseman and a truck driver who doubles as a janitor. The Negro witness,

formerly employed at the plant, testified that he was hired as a weaver-learner in the fall of 1966, but that he was subsequently assigned work as a sweeper, and that he quit in April 1967, because he felt that by reason of his race he never would be promoted to weaver. A young Negro girl, a senior at the Negro high school in Greenville, told us, in her words, that

> ... most of the Negroes know they aren't going to be hired for anything but sweeping the floor, so they just don't go out there.

Another large government contractor in the hearing area is Alabama Power Company, which grosses about $2.5 million a year under a contract with the General Services Administration. The company employs 5,394 persons; just 472 of these are Negro. About three-fourths of the Negro employees are in unskilled positions. In 1966, of the company's more than 1,300 craftsmen, just 3 were Negroes; two years later, at the time of our hearing, the number of Negro craftsmen had risen by one, to four. From 1967 to 1968, we found,

the proportion of the company's male employees who are Negro actually declined. We learned that the company still maintains segregated facilities at locations in Birmingham, Alabama. After field investigations of the company in early 1967, General Services Administration contract compliance staff reported finding patterns of restricted minority group employment and suggested that administrative action against the company should be considered. Nonetheless, at the time of the hearing adequate corrective action had not been taken. Indeed, the company official responsible for equal employment opportunity testified at our hearing that GSA's 1967 reviews had resulted only in "nominal suggestions" that were adhered to, and that he understood Alabama Power Company had been given a "clean bill of health." At the present time, 17 months after the GSA investigations, and 6 months after our hearing, Alabama Power Company still has not corrected these conditions of racial exclusion, restriction, and segregation.

Another large GSA contractor in the hearing area whose officials testified that they believe their company is in compliance with Federal equal employment requirements is Allied Paper Company, a pulp and paper mill located in Jackson, Alabama. The personnel manager testified that there are 47 Negroes out of a total of about 445 employees, and that none of the Negroes are clerical or supervisory personnel.

Following our hearing, on June 4, GSA acknowledged--in response to our inquiry--that Allied Paper Company's performance did not meet the requirements of the Executive Order, and stated that it would take action to bring the company into compliance. There then followed the kind of red tape and delay which too often is found in civil rights enforcement.

Shortly thereafter GSA learned that Allied Paper Company had become the subsidiary of a large Department of Defense contractor. Accordingly, GSA determined that enforcement should be turned over to DOD, and forwarded the file to DOD. But DOD compliance officials

in turn determined that GSA should continue to handle the case until the deficiencies were remedied. On September 20, the responsible DOD official wrote to OFCC requesting that it cause Allied Paper Company to be transferred back to GSA. Nine weeks later DOD officials reported that they were still awaiting a response to this letter.

THE CAUSES OF FAILURE

From the experience the Commission has gained in its hearings and investigations, it is clear that Federal contract compliance is not the effective force it should be in assuring equal employment opportunity. Some of the reasons for its failures are readily apparent.

One obvious reason is the gross inadequacy of staff. The OFCC, for example, with responsibility for establishing overall policy for all phases of the contract compliance operation, with responsibility for participating in the more significant contract compliance negotiations conducted with individual contractors, and--since

May of this year--with responsibility for conducting five debarment proceedings, has a staff of 12 professionals to carry out these responsibilities.

The Department of Defense, at the time of the Commission's hearing in Montgomery, Alabama, had a contract compliance staff of 11 professionals with responsibility for monitoring the compliance of more than 6,000 contractor facilities in the seven States and Puerto Rico that make up its Southeast region.

The General Services Administration contract compliance operation is much smaller than that of the Defense Department and less regionalized. To supervise equal employment opportunity in GSA contracts in the amount of $1,350,400,000, at the time of our hearing, GSA provided three professionals in Washington and 10 compliance investigators in the field. One investigator covered the entire seven-State Southeast region, devoting a portion of his time to matters other than contract compliance.

This lack of staff has had obvious effects in terms of the ability of the agencies to conduct inspections to determine compliance. We learned at our hearing, for example, that in the Defense Department's Southeast region, in the two and one-quarter years from January 1966 until the time of our hearing last May, just 437 Defense contractor facilities in the Southeast region were visited. Considering the fact that responsibility for these visits was carried out by a mere 11 professionals, this might be considered an impressive total. It also should be understood, however, that this was less than 8 percent of listed Defense contract facilities in the region.

It was estimated that nationwide, GSA had subjected about 10 percent of its contract facilities to compliance visits in the one and one-half years preceeding our hearing. Referring to this relation between staff size and workload, an experienced GSA contract compliance official, testifying at the Commission's hearing,

described GSA's system of compliance reviews as "sort of a hit and miss thing." I question whether GSA permits this kind of casual approach to inspections in areas other than civil rights.

But even this does not tell the whole story. Effective contract compliance enforcement requires much more than an initial compliance inspection. DOD contract compliance officials estimated that non-compliance is found in 85 percent of compliance visits in the Southeast region; in all such cases, the company is required to take steps to come into compliance. But this means that follow-up visits must be made to determine whether the facility is in fact coming into compliance. We learned that in the 16 months prior to our hearing, in DOD's Southeast region, contract compliance officers in 95 percent of their compliance inspections said that a follow-up inspection was necessary; yet in only 10 percent of the cases was a follow-up inspection actually made. On this point, there was the following exchange at our Alabama hearing with the head of DOD contract compliance in the Southeast region.

Question: Do you think that /the/ companies that you weren't able to revisit, but companies where you did find some deficiencies and wrote to them about the deficiencies, do you think that they are terribly concerned about what the consequences of not complying are?

Answer: No. Well, let me phrase it this way: I do not believe that you should ever tell a company that you are going to revisit them unless you /do/ ... they are human beings like we are.

Moreover, we learned at our hearing that under a new policy instituted in January 1968, the Department of Defense was making follow-up inspections only at facilities located in metropolitan areas, despite the fact that more than half the large DOD contractor facilities (those with 100 or more employees) in the Southeast region are located outside metropolitan areas.

Inadequacy of staff is only one reason why contract compliance enforcement has not been effective. Failure to systematically collect the data necessary to determine compliance, inadequacies in pre-award reviews, and the failure of OFCC to provide positive leadership, also have been important factors.

Inadequacy of reporting systems. The only method for reviewing the employment practices of government contractors, apart from these compliance inspections, is the use of reports submitted by the contractors themselves. The present system of reporting is wholly inadequate.

Companies covered by Title VII of the 1964 Act, and companies with substantial Federal contracts, are required to submit annually an employment data report called the "EEO-1" form. The report gives employee statistics, by race or national origin, for each of the employer's facilities. The data in general use are outdated; Federal agencies are still relying principally on data from forms submitted in 1966. Moreover, the agencies do not have reports covering all the facilities for which they are responsible. While GSA has responsibility for an estimated 5,000 contractor facilities, GSA told us that it has in its files EEO-1 forms covering only 1,600 facilities.

Of even greater significance is the fact that current racial data on applications, hiring, and promotions, which are crucial for evaluating present employment policies, are not systematically gathered. The official responsible for administering DOD contract compliance in the area comprised of Alabama, Mississippi, and portions of neighboring States, told us that less than a dozen of his 1,300 facilities were at present submitting special compliance reports detailing such current data.

Inadequacy of system for identifying contractors. There is no satisfactory system for informing contract compliance officers of the facilities for which they are responsible. GSA, for example, relies chiefly on a listing which is now more than two years old; there are hundreds of companies, representing thousands of different contractor facilities, for which GSA has contract compliance responsibility but which do not appear in its contract compliance listings. Similarly, we learned that though DOD's Southeast region has contract compliance responsibility for thousands of subcontractor facilities, these facilities appear in no listing made available to Southeast region compliance officials.

Inadequacy of pre-award reviews. Under the program of "pre-award" compliance inspections, any company which is to receive a publicly advertised Federal contract of $1 million or more must be inspected and cleared for equal employment compliance within no more than six months prior to award. In testimony at the Alabama hearing, contract compliance officials strongly endorsed the potential effectiveness of this pre-award program; a Defense Department official stated that in almost all cases contract compliance officers enjoy a much better bargaining position on equal employment opportunity before a contract is signed than after it has been signed. Nevertheless, at least in part because of the inadequacy of compliance staff, a DOD official stated that 40 to 50 percent of the inspections made supposedly under the pre-award program in the Southeast region, are in fact made several days or even weeks after the contract has been let.

The result is that new contracts are entered into with companies which are not in compliance with the Executive Order. For example, a DOD compliance officer reported as follows after his compliance inspection of a DOD contractor facility in the hearing area:

> Subject facility is located in ... /a county which/ has a nonwhite population of approximately 50 percent.... /O/n 3 February 1967, the company was awarded a contract for /more than $2 million/ covering the manufacturing of men's cotton denim trousers. Based upon the nature and extent of the deficiencies noted during this survey, subject facility was not in an awardable position for receiving the aforementioned contract ...

Inadequacy of OFCC direction. Executive Order 11246 gives to the Secretary of Labor responsibility for the administration of the Federal contract compliance program. The Order directs the Secretary to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate" to carry out the purposes of the Order. The Secretary of Labor discharges this duty chiefly through the Department of Labor's Office of Federal Contract Compliance.

OFCC's most important responsibility is to set out for the guidance of contractors and contracting agencies clear substantive requirements. Apart from directives on testing and segregated facilities, however, OFCC has provided little such guidance. For example, the single most important substantive requirement of the Executive Order is that contractors adopt programs of affirmative action towards equal employment opportunity. Yet OFCC has not made clear to the contracting agencies or to contractors what this requirement means. We are convinced that such coordination and leadership are essential if the Federal contract compliance program is to become effective.

The need for effective leadership by OFCC can be measured in terms of the strength of the forces working against effective contract compliance programs.

An OFCC Senior Compliance Officer told us at our Alabama hearing that, "ninety-five percent of the contracting agencies' staff and attention and desires are aimed at awarding contracts ... /It is therefore necessary/ to overcome this built-in resistance that we find in every contracting agency." Federal agencies are loathe to upset their relations with contractors. Effective enforcement might result in the disqualification of low bidders or other preferred contractors, or cause delays in the letting or performance of contracts.

On the other side, contractors may see little incentive to adopt meaningful equal employment policies. Particularly where the effects of past discrimination must be undone, such policies may involve substantial staff effort, or the expenditure of substantial funds on recruitment, training, or similar programs. In addition, problems may arise for the contractor where white employees see effects adverse to them in the equal opportunity program.

Thus for both the government agencies and the contractors, effective contract compliance policies may at times be inconvenient and at times even costly.

In short, lack of staff and other inadequacies in enforcement not only are causes of the relative ineffectiveness of the contract compliance program, they also reflect the deepseated reluctance of all parties concerned to upset the status quo. Business and government have enjoyed a comfortable relationship over the years through government contracts and the kind of change in the status quo that an effective contract compliance program requires is uncomfortable, even painful. But it is a difficult truth that in contract compliance, as in other areas relating to the rights of minorities in this country, we are now well past the point where painless programs can be particularly relevant. On the contrary, the painless, ineffective program may be worse than none at all, since it may become a ruse, a camouflage for inaction. For this reason,

I think the greatest damage to the purposes of the Executive Order has been done by those--in government and in business--who have seemed to support the cause but have not allocated the resources, or taken the firm stand, necessary for an effective program.

Mr. Chairman, there has been a good deal of discussion, particularly in recent months, over what private enterprise should be doing to assure equal rights, especially in the area of job opportunities. We agree that the private sector must assume a greater responsibility than it has in the past. In our view, however, government has an even greater responsibility. We have tried to show how in one critically important area--contract compliance--this responsibility has not fully been carried out.

The members of this Committee are well aware that this does not represent an isolated example of government's failure. The United States Code and the Federal Register are filled with statutes and executive orders relating to equal rights which have not been

fully implemented. It is highly misleading to suggest that government has exhausted all avenues and that we now must look to the private sector as the sole source of help for minority group members. And it is disingenuous for government to castigate private industry for failing to do its part in the cause of social progress. Government must first put its own house in order.

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