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Equal Employment Opportunity - The Philadelphia Plan - Burden on Contractor

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RECENT CASES

EQUAL EMPLOYMENT OPPORTUNITY—THE PHILADELPHIA PLAN —BURDEN ON CONTRACTOR—The Contractors Association of Eastern Pennsylvania and four contractors who had bid on a job involving a grant from the Department of Agriculture to the Commonwealth of Pennsylvania brought suit to strike down a regulation issued by the Department of Labor, pursuant to an Executive Order,[1] known as the "Revised Philadelphia Plan." The Plan required contractors who received federally assisted construction contracts to use *good faith efforts*[2] to employ a certain percentage of minority group members

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1. EQUAL EMPLOYMENT OPPORTUNITY, *Exec.* Order No. 11, 246, 3 C.F.R. 167 (Supp. 1965), 42 U.S.C. §2000e (Supp. 1970). Section 202 of this Order reads:
[A]ll Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:
"During the performance of this contract the contractor agrees as follows:
"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national orgin. The contractor will take affirmative action to ensure that applicants are employed, an that employees are treated [equally] . . . .
. . .
(3) The contractor will send to each labor union . . . with which he has a collective bargaining agreement . . . a notice, to be provided by the agency contracting officer, advising the labor union . . . of the contractor's commitments . . . and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
. . .
(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts . . . .
. . ."

2. The Plan provides:
"5. *Criteria for Measuring Good Faith*
Section 8 of the June 27 Order provides that a contractor will be given an opportunity to demonstrate that he has made every good faith effort to meet his goal of minority manpower utilization in the event he fails to meet such goal. If the contractor has failed to meet his goal, a determination of "good faith" will be based upon his efforts to broaden his recruitment baze through at least the following activities:
(a) The OFCC Area Coordinator will maintain a list of community organizations which have agreed to assist any contractor in achieving his goal of minority manpower utilization by referring minority workers for employment in the specified trades. A contractor who has not met his goal may exhibit evidence that he has notified such community organizations of opportunities for employment with him on the project for which he submitted such goals as well as evidence of their response.
(b) Any contractor who has not met his goal may show that he has maintained a file in which he has recorded the name and address of each minority worker referred to him and specificalley what action was taken with respect to each referred worker. If such worker was not sent to the union hiring hall for referral or if such worker was not employed by the contractor, the contractor's file should document this and the reasons therefor.
(c) A contractor should promptly notify the OFCC Area Coordinator in

on their jobs. The Plan covered six construction trades[3] in the Philadelphia area. The plaintiffs argued that the Plan was arbitrary and capricious, contending that it should be directed against the unions who were directly responsible for the evil. The United States District Court for the Eastern District of Pennsylvania *held* that the Plan was not arbitrary and capricious, and granted summary judgment for the defendants. *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 311 F. Supp. 1002 (E.D. Pa. 1970).

In addition to the arbitrary and capricious argument, the Court also considered the question of standing (none of the plaintiffs had been awarded a contract under the Plan), the question that the Plan forces the contractors to discriminate against non-minority group members in violation of the Civil Rights Act[4] and the question of whether the design of employment programs is a function of Congress rather than of the Executive. The court held that the plaintiffs had standing but ruled against the plaintiffs on the other questions. The court's holdings regarding standing, the alleged civil right violation, and the possible executive infringement are beyond the scope of this study which will be limited to a consideration of the court's justification for finding the Plan not to be arbitrary and capricious.

The basic problem involved with the court's decision is that it leaves any contractor who receives a Government contract in an unclear status. On the one hand, it is recognized that employees are referred to the contractors by the unions and that certain of these unions are slow in admitting minority group members.[5] It is clear that employers who interfere with union membership are apt to be accused of unfair labor charges under existing labor laws.[6]

The court was surely aware of the burden that they were placing on the contractors. As they noted:

> We acknowledge that the position in which the contractors find themselves is rather unfortunate and perhaps the solution may become difficult.[7]

Nevertheless, the Court asserts that the Government has the right

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order for him to take appropriate action whenever the union with whom the contractor has a collective bargaining agreement has not referred to the contractor a minority worker sent by the contractor or the contractor has other information that the union referral process has impeded him in his efforts to meet his goal.

(d) The contractor should be able to demonstrate that he has participated in and availed himself of training programs in the area, especially those funded by this Department referred to in Section 3(c) of this Order, designed to provide trained crafstmen in the specified trades."

LABOR RELATIONS EXPEDITOR 2544(1) (1969).

3. The trades are iron workers, plumbers and pipe fitters, steamfitters, sheet metal workers, electrical workers, and elevator construction workers.
4. 42 U.S.C. 2000a (1964).
5. Contractors Ass'n v. Secretary of Labor. 311 F.Supp. 1002, 1005 (E.D. Pa. 1970).
6. Labor-Management Relations Act, 29 U.S.C. § 158 (1965).
7. 311 F.Supp. at 1011.

to fix conditions upon those with whom it deals.[8] As a basis for this assertion, the Court cites *Perkins v. Lukens Steel Co.*[9] In *Perkins*, the question was whether the Government had the right[10] to proscribe minimum wages to be paid by contractors on Government projects. The Supreme Court confirmed this right. The Court in the instant case summarily equated the right to require minimum wages with the right to require the contractors to make a good faith effort to secure adequate minority group employment.[11] It may be shown, however, that this "right" which requires the contractor to make a determination of what the somewhat ambiguous term "good faith effort" means leads to serious problems and conflicts with the labor laws.[12]

To illustrate this problem, consider how the initial steps a contractor would take, once he is awarded a contract, are changed by the Plan. Prior to the Plan, he would contact the appropriate union and request that they supply the necessary craftsmen—this is only logical since there is no other source of experienced help. Now, under the Plan,[13] the contractor has to do much more than merely contact the union. He has to furnish names of qualified minority group members to the union, notify local community organizations of employment opportunities, and probably use some effort to see that the union actually supplies minority group members on his job. This last step is not called for in the Plan, but it is obvious that to come close to his goals[14] he has to see to it that the people he recruited do not go towards meeting another contractors goals. It is this step which creates problems with the labor laws.

To better understand the employer—employee relationship problem, it is best to consider the existing situation. Under existing Pennsylvania law,[15] it is legal for an employer to agree that only members of a particular union will be employed on his jobs. It can be assumed that the unions will demand such an agreement. The contractor, of course, will enter into such an agreement merely to keep himself in business—at the present time the only sizable number of skilled workers available are members of the union. It is easy to understand, then, why a contractor has to deal with the unions. Now, however, under the Plan, the contractor has to use good faith efforts

8. *Id.* at 1009.
9. Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).
10. The Walsh-Healey Act, 41 U.S.C. § 35 (1964) provides: [A]ll persons employed by the contractor [shall be paid] not less than the minimum wages [proscribed by the Secretary of Labor].
11. 311 F.Supp. at 1009, 1010.
12. See notes 18 and 19 *infra*.
13. *Supra* note 2.
14. These minority group employment goals are: first year—4 to 9 percent; second year—9 to 15 percent; third year—14 to 20 percent; fourth year—19 to 26 percent. 311 F.Supp. at 1005.
15. NLRB v. Television Employees Local 804, 315 F.2d 398, 401 (3d Cir. 1963).

to induce the unions to let in minority group members. This is where the problems with the labor laws come in.

Under existing federal law, the contractor is prohibited from interfering with his employees rights to self-organization and from dominating or interfering with the administration of their organization.[16] Under the Plan, we have to assume that urging the unions to admit minority group members does not exceed the limits of this law. Even if this assumption is correct, the union will very likely challenge the contractor's action and involve the contractor in litigation which even if it is not successful will impede the contractor's work and create hard feelings between the parties.

If we assume that the union will not accuse the contractor of unfair labor practices, we still have the question of what good will urging the union to admit minority group members accomplish. Probably it will only serve to antagonize the union. This result would seem to be most probable, due to the fact that there has been, in the past, emphasis and urging upon unions and the net result is that of the six crafts concerned in the Philadelphia area the highest percentage of minority group membership is 1.4 per cent.[17]

Since urging the union to admit minority group members would apparently have little effect and would probably result in unfair labor charges, other possible alternatives should be considered. For example, one other possible means of complying with the Plan would be to urge minority group members, through their community organizations, to undertake training programs to acquire the skills required (the contractor could also provide training programs on his own). Then, when a number of potential employees have acquired the necessary skills, the contractor could encourage them to attempt to join the existing union, encourage them to form their own union or hire them without their achieving union membership. This alternative does not appear to be very feasible either.

For example, encouraging the formation of a union is probably illegal.[18] Also, encouraging the joining of an existing union may be illegal.[19] The hiring of non-union workers would not be illegal[20] in

16. Labor-Management Relations Act, 29 U.S.C. § 158 (1965).
17. 311 F.Supp. at 1009.
18. Subsection (a) of 29 U.S.C. § 158 (1964) reads: "It shall be an unfair labor practice for an employer—(2) to dominate or interfere with the *formation* or administration of any labor organization . . ." (emphasis added). Although this subsection has usually been invoked in cases where the employer gives support to one or two or more unions seeking the right to bargain collectively for all the employees, there is nothing in the statute to indicate that it couldn't be invoked here. 29 U.S.C.A. § 158, n. 126 (1965). The existing unions would merely allege that they are the current bargaining union and that the employer is trying to organize a competing union. The contractor seemingly has no alternative—if he does nothing he may possibly forfeit his contract and if he takes positive action he may face an unfair labor charge.
19. Subsection (a) of 29 U.S.C. § 158 reads: "It shall be an unfair labor practice for an employer—(1) to interfere with . . . employees in the exercise of the rights guaranteed in section 157 of this title." Section 157 guarantees to employees the right to join or refrain from joining a union. The only exception to such interference is that the employer may make an agreement with a union that he will employ only members of that union.

itself but considering that the contractor probably has a union shop agreement with the existing union this would also create problems. The problem would be not only that the contractor is violating his agreement, with whatever legal sanctions may be involved, but also that the contractor would be precluding whatever possible assistance he would need from the union to complete his work force; it is highly unlikely that the union would agree to furnish only part of his work force and it is also highly unlikely that enough minority group members would qualify to meet his complete work force requirement.

Aside from the labor relations problems, the decision of the Court still leaves the contractor in a precarious situation, since he may avoid unfair labor charges and then find he has fallen short of a good faith effort. The Court states that since only a good faith effort is required it is not placing too severe a burden on the contractor.[21] The Court does not correlate this statement with the fact that specific goals[22] are set up as to the percentage of minority group members which should be employed in the crafts. It seems reasonable to infer that the Government would measure good faith with respect to the goals which have been established. If this is true the contractor could expend a great deal of good faith and still have the Government determine that he has fallen short of the good faith requirement because of the goal discrepancy.

In any event, once the Government decides that the contractor has not met his good faith requirement, he would have to resort to litigation to determine his actual status. As an example of the difficulties he will face in his hearing, "it is 'no excuse' that the union with which he has a collective bargaining agreement fails to refer minority employees."[23]

The problems involved in the Plan are pointed out in an analogous case which is pending in the Kansas City Area.[24] In that case the Builders' Association is suing the Bricklayers Union for $500,000. The Association alleges that racial discrimination by the Union caused the failure of a job training program financed by the Federal Gov-

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Such agreements are legal in Pennsylvania (see note 15 *supra*). Although this exception allows a contractor to interfere in as far as he can agree to hire only union members, it probably cannot be read so as to allow the contractor to actively encourage non-union members to join the union. There is a possibility that this action by the contractor may not be an unfair labor practice since the statute specifically refers to interfering with *employees*. Technically the minority group members are not employees, however, it is possible that a court hearing such an argument would equate employees with prospective employees. Even if such activities are determined to not be unfair labor practices, it would seem that such status could have been clarified in the Philadelphia Plan before a need for such a determination arose.

20. Indeed, this action may be an unfair labor practice also in that it may discriminate in discouraging union membership. 29 U.S.C. § 158(a)(3) (1964).

21. 311 F.Supp. at 1010.

22. These minority group employment goals are: first year—4 to 9 percent; second year—9 to 15 percent; third year—14 to 20 percent; fourth year—19 to 26 percent. 311 F.Supp. at 1005.

23. 311 F.Supp. at 1006.

24. Kansas City Star, Sept. 20, 1970, at 3A, col. 3.

ernment. To add to the problem, the Union has countersuited for $1,000,000. It is easy to imagine similar suits in the Philadelphia area if one of the contractors loses a Government contract because he has not met his good faith obligation. Any suit such as this must create friction between management and labor and especially so in a situation such as exists in Kansas City where a construction industry strike has already lasted more than five months.[25] It would seem that the Government could promote racial equality by other means which would be less conducive to labor-management strife.

One such method which would promote racial equality and which should not promote labor-management strife is indicated by the case of *United States v. Sheet Metal Wkrs. Int. Ass'n., Local* 36.[26] That case seems to recognize that it is better to direct racial equality efforts against the unions rather than the contractors. In *Sheet Metal Wkrs.*, the Court of Appeals for the Eighth Circuit ordered the union to undertake a public information program to show Negroes that they now have equal opportunities for union membership.[27] That action was undertaken by the United States Attorney General for the benefit of local minority groups. There is nothing in the digests[28] to indicate that any such action has been undertaken in the Philadelphia area. It is hard to understand how the Court in the instant case can say that the Philadelphia Plan is not arbitrary and capricious when there is a much more reasonable and efficacious method available as indicated by the *Sheet Metal Wkrs.* case.

It is not contested that the Government has the right and the duty to see that minority groups are properly represented in contracts involving federal money. It should be proper, however, to contest the methods which they have chosen to carry this out. It is suggested that applying pressure on the contractors rather than the unions is merely giving lip service to the intended goal.

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CRIMINAL LAW—SALE OF MARIJUANA—LIABILITY OF AGENTS—Appellant was arrested and tried for the sale of marijuana to Gregory Waxler, whom appellant claimed was his partner in the purchase of the marijuana.[1] On the evidence presented by Waxler, the

25. Kansas City Star, Sept. 9, 1970, at 2A, col. 3.
26. United States v. Sheet Metal Wkrs. Local 36, 416 F.2d 123 (8th Cir. 1969).
27. *Id.* at 140.
28. 5 WEST DECENNIAL DIGEST *Civil Rights* §§ 2-3 (7th ed. and 1967-1970 Supp.).

1. A reading of the trial transcript seems to sustain appellant's contention that Waxler was his partner.

[cross-examination of Gregory Waxler by Mr. Murphy]