3/17/75

James C

I have read this & obviously some decisions have to be made.

Seems to me this is something John Dunlop to review + make recommendations since he will be implementing in the future.

Talk with me about time & procedure for making decisions.

THE WHITE HOUSE

WASHINGTON

INFORMATION

March 10, 1975

MEMORANDUM FOR: THE PRESIDENT

FROM: JAMES CANNON

SUBJECT: Attached Memoranda on Equal Employment Opportunity in Institutions of Higher Education

There is a problem with the Department of Labor regulations implementing the civil rights laws and the Executive Order on civil rights which were developed primarily for industrial contractors. Application of these regulations to colleges and universities has caused considerable difficulty. You may recall this issue being raised with you in several recent meetings on higher education.

The attached memos and supporting documents from Secretary Weinberger have also been sent to Secretary-Designate Dunlop for his review. Secretary Weinberger hopes to meet in the near future with John Dunlop to work out an appropriate and mutually acceptable course of action.

We are following the development of this inter-agency matter and may need to send you a decision paper subsequent to the Secretary's meeting.

Attachments

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE
WASHINGTON, D. C. 20201

MAR 4 1975

SUMMARY MEMORANDUM FOR THE PRESIDENT

FROM: CASPAR W. WEINBERGER

SUBJECT: ATTACHED MEMORANDUM ON EQUAL EMPLOYMENT OPPORTUNITY IN INSTITUTIONS OF HIGHER EDUCATION

The basic problem here is that the regulations implementing the civil rights laws and the Executive Order on civil rights as administered by the Department of Labor are primarily designed for industrial contractors, and attempts to apply this approach to colleges and universities have caused great and unnecessary difficulties.

The memorandum discusses the "quotas-goals" problem. Many purport to oppose quotas but demand that "goals" be set and then met. I have great difficulty in distinguishing between the two. I believe the most helpful and best way to remove discrimination is to require a broader and comprehensive recruiting process but not to require either goals that must be met--or quotas.

I believe there should be substantial changes in our civil rights approach to colleges, and perhaps in Executive Order 11246 (the basic administrative charter) itself. Otherwise, I fear we will continue to impose unnecessary and basically ineffective and terribly burdensome requirements on our universities.

This problem and some proposed options are discussed generally in the unavoidably lengthy attachments.

I had hoped, and still hope, to be able to discuss and perhaps secure some agreement on these matters with Secretary Brennan. If we cannot conclude by the time of his scheduled departure, I will begin the same talk with John Dunlop and then report fully to you, I hope by the end of March.

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE
WASHINGTON, D. C. 20201

MAR 4 1975

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Recommended Changes in Current Department of Labor Regulations Pertaining to Equal Employment Opportunity Responsibilities of Institutions of Higher Education

Introduction

By memorandum dated October 11, 1974 (attached at Tab A), I provided you with my assessment of recent studies critical of the affirmative action employment program for higher education institutions administered by this Department under the rules and regulations promulgated by the Secretary of Labor pursuant to Executive Order 11246, as amended. On page 5 of that memorandum, I stated that the recommendations for improvement of the current program set forth in both reports (summarized on page 4 of the October 11 memorandum) contained considerable merit and indicated that positive action to implement two of the recommendations--the assignment of all Executive Order responsibilities for higher education institutions to DHEW, and the issuance of new regulations to streamline current substantive and procedural requirements--would require close coordination with, and the cooperation of the Department of Labor.

Since the date of that memorandum, we have pursued these concerns with the Department of Labor in staff level discussions. However, because of the filing of a lawsuit last month (WEAL v. Weinberger) alleging, among other things, a failure by this Department to follow with respect to higher education institutions the letter of current Department of Labor regulations setting forth both substantive and procedural requirements for the development of affirmative action compliance plans, I have determined that a speedier resolution of our current differences is mandated. In the view of the General Counsel of this Department, if changes to the regulations

are not made within the next 90-120 days, a real possibility exists that the United States District Court may enter an order, in effect, freezing the current requirements and ordering a strict adherence by this Department to such regulations. Accordingly, on February 26 I sent a letter to the Secretary of Labor (attached at Tab B) outlining those specific changes which I believe should be made as quickly as possible in the current Department of Labor regulations.

Recommended Changes

With respect to the substantive (content) requirements of Affirmative Action Compliance Programs applied to the academic employment (i.e., employment of persons whose primary responsibilities are teaching and/or research) practices of higher education, I have recommended that a substantial number of time-consuming and costly self-analysis requirements be deleted as conditions precedent to Affirmative Action Compliance Program approval. Current affirmative action regulations require the development of extensive statistical profiles of virtually all aspects of the employment process (including the total selection process; transfer and promotion procedures; training programs) and in-depth analyses with respect to any portion of that process where an adverse impact occurs with respect to minority or female employees. Our practical experience has been that these analytic requirements are inconsistent with the fact that the roles and criteria of academic positions are complex and varied (usually intertwining teaching, scholarship, and community service) and the great emphasis on peer group evaluation and selection and faculty self-governance. These requirements are the major contributor to the protracted delays in Affirmative Action Compliance Programs and have been a major source of adverse reaction by colleges and universities to the current program. Under the present regulatory structure, a large university could be required to conduct anywhere from fifteen hundred to two thousand (1500-2000) separate

analyses. In my judgment, the only currently mandated requirement which should be continued is the utilization analysis (comparison of the percentage of minorities and women in the current work force and the percentage of minorities and women in the pool of persons "available" for employment) and this should be restricted to those academic positions which are normally recruited from outside of the institution (as distinguished from tenured faculty positions normally filled by promotion). I believe that the objectives supported by the balance of the current analytic requirements could be pursued effectively on a case-by-case basis, as part of the non-discrimination program rather than as a condition precedent to Affirmative Action Compliance Program development. I also believe that the regulations should be changed to require the development of affirmative action efforts on the supply side of the academic employment market. In this area, the unique credentialling role of the university contractor (i.e., determining who gains entry to the available pool of persons for employment) could be developed through special recruitment and supportive service programs, to make a valuable contribution to the current dramatic underrepresentation of minorities in virtually all academic "availability" pools. These new efforts should create a renewed interest in the affirmative action program by minority persons, most of whom quite accurately regard the current academic employment program as exclusively focused on women. A balancing of potential program impact in this regard would, in my judgment, substantially strengthen the current program.

On the procedural side, our problems with the current regulations lie primarily with the timeframes required and, despite the willingness of an institution to comply, the inflexibility of enforcement procedures.

The major procedural changes I have proposed would permit colleges and universities a six-month period to develop plans consistent with new substantive requirements, require

the submission of such plans on a fixed date (rather than the current ad hoc approach) and permit a period of dialogue and voluntary negotiation after submission without being forced to immediate enforcement action.

I have also proposed that current complaint investigation timeframes be expanded because of the administrative impossibility of compliance and have recommended that, because of the complexity of job criteria and promotion/tenure decisions in the academic employment setting, an exemption provision be added to the current industry-oriented regulations regarding the formal validation (content or construct measures) of testing and selection procedures (i.e., those criteria or factors used to compare qualifications) to permit, upon the approval of this Department, the use by colleges and universities of an alternate set of non-discriminatory standards more appropriate to the academic employment context.

The letter concludes by proposing a meeting at the earliest possible time to discuss both the merits of our recommended changes and the mechanisms for accomplishing such changes (either direct amendment of current regulations or exemption of higher education institutions from current regulations and delegated authority to issue, or specific approval of, new DHEW regulations).

There are two options in addition to the approach described above (and set forth in my letter to Secretary Brennan) which I believe merit serious consideration. The first would involve Presidential action to amend Section 202 of Executive Order 11246 (with a corresponding change by the Secretary of Labor in 41 CFR 60-1.40) to relieve non-industrial contractors (including higher education institutions, hospitals, and public agencies) from all current affirmative action obligations imposed by the Order. This would leave the non-discrimination requirement of the Order in place with respect to all

Federal contractors but limit the affirmative action obligations only to the industrial setting where current requirements are clearly more workable and significantly less intrusive.

The second option, which would only require action by the Secretary of Labor, would be to eliminate the currently required establishment of numerical goals and timetables altogether in the case of higher education contractors. This approach would eliminate even the entry-level aggregated goals and timetables proposed in my letter to Secretary Brennan. In the place of numerical goals and timetables for entry level positions would be a requirement for a narrative description of the affirmative steps to be taken (and internal monitoring procedures to be instituted) to improve any under-utilization identified by entry-level utilization analyses. I believe this change would effectively remove the current confusion surrounding the goal-quota question.

As you can imagine, either of these two options would be viewed by many civil rights leaders as a retreat.

As I indicated above, I believe prompt action in this area is urgently needed. If we do not act before the District Court decides the WEAL case, both DHEW and Labor may be under an injunction and any subsequent regulations may (as in some other cases involving DHEW) be subject to court review before adoption. I hope to be in a position to report on the results of this meeting by mid-March.

Secretary

Attachments

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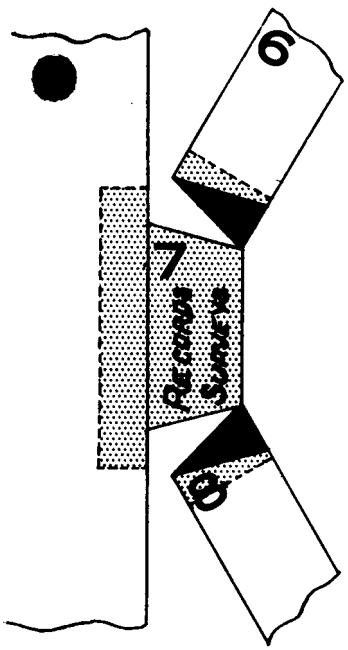

TABBED SEPARATOR SHEET
Form HEW-69D
(3-56)

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE
WASHINGTON, D. C. 20201

OCT 11 1974

MEMORANDUM FOR THE PRESIDENT

SUBJECT: An Assessment of the Current Effectiveness of Equal Employment Opportunity Programs as Applied to Institutions of Higher Education

By memorandum of September 5, Jim Cavanaugh requested on your behalf my assessment of recent studies critical of the affirmative action employment programs administered by the Department of Health, Education, and Welfare (DHEW) in the area of higher education.

Introduction

The equal employment opportunity programs currently being administered by DHEW which affect institutions of higher education are of two basic types: affirmative action requirements and employment discrimination prohibitions. Executive Order 11246, which has been the focus of most higher education criticism, contains both affirmative action requirements and employment discrimination prohibitions. Under E.O. 11246 all higher education institutions receiving Federal contracts (approximately 1,100 of the Nation's 3,500 colleges and universities) are prohibited from discriminating in employment on the basis of race, color, national origin, religion or sex, and are required to take affirmative action to ensure that employees are hired and treated without regard to the above factors.

Simply stated, adherence to the affirmative action obligation requires a recipient of a Federal contract to compare the number of women and minorities in its work force with the availability of qualified women and minorities in the general population. If the contractor finds that women and minorities are underrepresented in its work force, the contractor must establish hiring goals and timetables and must make "good faith efforts" to overcome such "underutilization."

E.O. 11246 is administered by the Secretary of Labor who has delegated routine program administration in the area of higher education to DHEW. The Secretary of Labor, however, has retained policy-making authority under the Executive Order; thus, DHEW administers the Executive Order program at colleges and universities under policies and regulations which are promulgated by the Secretary of Labor and which apply to all Federal contractors regardless of whether they are academic institutions or industrial organizations.

In addition to E.O. 11246, DHEW has statutory responsibioity for both program administration and policy determination under a number of other Federal anti-discrimination laws relating to race, color, national origin and sex. (A more detailed discussion of the Executive Order and statutory responsibilities of DHEW is appended at Tab A.)

Summary of Recent Studies

Dr. Richard Lester, Professor of Economics (formerly Dean of the faculty), Princeton University, has prepared a report recently published by the Carnegie Commission under the title of Anti-Bias Regulations of Universities, which (1) evaluates the current administration of both employment discrimination prohibitions and affirmative action requirements by the Departments of Labor and Health, Education, and Welfare; (2) discusses problems endemic to a proper evaluation of the availability of both minorities and women for academic (as distinguished from non-academic staff) employees of universities; and (3) recommends specific changes in the current enforcement program designed to improve its effectiveness and eliminate unnecessary and undesirable side effects on higher education institutions.

A completely separate study by Professor Jan Vetter (Professor of Law, University of California, Berkeley) for the Administrative Conference of the United States entitled Affirmative Action in Faculty Employment under Executive Order 11246, also contains both an evaluation of the current administration of the equal employment opportunity programs with respect to institutions of higher education and a series of recommended changes in the current enforcement program.

A study of the administration of the Executive Order program has also recently been concluded by the General Accounting Office. Although this Department has not yet formally received a copy of this study (scheduled for release in January 1975) staff of the Department have discussed the general conclusions of the study with officials of GAO and have found them to be generally consistent with the evaluation made by Messrs. Lester and Vetter.

These studies identify the following basic problems with respect to the administration of affirmative action requirements and employment discrimination prohibitions:

(1) The current Department of Labor Regulations governing the content of and procedures to be followed in developing an Affirmative Action Program under Executive Order 11246 are based on an industrial employment model wholly inappropriate to a University setting and potentially destructive of important aspects of University life.

Both reports stress the difficulty of applying the current regulations to employment decisions in academic areas pointing out that any real enforcement of these provisions would require a firm, administrable conception of job criteria and performance which is wholly inconsistent with the fact that the roles and criteria of academic positions in universities

are complex, varied and vague, often involving intertwined considerations of teaching ability, scholarship and community service in a process which places great emphasis on peer group evaluation and selection. In order to determine underutilization in all but entry level positions both argue under current DOL regulations that universities can only establish availability of persons for employment by first establishing selection criteria which could be uniformly applied and which could be validated as "non-discriminatory." This would, in turn, encourage universities to subdivide the traditional multi-faceted role of faculty (research and teaching) and strengthen central university administration (thus destroying important aspects of faculty self-governance). Both conclude because of this complexity that the use of numerical goals and timetables in all but entry level academic positions is unworkable. Both studies also express concern that the current regulations with their heavy emphasis on numerical goals and timetables and their industrial employment approach to selection criteria strongly encourage the lowering of academic employment standards and/or actual reverse discrimination in the academic employment process.

(2) The separation of policy-making and administrative responsibilities between DHEW and DOL under the Executive Order creates confusion and inconsistent administration of policies with respect to affirmative action requirements and employment discrimination prohibitions.

Both reports point out that the organizational confusion with respect to the affirmative action requirements is compounded with respect to employment discrimination enforcement by the fact that statutory provisions virtually duplicate in substance, and completely duplicate in institutional coverage, Executive Order provisions but such statutory provisions vest all policy-making authority in the Secretary of HEW. Thus, HEW compliance staff could be required to follow conflicting employment discrimination standards with respect to the same university and the same alleged discriminatory action depending on whether they were investigating a complaint pursuant to the Executive Order (thus, under policies established by DOL) or Title IX of the Education Amendments of 1972 (thus, under the policies established by DHEW). Both point out that this ironic situation could be further escalated by a "double jeopardy" of sorts where staff of DHEW could find a proprosal by a University to remedy discrimination identified under one source of authority to be acceptable, but be instructed to reject that same remedy under another source of authority purported to prohibit the same type of discrimination.

(3) The current multiplicity of regulations covering both affirmative action requirements and employment discrimination prohibitions creates unnecessary confusion.

(4) The current decentralized management of the higher education program in DHEW's Office for Civil Rights (among the 10 regional offices) has resulted in major inconsistencies among the OCR regional offices in terms of (a) the Affirmative Action Program requirements imposed by staff on universities, and (b) what constitutes a proper employment discrimination investigation and appropriate remedies.

(5) The Office for Civil Rights staff lack sufficient familiarity with universities and university employment practices to intelligently apply the current DOL affirmative action regulations to the university community and to properly investigate and assess potential employment discrimination; DOL staff has a substantially greater lack of familiarity.

(6) Dr. Lester views the lack of a systematic and periodic collection of basic employment data by DHEW from colleges and universities to have materially contributed to the generally unreliable state of availability data for academic positions.

(7) Professor Vetter believes that the severity of the sanctions currently available to both Departments under the Executive Order (i.e., suspension of all new contracts; and debarment) has contributed in great part to a reluctance by DHEW to enforce the letter of many Executive Order affirmative action requirements.

Summary of Recommended Changes Proposed by the Studies

(1) Assign all Executive Order responsibilities for affirmative action and employment discrimination enforcement with respect to institutions of higher education to the Department of Health, Education, and Welfare.

(2) Issue a new regulation tailored to the realities of the employment situation of higher education institutions articulating uniform standards (under the various sources of legal authority) for both affirmative action and employment discrimination enforcement programs. These regulations should revise time frames; streamline and simplify data collection and analysis requirements; clearly prohibit reverse discrimination and/or lowering of academic standards; provide for graduated sanctions; and shift the emphasis from affirmative action to employment discrimination approaches to utilization and treatment of academic staff after initial employment.

(3) Design and implement a periodic and systematic data collection, analysis, and reporting system covering the basic characteristics of academic staff and degree candidates.

(4) Recentralize the management of the higher education program within the Office for Civil Rights and develop aggressive programs through training, hiring, and consultative assistance strategies to increase the familiarity of OCR with universities and the university employment system.

DHEW Reaction to Recommended Changes

This Department believes the recommendations made by the Lester and Vetter reports contain considerable merit. Indeed, even prior to issuance of the reports, DHEW had taken certain internal steps to address each of the areas of concern. It should be noted, however, that while DHEW is in a position to address the recommendations contained in (3) and (4) above on its own initiative, addressing the recommendations listed in (1) and (2) above will require close coordination with, and the cooperation of, the Department of Labor. We intend to pursue these matters with DOL during the next several months. I would expect to be in a position to give you a report on our discussions with DOL by December 1.

Secretary

cc: Honorable James H. Cavanaugh

B

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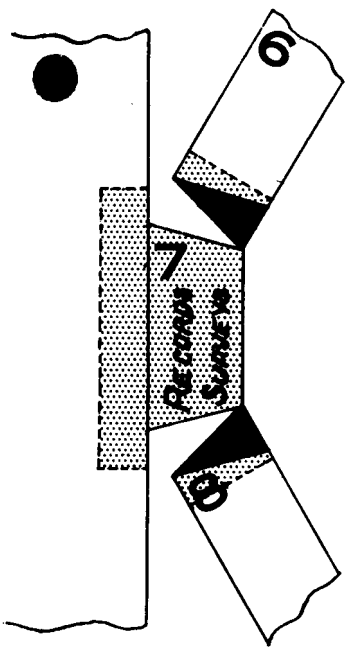

TABBED SEPARATOR SHEET
Form HEW-69D
(3-56)

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE
WASHINGTON, D. C. 20201

February 26, 1975

Honorable Peter J. Brennan
Secretary of Labor
Washington, D. C. 20210

Dear Secretary Brennan:

In recent months I have focused an increasing amount of attention on the administrative problems faced by this Department in carrying out the enforcement responsibilities delegated by the Department of Labor pursuant to Executive Order 11246.

Two important studies by persons in the private sector (supported by the Carnegie Commission and the Administrative Conference of the United States), a report prepared by the General Accounting Office and a complaint filed recently in the case of WEAL v. Weinberger have all raised serious concerns about the current administration of Executive Order 11246 requirements with regard to the academic employment practices of higher education contractors.

While several of the specific allegations raised in one or more of these documents suggest specific management decisions which can be made by the Secretary of this Department on his own initiative and at his own discretion to improve the current enforcement effort in this area, many other allegations, including those I believe to be most supportable, address fundamental decisions with regard to the substantive content and procedural requirements of the affirmative action obligations currently detailed by Revised Order No. 4 (41 CFR 60-2) which can only be made by the Secretary of Labor. I have already taken several internal steps to improve the efficiency of our operations and have, after careful review and extended discussion, concluded that several changes in these regulations should be made in order to strengthen the Executive Order program. I believe that the current position of both of our departments as co-defendants in the WEAL case requires that we move expeditiously to redefine both substantive and procedural requirements for the E.O. 11246 Affirmative Action Program which are likely to be productive of the end goal--equal employment opportunity--and workable in the context of the academic employment setting. In other words, I feel that we should, as quickly as possible, modify existing requirements in a way which would permit this Department to adhere strictly to published regulations while permitting colleges and universities a fair opportunity to develop and implement Affirmative Action Compliance Programs without the spectre of a massive and mechanistic enforcement effort unconcerned about the potential for voluntary resolution of compliance problems.

Let me first address the procedural requirements of current DOL regulations pertaining to affirmative action (as distinguished from non-discrimination) obligations of Federal contractors.

With respect to procedural requirements imposed by the current Department of Labor regulations (primarily by Revised Order No. 4 - 41 CFR 60-2 and Revised Order No. 14 - 41 CFR 60-60) on the development and review of Affirmative Action Compliance Programs, I am advised by the General Counsel of this Department that DHEW has no discretion to modify these requirements based on our experience and judgment as to their feasibility or desirability in the academic employment context, and despite the fact that these requirements impose unworkable time frames on the particularly complex process of Affirmative Action Compliance Plan development faced by higher education institutions.

I believe the fact that college and university contractors are not now routinely required to submit an Affirmative Action Compliance Program for review and approval has unnecessarily contributed to the current confusion in this area. The approach taken by the current regulations--triggered as it is by pre-award clearance requests and routine compliance checks on a sample basis--has failed to provide the necessary incentive to most institutions who view the current hit-and-miss approach as either unfair or avoidable, or both.

I believe the current regulations should be revised to require all higher education contractors to submit (not simply develop and keep on file awaiting a request) an Affirmative Action Compliance Program to this Department for review and approval by a specified date.

It has been our experience that the development of an acceptable Affirmative Action Compliance Plan is a time-consuming process (particularly with respect to those portions addressed to the academic employment process) which requires a close working relationship between the contractor and this Department both from the standpoint of technical assistance and frequent evaluation of progress. Pursuant to current Department of Labor regulations, this time-consuming interactive process is foreclosed by several requirements. The majority of higher education contractors (i.e., all contractors as of October, 1972) are required to have completed already the development of an acceptable plan (i.e., by March, 1973) and, if not previously required, are required to develop and submit such an acceptable plan within one hundred twenty (120) days of the commencement of their initial contract. With respect to contractors who have already received contracts, there is little latitude for current cooperative development toward perfecting a deficient Affirmative Action Compliance Program. With respect to future contractors, the time frame does not permit a successful effort in this regard. If the purposes of the Executive Order are affirmative and corrective rather than punitive, I do not believe that any procedural requirements should require punishment of a contractor who, although previously unwilling or unable to comply, is willing,

at that point in time, to do everything required by the Order as expeditiously as possible.

Current Department of Labor regulations provide little or no latitude in the imposition of sanctions upon a finding of current non-compliance regardless of the current willingness of the contractor to eliminate all deficiencies within a reasonable period of time. Current requirements of 41 CFR 60-2.2(c) require the dispatch of a show cause letter immediately upon a finding that a contractor has an unacceptable Affirmative Action Compliance Program regardless of the prospects of resolving the deficiencies through negotiation or conciliation. That provision further requires that if the contractor fails to show good cause or remedy all deficiencies within a thirty (30) day period, the compliance agency (with DOL approval) must issue a notice of proposed cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts. Department of Labor officials have indicated that they do not regard the need for time-consuming cooperative development (discussed above) as "good cause" within the meaning of that provision and, in any event, could only contemplate the possibility of a single thirty (30) day extension if substantial progress is made. Once again, if on the thirtieth day of the show cause period the contractor has not complied but is willing to comply as quickly as possible, current regulations force the process toward the imposition of severe sanctions. Even though 41 CFR 60-1.26(a) permits the use of informal hearings (without the immediate spectre of mandatory sanctions) and post-hearing conciliation and negotiation, if appropriate, before the commencement of formal proceedings, 41 CFR 60-2.2(c) prohibits the use of informal hearings to address Affirmative Action Compliance Program deficiencies and requires the use of formal proceedings--41 CFR 60-1.26(b). This is indeed a bizarre situation when one realizes that informal hearings are available as a procedure for employment discrimination cases but not for instances of Affirmative Action Compliance Program deficiency.

We have on previous occasions discussed the use of Conciliation Agreements (prescribing a reasonable time frame during which a contractor will correct deficiencies in an Affirmative Action Compliance Program) to permit negotiated settlement, but current Department of Labor regulations are unclear as to the status and general requirements of such an agreement. In any event, in my judgment, a change in the current inflexible procedures is much more desirable than an occasional ad hoc resort to the Conciliation Agreement approach.

A second major area of concern with current Department of Labor procedural requirements relates to the time frames imposed on this agency, pursuant to 41 CFR 60-60, with regard to the evaluation and final acceptance or rejection of Affirmative Action Compliance Programs submitted for review. The sixty (60) day period currently in effect is simply not sufficient in light of current staff resources, the number of plans to be concurrently evaluated, the complexity of the academic employment process, the excessive detail of current substantive requirements (41 CFR 60-2), and the need for clarification and evaluation through discussion.

Before making recommendations as to specific changes in procedural requirements related to the affirmative action obligations of higher education institution-contractors, I think it is important to note that, in stark contrast to current Executive Order procedures, Congress has insisted that in the enforcement of the non-discrimination requirements of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 regardless of past failures, every effort be made to achieve compliance through negotiation and agreement on a plan of current and future action before commencement of formal enforcement proceedings. In summary, I believe that to strengthen the enforcement of the Affirmative Action Compliance Program as it applies to higher education institutions the following changes should be made to the procedural requirements of Revised Order No. 14:

1. Instead of the current ad hoc procedure for requesting the submission of Affirmative Action Compliance Programs, all contractors should be given a period of one hundred eighty (180) days from the date of change in the applicable regulation to develop and submit an Affirmative Action Compliance Program for review by this Department. If no such program is submitted by a contractor on or before such date, a show cause letter must be issued consistent with present requirements.

2. In order to provide an incentive for negotiation and voluntary compliance, during any "show cause" period, the regulations should be changed to permit an extension of the show cause period, at the discretion of the compliance agency, if substantial progress is demonstrated by the contractor in developing a submission. If no submission is forthcoming during the show cause period, then consistent with present requirements, a notice of proposed cancellation of existing contracts or subcontracts and debarment from future contracts and subcontracts (hereafter referred to as a "Notice of Proposed Debarment") would be issued and a formal hearing convened pursuant to 41 CFR 60-1.26(b).

3. Upon the submission of a proposed program by a contractor, the current sixty (60) day evaluation requirements of Revised Order No. 14 should be altered to the more realistic position that the compliance agency shall analyze the submission as quickly as staff resources permit.

4. If on the basis of the analysis by the compliance agency described in (3) above, the compliance agency determines that the initial submission is deficient, then instead of the immediate issuance of a show cause letter as presently required by Revised Order No. 4, the contractor shall be given written notice of the specific deficiencies and a revised submission will be requested within sixty (60) days of the notice of deficiency. This period may be

extended by the compliance agency if it concludes that technical assistance needs require or that the contractor has acted expeditiously in good faith to complete the revision but has been unable to do so within the sixty (60) day period.

5. If a revised submission is not made within sixty (60) days (or an agreed upon period in excess of sixty (60) days), a Notice of Proposed Debarment (there being no purpose at this point in time to the issuance of a "show cause" letter) will be issued.

6. Upon receiving the revised submission, the compliance agency shall analyze the revision to determine its final acceptability. If the revised submission is determined to be unacceptable, at the discretion of the compliance agency, either a Notice of Proposed Debarment will be issued forthwith (again, there being no purpose served by a "show cause" letter) or an informal hearing may be first convened pursuant to 41 CFR 60-1.26(a) and such notice issued in the event of a favorable determination (41 CFR 60-2.2(c) presently precludes the use of an informal hearing in this regard.)

7. As is presently required, all contractors shall prepare and submit annual reports on the progress made under the Affirmative Action Compliance Program and shall triannually (rather than annually, as is presently required) revise the utilization analyses and aggregated goals and timetables contained therein on the basis of updated information.

8. No sanctions shall be imposed on any contractor for failure to submit an acceptable Affirmative Action Compliance Program until a decision of non-compliance has been reached pursuant to a formal hearing (41 CFR 1.26(b)).

These recommended revisions are based upon this Department's assessment of the procedures which should be followed to enforce the revised substantive provisions discussed below. The enforcement of current substantive requirements (unchanged) with respect to academic employment matters would necessitate much longer periods of time than those recommended in (1) and (5) above.

While I believe, based on our own observation and experience, that most of the substantive requirements of current DOL regulations and policies are workable and productive in the non-academic employment setting, I have concluded that some of these provisions ignore important affirmative efforts which could be made by colleges and universities while others are simply unworkable and counterproductive in the area of academic employment. This dysfunction, in my view, occurs uniquely in the academic employment area of higher education institutions because of

several important and traditional aspects of university life. For example, the current regulations--with a total emphasis on the demand-side of the academic employment market--have placed the entire thrust of current affirmative action enforcement on the question of the proper distribution of those persons already in the available pool and ignores, to a great extent, the equally important issue of entry by minorities and women into the available pool. This skew is particularly serious from the standpoint of academic employment for minorities where current availability in many academic employment pools is often less than 1-2%. A supply-side emphasis would appear to be much more relevant to the interests of improved employment opportunities for minorities. This is particularly true because of the fact that colleges and universities for the most part control the access of persons to the academic employment pools from which they recruit. Because most academic employment positions require any "qualified" applicant possess at least an undergraduate degree (and, usually at least one or more graduate degrees) and because such degrees are exclusively granted by higher education institutions the possibility exists for a unique contribution by this type of contractor on the supply-side.

While avoiding the spectre of preferential admissions, this Department has successfully pursued this type of affirmative action approach as part of the remedy developed pursuant to Title VI (Civil Rights Act of 1964) enforcement efforts with regard to eight (8) previously segregated higher education systems. Focusing both on special recruitment efforts and supportive service programs to improve retention of currently enrolled students, the added requirement of affirmative action effort on the supply-side of the employment process could, in my judgment, substantially improve the overall success of the Executive Order program. This added focus could also dramatically improve the development of truly reliable data (in contrast to the "soft" data currently available) on the availability of minorities and women for various types of academic employment.

A second set of concerns with the interface of current DOL regulations (particularly those of Revised Order No. 4 - 41 CFR 60-2) and unique aspects of the academic employment context relates to the utilization analyses for all major job categories required by 41 CFR 60-2.11 and in-depth analyses of various employment practices (including the total selection process; transfer and promotion procedures; training programs) required by 41 CFR 60-2.23. While these requirements represent a laudable effort to mandate a detailed self-examination of the impact on minorities and women of both initial employment decisions and post-employment treatment, they are based on an employment model which assumes a firm, administrable conception of job criteria and performance which is wholly inconsistent (for all but initial employment) with the fact that the roles and criteria of academic positions in universities are complex, varied, and vague, often involving intertwined considerations of teaching ability, scholarship, and community service in an employment process which

places great emphasis on peer group evaluation and selection, and faculty self-governance. Apart from these policy considerations, our practical experience has been that these analyses (excluding the utilization analysis for entry level academic positions), if conducted in a manner consistent with the spirit of the current regulations, inevitably require lengthy periods of time to prepare and numerous negotiation sessions to attempt to perfect. The requirement of these analyses is without question the major contributor to the protracted delays in Affirmative Action Compliance Programs and, in retrospect, they rarely produce any real insight into the complex maze of factors which, for example, may effect a tenure decision. The difficulty of conducting the current analyses is exacerbated by the requirement of 41 CFR 60-2.13(d) that analyses be conducted at a level of detail sufficient to identify problem areas by organizational unit and job classification. This would, in effect, require a separate analysis for each job classification (e.g., Assistant Professor, Associate Professor, Full Professor, Lecturer, Teaching Assistant) within each academic department (ranging anywhere from 20-80 for most universities) for each employment practice analyzed. For example, at a large university, fifteen hundred (1500) separate analyses could well be required, even though no evidence of discrimination existed and no complaint had been made. After several unsuccessful requests to the OFCC requesting copies of model Affirmative Action Compliance Programs (from any contractor) which illustrate a proper way to conduct these in-depth analyses, we have concluded that a continued demand for these costly and time-consuming analyses is both unfair and counter-productive. Rather than contributing to true improvement in equal employment opportunity, I am convinced that a continued demand for this type of complex and expensive self-analysis (coupled with a requirement for non-entry level goals and timetables) is an unreasonable and burdensome requirement on college and university contractors which is unworkable and likely to encourage the lowering of academic employment standards or a resort to preferential treatment.

In my view, the objectives of the current "affirmative action" requirement for analyses other than the "utilization analysis" (e.g., promotion and transfer analysis; separation analysis) could be effectively pursued, on a case-by-case basis, as part of the non-discrimination enforcement program rather than as a condition precedent to the approval of any Affirmative Action Compliance Program. Routine reporting of basic employment data relating to applicant flow, selection, promotion, etc., (as distinguished from extensive self-analysis) along with the complaint process could provide the compliance agency with a sufficient base to target investigations of suspect institutions.

A third important obstacle to the successful implementation of Affirmative Action Compliance Programs is the current insistence on mandatory goals and timetables in all cases of underutilization, as reflected by a recent exchange of correspondence between Under Secretaries Schubert and

Carlucci. The Department of Labor regulations currently require numerical goals and timetables whenever any degree of underutilization exists, and, thus, would require a contractor to set a numerical hiring goal for a given academic organizational unit (e.g., academic department) even if the underutilization of minorities or women amounted to only one or two persons (41 CFR 60-2.13(c)). Moreover, such a goal would have to be set even where a university could demonstrate, on the basis of current turnover projections, that the goal would have to be established as 100% of all new hires for the next twenty to thirty years. In these circumstances, which would be frequent in the case of goals for academic employment, the potential for abuse--i.e., "goal" translated into "quota"--would appear to be very great.

On the basis of the foregoing discussion, I wish to recommend that current substantive requirements for the Affirmative Action Compliance Program as applied to the academic employment practices of higher education institution-contractors be revised to include a significant focus on potential supply-side contributions by the contractor. I am also convinced that the current requirements should be simplified to require in-depth analysis only to the extent of a utilization analysis with respect to all positions for which a substantial recruitment effort is made outside the current work force of the contractor (as distinguished from promotion). This utilization analysis would be conducted by organizational units but higher education institutions would be permitted to aggregate organizational units (on the basis of common administrative control or related discipline) for purposes of setting goals and establishing timetables. The regular reporting of basic data regarding all employment practices to facilitate the enforcement of non-discrimination requirements would replace the current requirements for all statistical and in-depth analyses (other than the utilization analysis) of 41 CFR 60-2.23 from the affirmative action obligations unless the compliance agency determined on the basis of available evidence of possible discrimination that a given analysis should be conducted as part of the Affirmative Action Compliance Program development.

The supply-side focus would be established by the requirement that the contractor examine, as an extension of the current utilization analysis components of 41 CFR 60-2.11, whether the percentage of minorities and women in either or both the graduate or undergraduate student population of the institution significantly exceeds the percentage of minorities and women in the various academic availability pools. If so, the contractor would be required to outline affirmative action efforts, underway or proposed, to contribute to the elimination of this disparity.

With these substantive changes accomplished, I believe that the balance of the current requirements can be effectively incorporated into a new Affirmative Action Program for higher education which is both workable and highly conducive to major progress in securing equal employment opportunity.

Let me reiterate that the concerns outlined above and these recommendations pertain only to academic employment matters. I see no reason why the current substantive requirements should not apply to the non-academic employment practices of higher education institutions.

It appears to me that there are several possible approaches to effectuating both the substantive and procedural changes recommended. One approach would be to amend the relevant provisions of 41 CFR 60-2 and 41 CFR 60-60 to create a different regulator scheme for the academic employment aspects of higher education contracts. This could be done by regulations issued by the Department of Labor or jointly with this Department. The other approach would be to amend 41 CFR 60-1.40 and 41 CFR 60-2 to delegate the authority to the Secretary of Health, Education, and Welfare to promulgate rules and regulations to secure the compliance of contractor higher educational institutions with the requirements of 41 CFR 60-1.40 and exempt such contractors from the general requirements of 41 CFR 60-2. Because of the prohibition outlined in Section 401 of the Executive Order, we are unsure as to the legal supportability of this option without amendment to the Executive Order, itself. A final option which might be considered would be the amendments to 41 CFR 60-1.40 and 41 CFR 60-2 outlined above and the issuance by this Department of regulations which would be specifically approved by the Department of Labor.

Before concluding, I feel it important to bring to your attention one matter relating to the non-discrimination requirements (as distinguished from affirmative action obligations) of the Executive Order which needs to be addressed.

The "Employee Testing and Other Selection Procedures," (41 CFR 60-3) currently require that the criteria used by higher education institutions for all academic employment decisions be validated if there is an adverse affect upon the opportunities of minority persons or women for hire, transfer, promotion, training or retention (41 CFR 60-3.3). To the extent that personal history, background, educational and work history are specifically used as a basis for qualifying applicants (e.g., Ph.D. requirement; publications) such validation at present may only be made pursuant to the minimum standards for validation set forth in 41 CFR 60-3.5 or by use of "other validating studies" pursuant to the provisions of 41 CFR 60-3.7.

The requirements of both sections involve the development or use of formal content or construct validity measures which are, in turn, predicated upon the assumption that relatively simple, clearcut job criteria and performance standards are possible. The complex and usually multifaceted roles of academic employees simply do not lend themselves to these types of validation procedures and even if the selection techniques were regarded as outside the extremely broad definition of test set forth in 41 CFR 60-3.2 the same approach to validation is mandated by 41 CFR 60-3.13.

In summary, I believe that the current requirements of this part are wholly inappropriate to the academic employment decision-making process and because of the particular complexity and uniqueness of this process, I recommend that 41 CFR 60-3.17 be amended to provide an exemption from the application of that part for institutions of higher education using tests to measure the eligibility for hire or suitability for promotion of or granting of tenure to employees whose primary employment activity is the preparation for and conduct of instruction, supervision or conduct of research, or a combination of both, when the Secretary of Health, Education, and Welfare or his designee has determined that an alternate set of non-discriminatory standards proposed by such a contractor-institution for evaluating the comparative merit of such persons is more appropriate to the academic employment context.

Before closing, I would like to briefly raise two matters which have already been the subject of extensive staff discussion between our Departments.

The first pertains to the requirements of 41 CFR 60-1.24 which, in practical effect, require that the investigation of all complaints of discrimination filed under the Executive Order shall be completed, and written findings made, within sixty (60) days from receipt of a complaint. As indicated in recent correspondence from the General Counsel of this Department to the Solicitor, Department of Labor, we believe that because of the substantial number of complaints filed with the Department, the current staff available to investigate such complaints in the various regional offices, the complexity of the investigations required (particularly in such matters as promotions in the academic employment area--the most frequent type of complaint), and the multiple allegations (both as to types of alleged discrimination and/or institutions alleged to be discriminating) often contained in a single complaint, this sixty (60) day time frame is administratively impossible to comply with.

I am advised that other Departments have had similar problems in meeting this requirement and urge your careful consideration of a government-wide change in this regard. I have asked my staff to prepare an accounting of the current complaint backlog in this Department and a plan for addressing and eliminating that backlog as quickly as possible. I have requested that the Director, Office for Civil Rights (DHEW) forward this plan to the Director, OFCC (as soon as it has been finally approved) so that a formal determination of "good cause" for delays beyond sixty (60) days can be made pursuant to the existing provision.

The second matter on which your assistance would be appreciated relates to the repeated requests by this Department for a master directory of Federal contractors. Despite requests dating back several years, this directory has not been circulated by OFCC and, as a result, this Department has been unable, on several occasions, to determine whether

or not a particular college or university was a Federal contractor. This has, on some occasions, led both to requests for Affirmative Action Compliance Programs from non-contractor colleges and universities and failures to pursue the development of such programs with contractor institutions.

As I think is clearly revealed by the preceding discussion, the serious incompatibility between current Department of Labor policies and regulations (both substantive and procedural) and the academic employment setting (and related compliance difficulties) has created a situation which, in my judgment, is counterproductive to the underlying objectives of the Executive Order program--equal employment opportunity for all.

At the request of the President, I prepared a memorandum on October 11, 1974 summarizing many of the same concerns which are discussed in this letter. I am enclosing a copy of that memorandum. I propose that a meeting be held at your earliest convenience to discuss these matters in furtherance of our mutual concern for the continued vitality of an effective Executive Order program with respect to all Federal contractors.

Sincerely,

/s/

Secretary

Enclosure

THE WHITE HOUSE

WASHINGTON

March 17, 1975

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: JIM CANNON

FROM: JERRY H. JONES

SUBJECT: Attached Memoranda on Equal Employment Opportunity in Institutions of Higher Education

Your memorandum to the President of March 10 on the above subject has been reviewed and the following notation was made:

> -- I have read this and obviously some decisions have to be made.
>
> Seems to me this is something John Dunlop should review and make recommendations since he will be implementing in the future.
>
> Talk with me about time and procedure for making decisions.

Please follow-up with the appropriate action.

Thank you.

cc: Don Rumsfeld