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Comment

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COMMENT

GEORGE W. CULBERSON*

I N my letter accepting the invitation to participate in this symposium, I expressed surprise that the subject of a "Contract Nondiscrimination Clause" was considered as a "supplementary or non-enforcement" kind of activity. My experience leads me to the conclusion that proper administration of a nondiscrimination clause is a most effective and efficient method of enforcement. In fact, it is the most effective tool that I have ever used.

Mr. Conway has presented a most careful analysis and performed a real service to all of us in his documentation of the legal authority for and the reasons why states and cities should include a clause in contracts. He has also stated that his only experience had been with a state that had a Commission and staff working on the problem of enforcement. Madison Jones stated that his Commission had not been able to do much about the contract clause because of insufficient resources which prevented them from getting around to it. My ten years' experience in Pittsburgh is precisely that of Madison Jones. My time and that of the staff was taken up with the investigation and processing of complaint cases. That is all we could do with the manpower and budgetary resources available to us. My first point, therefore, is that we will have to redirect current resources or find new ones to do what needs to be done in contract compliance.

The clause in the New York State contracts seems to have a contradiction between the first part and the procedural section, F. The first part requires compliance in an affirmative manner and requires the contractor to do more than just refrain from overt discriminatory action. When you get to the procedural clause, it has a sentence which seems to throw the whole thing back into the complaint frame of reference. The disturbing sentence reads, "After conciliation efforts by the Commission have failed to achieve compliance with the nondiscrimination clause and after a verified complaint has been filed with the Commission." I find that in dealing with legal documents that a few words in a sentence can alter the whole tone of the document. To me, and I could be wrong, my interpretation of this sentence says, when you get right down to the enforcement stage, you have to have a verified complaint. The question would be, "is the contract clause enforceable without a verified complaint?" If not, we are right where we started.

My theory of what is required in terms of administering a contract clause is "surveillance." You live with the contractor during the life of the contract; you don't just go in one time and look at the pattern and come out and mark him A, B, C, D or F. You go in as often as you can, certainly not less than once a year for every contractor and more often for those that require it, de-

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pending upon the circumstances. This requires staff and budget or you just cannot do it.

The Air Force has thirty persons on a staff administering a contract clause on equal employment opportunity. Six of them are assigned to complaint investigations, four to top level administration, and the rest are all in contractor surveillance without any complaint. This ratio is not necessarily one that I would approve of, but it is required because of the number of complaints we have to handle. We are spending too much of our time and resources on these complaints.

I wish that Herbert Hill had not left the room. He says that he has 900 complaints with the President's Committee. Of course, the President's Committee gives those complaints to the agencies to investigate and resolve and I've had 200 of these each year since I have been with the Air Force. About three-fourths of the complaints we get have been stimulated by Herbert Hill. I want him to cut it out. It is not profitable. We're wasting our time and money and our resources in the investigation of these complaints. I could take these same staff people and put them into the contractor surveillance program and get results. The Air Force has actually assisted in the employment and upgrading of thousands of minority workers in new categories under the surveillance program whereas it is a mere handful that result from the complaint investigation. I am quite opposed to the idea of going out and beating the bush or in any way encouraging more complaints. You just continue the practice of dissipating the resources of commissions which are already understaffed and underbudgeted for this kind of program.

Mr. Conway's comment about his experience being limited to Commission operated programs, leads me to say that I do not think it would be helpful to have a nondiscrimination clause in a contract unless there were enforcement possibilities. The head of a department entering into a contract is not interested in employment opportunity for minority workers. He is interested solely in obtaining the product or securing the services or getting the construction completed on schedule. I would go along with the thesis that if there is a clause in the contract, one would have to have an administrative agency to do the checking, making appraisals, and otherwise seeing to it that the contractor lived up to the clause requirements.

Madison Jones has presented quite an imposing list of requirements with emphasis upon affirmative action and initiative on the part of the contractor. He has been very detailed and specific in his list of requirements. In general, I would oppose efforts to try to come up with a check list of requirements, especially in the affirmative action field. The factors in any situation vary so greatly that they are not amenable to a standard remedial action. What we are dealing with here is finding ways and means of breaking with traditional customs and practices of long standing. The intensity of feeling about changing patterns varies from one section of the country to another, from community

to community, factory to factory, and department to department, and the degree and extent of affirmative action varies with each individual situation. Government, in contract matters, should consider itself a customer instead of an enforcement agency. The "customer is always right" and therefore, any interpretation of the requirements by the customer is the one that should prevail.

The strong actions proposed by Madison Jones are certainly in agreement with the times in which we live today. I think we have all recognized that we have moved from a period of time when as commissions we have been emphasizing color blindness to a period of color consciousness. Contractors, however, have not yet, quite, got used to the idea of our change of thinking. They are worried about the fact that we have become color conscious. The fact is, if you're not really conscious of what the problem is, you can't analyze it and you are not going to resolve it.

Except in the area of "affirmative action," I think the contract clause should be specific in terms of the requirements and expectations. The New York contract clause is very good. The clause should provide for inspection of records. This is important because the records provide the basic source of information and can be secured without subpoena. I see no reason why the clause should be effective only for contracts above a certain amount of money or based upon the number of employees in an establishment. I notice that the New York contract has avoided these limitations.

Now, I have already made the point that the contract clause requires surveillance. It is my opinion, and it is based upon several years of experience, that there is very little overt, willful and deliberate discrimination on the part of contractor management. What we are bucking here is tradition. The way we have always done things is the way we want to continue doing them. To change, means being resourceful and sometimes it means more expense. Change, frequently brings trouble and this is certainly to be avoided. The only way to root out these problems, and therefore resolve them, is to help the contractor to identify them. This means surveillance.

The specialists employed by commissions must be able to analyze the personnel actions and policy implementation programs of the contractor to determine if and where these have resulted in exclusion of qualified workers for reasons of race, creed, color or national origin. After that, these specialists must be qualified to assist the contractor in affirmative action proposals so that changes can be made. I say to the Air Force specialists, it is not enough for you to point out the problems—you must show him how to resolve them.

Finally, repeating something I previously said, a nondiscrimination clause is worth no more than the amount of surveillance you are going to be able to give it and the amount of assistance you are going to be able to render. This means sufficient resources and staff to do it.

PART III. DISCUSSION SUMMARY

The afternoon discussion centered on (1) methods of implementing programs requiring compliance with equal employment opportunity clauses in government contracts, and (2) the role of private groups.

Contract Compliance Programs

In his comment, Mr. Culberson had discussed the contract compliance procedures announced for New York State by Governor Rockefeller in December 1963, and pointed to a possible inconsistency between the requirement in clause (a) that the contractor not only not discriminate but that he take affirmative action, and the requirement in clause (f) of a verified complaint before a contract is cut off for non-compliance with clause (a). The latter requirement he considered appropriate for antidiscriminatory conduct but not for situations where the contractor is required to take affirmative action, for which regular and intense surveillance is necessary.

Commissioner Conway replied that there did seem to be a contradiction on the surface, but the verified complaint procedure, which would probably be initiated by the Attorney General, applies to the contractor who refuses to take even the most minimal affirmative action possible to comply with the contract. In sum, the contract clause sets up a two-pronged attack: (1) action under both the antidiscrimination law and the contract if there is evidence of discrimination; and (2) action under the contract alone if there is no discrimination but the contractor refuses to take any steps whatsoever to comply with the "affirmative action" obligation under clause (a) of the contract.

In response to a question, Commissioner Conway noted that the statutory "low bidder" requirement of many states was not really a problem in preventing discriminatory contractors from getting or keeping state contracts, since the New York requirement at least, was couched in terms of the "lowest *qualified* bidder" and a discriminatory contractor would not be considered "qualified."

Professor Jaffe asked whether a reporting system might be instituted for each specific job when the work force was first assembled, whereby the employer would report immediately on how many minority group members were employed. This would avoid the difficulty of having to go to each employer to learn this information. Although Commissioner Conway raised the possibility of employer resistance to still another form to file, Mr. Culberson thought government contracts should require such reports on a regular basis so that one could screen them to pick out some for surveillance. These reports need not be monthly or even quarterly, so long as they were regular. There had to be some way to start the surveillance proceedings and such reports were one device; the President's Committee on Equal Employment Opportunity used them. Mr. Jones also approved of the suggestion, but pointed out that policing the accuracy and honesty of the reports is itself a monumental task because of the volume.

Private Groups

Mr. Karpatkin noted that private and official groups could often cooperate very effectively. In one case he related, a CORE chapter had managed to increase the number of Negroes employed at a restaurant chain by staging a series of demonstrations culminating in a sit-in, but some of the demonstrators were arrested. At the initiative of counsel for the arrested demonstrators, the New York City Commission was motivated to use its good offices with court and prosecutor, thereby resulting in a dismissal of all charges. Thus the sit-in resulted in both the amelioration of the discriminatory situation and the arrest of the demonstrators. Throughout the demonstrations, the New York City Commission played a significant role in attempting to obtain voluntary compliance from the employer. The negotiations resulted in a written agreement satisfactory to the CORE people. But the nine pending criminal cases would have remained as an unhappy residue of the otherwise successful project, had it not been for the intelligent cooperation of private and public agencies.

Mr. Jones added that private business and trade groups could be more effective if high public officials on each level of government were to meet with such groups and to assume leadership in the civil rights struggle. Such meetings should be held annually or biennially.

The discussion of private groups raised the problem of preferences, discussed at the Friday night session. Mr. Robison pointed out that although governmental agencies can do a great deal for Negro job applicants and employees even without preferences, in order to redress past injustices, he felt that sooner or later, such agencies would have to exercise such preferences, even though they would never admit this openly. Mr. Karpatkin pointed out that here the activity of private groups could supplement the work of governmental agencies, for whereas the latter may not be able constitutionally to require such preferences, private groups are under no such inhibition. Although a good argument can be made, he thought, that no government agency may constitutionally compel a preference based on race or color, it is quite another thing for a private group to seek to influence the community and private employers to take realistic steps to redress past discriminatory practices. Any paradox here is more imagined than real. There are many areas of conduct which are quite blameless, and indeed sound public policy, for private persons to support, but which could not be compelled of government.