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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
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MEMORANDUM TO COLLEGE AND UNIVERSITY PRESIDENTS

The Office for Civil Rights (OCR) has responsibility for the enforcement of Executive Order 11246, as amended, with respect to employment at colleges and universities which hold Federal contracts. Under the Executive Order, Federal contractors, including institutions of higher education, are prohibited from discriminating against any person on the basis of race, color, religion, sex, or national origin in recruitment, selection, promotion and any other employment practices and procedures. Further, contractors are required by the Executive Order to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." (Section 202(1)) Such affirmative action should be designed to expand employment opportunities for women and minorities and to eliminate those policies and practices which have had the effect of excluding or limiting female and minority group employment.

Further, under Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, both of which are within the compliance jurisdiction of the Office for Civil Rights, educational institutions which are recipients of Federal financial assistance must ensure non-discrimination. Under Title VI the recipients of Federal financial assistance may not discriminate on the basis of race, color, or national origin. Title VI prohibits employment discrimination only to the extent that such discrimination tends to exclude individuals or deny them the benefits of Federal financial assistance. With certain exceptions, Title IX prohibits discrimination based on sex in federally assisted education programs or activities. It extends to all employment practices of a covered institution. While the Executive Order coverage is extended only to those institutions which are Federal contractors, Title VI and Title IX reach all of the nation's higher education institutions which receive Federal financial assistance. Whereas affirmative action in employment is expressly required under the Executive Order, even in the absence of a finding of specific discrimination by the institutions, it is not required under Title VI or Title IX. However, voluntary affirmative action is permitted under both Title VI and Title IX "... to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, national origin, or sex."

It should be noted that where there has been a specific finding of discrimination under the Executive Order, Title VI or Title IX, specific remedial or corrective action is required. Remedies in these cases are

tailored to the specific wrong which has occurred. This memorandum is not intended to apply to corrective actions undertaken pursuant to a specific finding of discrimination.

This Office, in October 1972, issued Higher Education Guidelines which set forth the compliance responsibilities of colleges and universities under the Executive Order. In the time during which the Guidelines have been in effect, OCR has been faced with determining the permissibility of many common practices designed to effect compliance with the Executive Order. The purpose of this Memorandum is to encourage resort to positive affirmative action steps by setting forth concrete examples designed to distinguish such positive steps from others which might conflict with nondiscrimination requirements.

At the outset, certain general principles should be made clear. Colleges and universities are entitled to select the most qualified candidate, without regard to race, sex, or ethnicity, for any position. The college or university, not the Federal Government, is to say what constitutes qualification for any particular position. No single appointment will be objected to where those not appointed are less well-qualified than the candidate actually selected.

I. RECRUITMENT FOR EMPLOYMENT VACANCIES MUST BE UNDERTAKEN WITHOUT DESIGNATION OR IDENTIFICATION BY RACE, SEX, OR ETHNICITY.

As defined on page five of the Guidelines, "[r]ecruitment is the process by which an institution or department within an institution develops an applicant pool from which hiring decisions are made." As indicated on page six of the Guidelines, a contractor must make an explicit statement of its commitment to equal employment opportunity in all recruiting announcements and advertisements, and it may do so by specifying that it is an "equal opportunity employer." There is a caveat:

It is a violation of the Executive Order, however, for a prospective employer to state that only members of a particular minority group or sex will be considered.

A major purpose of the affirmative action provision of the Executive Order is to broaden the pool of applicants so that women and minorities will be considered for employment along with all other applicants. The affirmative action process must not operate to restrict consideration to minorities and women only. Acceptable nonrestrictive language designed to broaden the pool of applicants would be:

The English Department of X University is subject to the requirements of Executive

Order 11246 and is an affirmative action employer. All interested persons are encouraged to apply.

It would, however, be unacceptable to state that "women and minorities are preferred" or "this is an affirmative action position." Status as a member of any specific group should not be mentioned in any advertisement as preferred.

The type of announcement which identifies the category of applicants who will be considered on the basis of race and/or sex would be unacceptable because it has the effect of discouraging the candidacy of other categories of persons. Therefore, it would be unacceptable for an announcement to read:

Pursuant to our affirmative action plan establishing goals for the employment of women and minorities, the English Department of X University is seeking to fill this position with a woman.

Of course, under the Executive Order, all employment advertising must contain a statement that the institution is an equal opportunity employer.

It has been suggested that a position might be designated on the basis of race or sex in order to meet an employment goal. This would be in violation of the nondiscrimination provisions of the Executive Order.

The following case represents an example of an improper interpretation of the affirmative action obligation:

For the past four years, the Mathematics Department of X University has been operating under an affirmative action program. Although its goal for hiring women was established at 20 percent over a five-year period, during the past four years, each of four vacancies has been filled by a male. At an annual professional association conference, the department chairman informed a male applying for a fifth vacant position that he could not be given consideration regardless of his qualifications because Federal regulations require the department to fill the position with a woman.

The Mathematics Department has violated its equal employment opportunity obligations by designating the vacancy as a position for a woman, or as one in which a woman would be preferred, thereby excluding all other categories of applicants from consideration. Such action is forbidden

by the Executive Order, and it is improper to suggest or to act on the assumption that Federal affirmative action provisions require that any particular position be filled by a woman or minority person.

The Mathematics Department has misunderstood the nature of goals. Goals are good faith estimates of the expected numerical results which will flow from specific affirmative actions taken by a college or university to eliminate and/or counteract factors in the university's employment process which have contributed to underutilization of minorities and women in specific job categories or resulted in an adverse disproportionate impact in terms of promotion, compensation and training of currently employed minorities and women. They are not rigid and inflexible quotas which must be met. Nor should a university strive to achieve goals as ends in themselves, for "[n]o contractor's compliance status shall be judged alone by whether or not he reaches his goals and meets his timetables. Rather, each contractor's compliance posture shall be reviewed and determined by reviewing the contents of his program, the extent of his adherence to this program, and his good faith efforts...." (41 Code of Federal Regulations, Sec. 60-2.14, known as "Revised Order No. 4")

The Mathematics Department must be able to demonstrate clearly that it has adhered to its affirmative action obligation by making a full and good faith effort to recruit and consider women for each of the five vacancies. If the Department is able to make this demonstration, its inability to meet its employment goal would not be deemed a violation of its affirmative action obligation. However, a failure by the Mathematics Department to make a sufficient good faith effort to recruit and consider women and minority candidates for the four earlier openings would constitute a violation of the Executive Order regulations.

As noted on page seven of the Guidelines, minorities and women are often sought to fill positions in women's and ethnic studies programs. Consider the following example, which would constitute a violation of the Executive Order:

A job description for an instructor position for a University's Black Studies Program, included, as job requirements, the ability to bring special insights to the course material and the ability to relate well to the large number of black students attracted by the program. The Dean of Arts and Sciences decided that only a black person could meet these requirements. When questioned by a white applicant, the Dean defended the selection of a black person on the grounds that race was a necessary element for the proper performance of the job.

While the university established job requirements to answer what it deemed as its special needs for the Black Studies Program, its actions amounted to giving exclusive consideration to candidates on the basis of race. Such action results in the restriction of the applicant pool and is a violation of the Executive Order.

In this case, the job requirements themselves (ability to relate to students, special insights, etc.) do not limit the applicant pool on the basis of race and do not by their own terms prohibit non-minorities from applying or being employed. However, it is the university's assumption that only a black person can meet the job requirements and serve as an instructor in a successful Black Studies Program which brings the university into violation of the Executive Order.

II. IF AN INSTITUTION HAS FAILED TO FOLLOW ITS AFFIRMATIVE ACTION RECRUITMENT PROCEDURE OR IF ITS RECRUITMENT EFFORTS DO NOT YIELD AN EXPANDED APPLICANT POOL, THE RECRUITMENT PERIOD FOR ALL CANDIDATES MAY BE EXTENDED.

The Guidelines, on pages 5-7, set forth a specific framework to which the recruitment process should conform. An institution or institutional department must develop a nondiscriminatory applicant pool from which hiring decisions are made, and failure to do so constitutes a violation of the Executive Order. Consider the examples which follow:

- A. The Psychology Department of X University was given a period of two months to fill a vacancy on its clinical teaching staff. Prior to beginning its recruitment efforts, the Department received the unsolicited application of a qualified white male applicant, and made no further efforts to recruit for the position. Shortly before the two-month period was up, the nomination was sent to the Vice Chancellor for approval as a choice candidate. On the advice of the affirmative action monitoring committee, the Vice Chancellor rejected the nomination on the ground that the Department had failed to make adequate attempts to reach female and minority applicants, and required that the recruitment search be reopened and extended for another month.

The obligation to take specific steps to recruit applies even in instances where a university has not previously made a practice of active recruiting. Hence, even though it had received an unsolicited application from a person who was qualified, the Department's failure to recruit and consider women and minorities constitutes a violation of the Executive Order. In

such case, further action is required under the Executive Order and the Vice Chancellor's decision to extend the period for recruitment does not amount to an abuse of the affirmative action process with respect to the Department's first choice, who will be subjected to greater competition for the job.

- B. In seeking to fill an academic position, the English Department took the recruitment steps required under its affirmative action plan. At the end of the recruitment period, during which time it had not received the applications of any women or minorities, the Department nominated one of the white male applicants as its first choice. Although the Vice Chancellor noted that good faith efforts to recruit women and minorities had been made, he required the Department to extend the recruitment period for another month during which period additional specified efforts were to be made to reach available women and minority applicants.

In carrying out an affirmative action plan, the period for recruitment may be extended, particularly where a utilization analysis indicates that the percentage of women and minorities recruited is substantially less than the percentage of qualified women and minorities available in the work force. In such cases, additional positive recruitment efforts may be undertaken to broaden the applicant pool to include qualified women and minorities. OCR would approve (but not require) the decision to keep open competition for the position. But it must be emphasized again that nothing in an affirmative action plan requires the employment of any specific number of women or minorities.

Thus, if the Department can demonstrate that it has taken all recruitment steps required under its affirmative action plan--and even though no (or very few) applications have been received from women and minorities--there would be no requirement that the recruitment period be extended, as in the following example:

- C. The Physics Department took all the affirmative recruitment steps called for by the university's affirmative action plan, and advertised the opening for several months. At the end of that time, no women and no minority candidates had applied and the recruitment procedure was concluded.

The Department was justified in ending the recruitment period, inasmuch as it had done everything possible to publicize the opening for a reasonable period of time.

III. JOB REQUIREMENTS MUST BE APPLIED UNIFORMLY TO ALL CANDIDATES WITHOUT REGARD TO RACE, COLOR, SEX, RELIGION, OR NATIONAL ORIGIN.

The Guidelines stress the need for standardized employment practices that minimize the opportunity for arbitrary and/or discriminatory hiring decisions. It is not intended that affirmative action should result in a dilution of standards in order to attain the objectives of the Executive Order. Consider the example of the following institution, which violated the Executive Order:

Because of the small size and location of X University, its History Department had experienced considerable difficulty in recruiting women and minorities for several teaching positions in the past. Consequently, the department chairman, with the support of his faculty and administration, waived the Ph.D. requirement for those women or minorities who wished to apply for the vacant Associate Professor position but retained the requirement for males or non-minorities applying for the same position and for all other positions.

The Executive Order does not require that job requirements be waived or lowered in order to attract women and minority candidates. Indeed, it expressly forbids differential standards based on race, color, sex, religion or national origin. Further, it requires that once valid job requirements are established, they must be applied equally to all candidates. It is discriminatory for such requirements to be applied selectively on the basis of race, color, religion, sex, or national origin. Thus, the history department must either waive the Ph.D. requirement for all applicants (without regard to race or sex) or maintain it for all applicants.

IV. A JOB REQUIREMENT WHICH RESULTS IN A DISPROPORTIONATE IMPACT UPON MINORITIES AND/OR WOMEN CAN BE MAINTAINED ONLY IF IT IS JOB-RELATED.

As the Guidelines make very clear (page 4), the Executive Order does not require an institution to eliminate or dilute legitimate employment standards by which to measure prospective employees. On the other hand, no standards or criteria which have, by intent or effect, worked to exclude women and minorities as a class can be utilized, unless the institution can demonstrate the necessity of such standards to the performance of the job in question. For example:

X Law School has established a Teaching Fellows Program which is responsible for the administration

of the law school's clinical practice program. The requirement for Teaching Fellows includes holding a graduate law degree as well as an LL.B. or J.D. Degree. In analyzing its workforce for its affirmative action program, the law school learns that this job requirement disproportionately excludes blacks from consideration for the Teaching Fellows positions.

In order to continue the requirement for a graduate law degree, the law school must demonstrate that the requirement is related to successful job performance. If the law school is able to demonstrate that the skills and knowledge acquired through the advanced law degree are necessary for effective job performance, the job requirement can be maintained. On questions relevant to the validity of the requirement, the opinion or testimony of persons experienced in the conduct of legal aid clinics will be given substantial weight by HEW.

V. A UNIVERSITY IS REQUIRED TO OBTAIN INFORMATION ON THE RACE, SEX, AND ETHNIC IDENTITY OF APPLICANTS FOR EMPLOYMENT.

The Executive Order establishes the principle that Federal contractors, including colleges and universities, are required to collect and maintain data on the race, sex and ethnic identity of all applicants for employment.

The collection and analysis of such data is recognized as an essential means of providing both the institution and the Federal Government with the information necessary to monitor the compliance posture of the institution. In the case of universities and colleges, the collection of such data is particularly essential for the workforce analysis required by Revised Order No. 4. Each institution must adopt safeguards to ensure that such information cannot be used as a basis for discrimination.

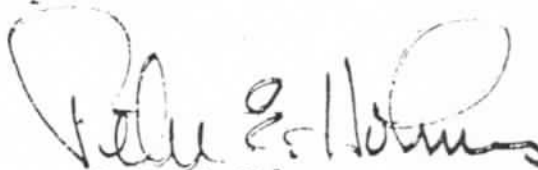
Preserving the anonymity of applicants in the collection of applicant flow data can be accomplished by gathering the requisite race, sex, and ethnic data separately from the application form. Furthermore, applicants should be instructed not to identify themselves by name or number on this form. If the institution wishes to determine applicant response for a particular position, the data form may be coded by position, as long as it does not individually identify any applicant.

This document is intended to help clarify areas of confusion which have arisen during the implementation of contractor requirements set forth in the Executive Order regulations. This Memorandum should be circulated

among all members of your administrative staffs. Experience of the recent past seems to indicate that much of the existing confusion over affirmative action requirements has resulted from an absence of clear lines of communication concerning Federal regulations. It is most important that all officials charged with recruiting and hiring responsibilities have a clear understanding of the Higher Education Guidelines and that they ensure that institutional employment conform to the provisions of those Guidelines.

Additional copies of this Memorandum may be obtained from the Regional Office for Civil Rights in your area, or from the Office for Civil Rights, Department of Health, Education and Welfare, Washington, D. C. 20201. Requests for technical assistance and inquiries relating to development and implementation of affirmative action programs should also be addressed to these Offices.

Thank you for your continuing cooperation.



Peter E. Holmes
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