

17-2273

United States Court of Appeals For the Second Circuit

ALBERT E. PERCY;
Plaintiff-Appellant,

JOHN MERCADO; MANUEL MEJIA;
FIGHT BACK and the NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF COLORED PEOPLE,
Plaintiffs,

-against-

United States Department of Labor, THOMAS DOWD, Federal Contract Compliance Programs,
ALEXANDER ACOSTA, United States Secretary of Labor, ANDREW AUERBACH, Office of
Labor Management Standards, ANDREW MARK CUOMO, Governor of the State of New
York, ROBERTA REARDON, New York State Department of Labor, Building and
Construction Trades Council of Greater New York, New York State Department of Labor,
New York Building and Construction Industry Board of Urban Affairs Fund,
New York Plan for Training, Inc.,
Defendants-Appellees.

On Appeal From the United States District Court for the
Southern District of New York

APPENDIX 2, Volume IV of IV (pp. 861-917)
ON BEHALF OF PLAINTIFF-APPELLANT
UN-DOCKETED DOCUMENTS IN CASE 73-cv-04279
CERTIFIED BY THE NATIONAL ARCHIVES

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APPENDIX 2
UN-DOCKETED NATIONAL ARCHIVES CERTIFIED DOCUMENTS
DETAILED TABLE OF CONTENTS

Volume I

0000-00-00; Seattle Bldg Trades book - certified 2017-10-04 -1 doc 7.....	1
0000-00-00; Seattle Bldg Trades book - certified 2017-10-04-4 doc 7.....	12
0000-02-28 Handwritten Notes - certified 2017-10-06 doc 34.....	23
1972-10-00; Hometown Plans For The Construction Industry in NYS - certified 2017-08-11 doc 17.....	25
1972-10-01; Hometown Plans For The Construction Industry in NYS - certified 2017-10-04-5 doc 1.....	30
1973-10-09; Civil Cover Sheet w Misc Signature pages - certified 2017-10-04-2 doc 8.....	144
1973-10-09; Percy -v- Brennan - MOL in Support of Plaintiffs Motion Injunction - certified 2017-10-04-1 doc 8.....	153
1973-10-26; Filed summons with marshals return by certified mail - certified 2017-07-26 doc 7.....	204
1973-11-00; The Record Of The Association Of The Bar OF The City Of NY - certified 2017-10-04-5 doc 2.....	213
1973-11-30; Assoc General Contractors v Alan Altshuler-Appeal from Judgment - certified 2017-10-04-4 doc 6.....	237

Volume II

1973-12-12; Filed plttffs memo of law in support of motion, cert 2017-10-04-4 doc 3.....	246
1974-01-17; Colleran Letter to US District Court re Notice of Motion and Memorandum - certified 2017-08-08 doc 1.....	311

1974-01-17; letter from Yeager to Hon Lasker re Various - certified 2017-10-04-3 doc 2.....	312
1974-01-17; M Bourk Affidavit Service of Notice of Motion - certified 2017-08-08 doc 3.....	318
1974-01-17; Memo of Law in Support of Motion to Consolidate - certified 2017-08-11 doc 5.....	321
1974-01-17; Percy v Brennan - Memo Motion to Dismiss - certified 2017-10-4-6 doc 10.....	328
1974-01-17; Percy -v- Brennan - Motion of Partial Summary Judgment pursuant to Rule 56 - certified 2017-08-11 doc 6.....	338
1974-01-17; Percy -v- Brennan 3 Motion to Consolidate Percy and Diamond Cases - certified 2017-08-11 doc 4.....	342
1974-01-17; Percy -v- Brennan 3 Motion to Consolidate Percy and Diamond Cases - certified 2017-10-04-5 doc 4.....	347
1974-01-17; Percy v Brennan-City of NY v Diamond Memo-Motion for Consolidation - certified 2017-10-04-3 doc 6.....	352
1974-01-17; Percy v Brennan-Memo in Support of Plaintiffs Motion for Consolidation - certified 2017-10-04-3 doc 5.....	358
1974-01-17; Percy v Brennan-Memo of Law-Motion- Partial Summary Judgment - certified 2017-10-04-3 doc 4....	364
1974-01-24; Memo of Fed Def in Opp to Motions - certified 2017-10-04-6 doc 2.....	371
1974-01-28; Filed plttfs affdvt & MOL in opp to State Defts - certified 2017-10-04-1 doc 3.....	422
1974-02-08; Milliken AAG Ltr to Hon Lasker re Defendants letter - certified 2017-08-11 doc 7.....	444
1974-04-00; Seattle Bldg Trades Order book pages - certified 2017-08-11 doc 15.....	447

1974-06-19; Lasker letter to counsel pending decision - certified 2017-10-06 doc 3.....	458
1974-06-20; Memorandum Opinion of Zirpoli, Executive Order 11246 of 9-24-1965 - certified 2017-08-11 doc 1.....	459
1974-07-03; Yeager, Attny for Plaintiff letter to Hon Lasker - certified 2017-08-11 doc 12.....	487
1974-07-16; R Benisch Atty to Hon Lasker re Board of Urban Affairs Pending Motion for Stay - certified 2017-08-08 doc 5.....	492
0494 - 0495 1974-07-16; R Benisch to Hon Lasker re Oppose Pending Motion - certified 2017-10-06 doc 16.....	494
1974-07-16; R Benisch to Lasker re Opposition Board of Urban Affairs Pending Motion - certified 2017-10-04-1 doc 6.....	496
1974-07-17; Return on Order to Show Cause Temporary Stay and Restraint - certified 2017-08-11 doc 10.....	498
1974-07-18; Ltr Yeager, Attny for Plaintiff to Hon Lasker re Zirpoli's Opinion Alameda Cnty - certified 2017-08-11 doc 11.....	508
1974-08-02; Ltr Yeager, Attny for Plaintiff to Hon Lasker re C. Martin's - certified 2017-08-11 doc 13....	509
1974-08-05; Ltr P. Curran by Glassman to Hon Lasker re DOL NY Plan Extension - certified 2017-08-11 doc 16.....	514
1974-09-17; Affidavit of Russell Galloway - certified 2017-10-04-4 doc 5.....	517
1974-09-17; letter Yeager to Hon Lasker re C. Martins Request - Information - certified 2017-08-11 doc 3.....	528
1974-09-17; letter Yeager to Hon Lasker-Ltr of 8-2-74 Response to C Martins Info - certified 2017-10-04-4 doc 4.....	541

Volume III

1974-09-18; R Galloway - S Ronfelt Affidavit from NYC v. Henry Diamond - certified 2017-08-11 doc 14.....	543
1974-09-24; Lasker response to Yeager 9-3 ltr - certified 2017-10-06 doc 4.....	554
1974-10-02; Ltr Yeager to Hon Lasker re DOL rescind approval of Illinois Affirmative Action - certified 2017-08-11 doc 2.....	557
1974-10-09; from Def's Various Attnys to Hon Lasker re Response to Interrogatories - certified 2017-10-06 doc 30.....	560
1974-10-11; United Workers Assoc v P Brennan - Memorandum and Order - certified 2017-10-06 doc 39.....	573
1974-10-24; Hon Lasker to counsel proceed with discovery - certified 2017-10-06 doc 2.....	578
1974-10-28; Article 62 of the CPLR Declared Unconstitutional - certified 2017-08-08 doc 8.....	579
1974-11-06; letter D Yeager to Hon Lasker - certified 2017-10-06 doc 9.....	580
1974-11-13; Hon. Lasker Order Show Cause Enjoin defendants - certified 2017-08-11 doc 8.....	581
1974-11-13; S Glassman US Atty letter to Hon. Lasker re Decision not to Extend New York Plan - certified 2017-08-09-6 doc 9.....	584
1974-11-21; Hearing Transcript re Case Moot Question - certified 2017-08-11 doc 9.....	587
1974-11-26; L Levine Industrial Commissioner to Hon Lasker re NY Plan - certified 2017-08-09-6 doc 8.....	612
1974-11-26; L Levine to Hon Lasker re Clarification of States Position - certified 2017-10-06 doc 19.....	616
1974-11-27; Ltr R Gibson to Hon Lasker - States Position of NY Plan - certified 2017-10-06 doc 15.....	620

1974-12-01; Agreement NY and The City of NY - Trainee Wage Rates - certified 2017-10-06 doc 37.....	622
1974-12-04; L Levine Commissioner to Hon Lasker- NY Not Including Bid Specif Contracts - certified 2017-08-09-6 doc 6.....	623
1974-12-04; Law Clerk to All Council re Levines Ltr of 11-26-74 Gibsons Ltr of 11-27-74-NY Plan doc 7.....	626
1974-12-05; D Yeager to Lasker re pre trial discovery - certified 2017-08-09-6 doc 3.....	628
1974-12-05; Lasker Law Clerk -Hon P Gibson Deputy Mayor-Requesting Comments on Issues - certified 2017-08-09-6 doc 5.....	634
1974-12-05; Lasker Law Clerk to L Milliken Assistant AG re Clarification - certified 2017-08-09-6 doc 4.....	635
1974-12-09; L Milliken to Hon Lasker re Drafted Reply to Memorandum - certified 2017-08-09-6 doc 2.....	636
1974-12-09; Lefkowitz to Hon Lasker re Drafted Reply - certified 2017-10-06 doc 7.....	637
1974-12-10; L Milliken Assistant AG to Hon Lasker - The NY Plan will not be affirmative action - certified 2017-08-09-6 doc 1.....	638
1974-12-10; letter L Milliken to Hon Lasker - certified 2017-10-06 doc 8.....	642
1974-12-11; D Yeager to Hon Lasker re Copy of MOL Filed 1011-1974 - certified 2017-10-06 doc 6.....	646
1974-12-11; Yeager Attny for Plaintiff to Hon Lasker-Pre Trial Discovery and Memo-Order - certified 2017-08-09-3 doc 1.....	648
1974-12-12; All Counsel - re Answers to Yeagers letter with response - certified 2017-08-09-2 doc 9.....	655
1974-12-13; B Gross Assist Corp Counsel - re NYC Response - certified 2017-08-09-2 doc 7.....	658

1974-12-13; Yeager Atty Plaintiff to Lasker response - certified 2017-08-09-2 doc 8.....	660
1974-12-20; L Milliken to Hon Lasker-Interim Agreement to Utilize Bid Conditions Part II - certified 2017-10-06 doc 21.....	662
1974-12-20; letter B Gross to Hon Lasker re NY Plan Clarification - certified 2017-10-06 doc 22.....	666
1974-12-23; All Counsel - 3 letter re Differences to Extent of Agreement -Cert-2017-08-11 doc 18.....	669
1974-12-23; All Counsel - letter re Differences of Agreement between State and City - certified 2017-08-09-2 doc 6.....	677
1974-12-24; B Lief Law Clerk to Hon Lasker - Conference - certified 2017-08-09-2 doc 5.....	685
1975-01-00; Percy v Brennan - NOT EXECUTED Order - certified 2017-08-09-3 doc 6.....	686
1975-01-00; Percy v Brennan - NOT EXECUTED Order - certified 2017-10-06 doc 31.....	688
1975-01-03; To Hon L Levine DOL re Conference - certified 2017-08-09-2 doc 4.....	690
1975-01-10; Glassman letter and proposed Order to Lasker - certified 2017-07-25 doc 5.....	691
1975-01-10; Glassman letter and Proposed Order - certified 2017-08-09-2 doc 3.....	694
1975-01-10; Percy v Brennan - Order - Dept of Labor Proposed Order - certified 2017-08-09-3 doc 7.....	701
1975-01-14; S Glassman - NYC Training Program Submitted - certified 2017-08-09-2 doc 2.....	705
1975-01-17; Notices - Dept of Labor - Approval of EEO - certified 2017-08-09-2 doc 1.....	707
1975-01-27; L Milliken Assistant AG to Hon Lasker Proposed Order - certified 2017-08-09-3 doc 5.....	710

1975-01-27; Levine letter to Lasker - certified 2017-07-25 doc 6.....	714
1975-01-29; L Toboroff to Hon Carter re Case N Georga Finishing v Di-Chem - certified 2017-08-08 doc 9.....	716
1975-01-30; L Toboroff to Hon R Carter re Lasker decision - Commodity Assoc v Incomco - certified 2017-08-08 doc 7.....	726
1975-02-03; A Freedman to Hon Carter - motion to reargue - certified 2017-08-08 doc 6.....	728
1975-02-03; Co-Counsel Non Governmental Defendants to Hon Lasker - Proposed Order - certified 2017-08-09-3 doc 3.....	731
1975-02-05; D Yeager Attney for Plaintiffs to Hon Lasker re Proposed Order - certified 2017-08-09-3 doc 4.....	734
1975-02-07; D Yeager to Hon Lasker re Fed Reg (Vol 40, No.21) - NO ATTACHMENT - certified 2017-08-09-7 doc 5.....	741
1975-02-07; Ltr Yeager to Lasker re Federal Register 2017-10-06 doc 12.....	742
1975-02-11; R Benisch Co-counsel for Board of Urban Affairs to Hon Lasker re Proposed Order - certified 2017-08-09-7 doc 4.....	743
1975-02-12; D Yeager Attney for Plaintiff to Hon Lasker re Benisch Ltr of 2-11-75 - certified 2017-08-09-7 doc 3.....	746
1975-02-12; Ltr Yeager to Hon Lasker re Benischs letter - certified 2017-10-06 doc 10.....	748
1975-02-14; L Milliken Assistant AG to Hon Lasker re Plaintiffs Proposed Order - States Position - certified 2017-08-09-7 doc 2.....	750
1975-02-14; L Milliken to Hon Lasker re Proposed Order - certified 2017-10-06 doc 18.....	751

1975-02-19; S Glassman Assistant US Attny to Hon Lasker - DOL Informing MARTA - certified 2017-08-09-7 doc 1.....	752
1975-02-21; D Yeager Attny for Plaintiff to Hon Lasker re Observations - certified 2017-08-09-1 doc 6.....	754
1975-02-21; Hon Lasker - Order - Amended Complaint - certified 2017-08-09-5 doc 1.....	757
1975-02-21; letter to Lasker from Yeager - certified 2017-10-06 doc 1.....	759
1975-02-21; Percy v Brennan - Order - NOT EXECUTED - certified 2017-10-06 doc 36.....	760
1975-02-21; Percy v Brennan - Order Amended Complaint 2017-10-06 doc 35.....	762
1975-02-25; D Yeager Attny for Plaintiff to Hon Lasker bid extracts - certified 2017-08-09-1 doc 5.....	764
1975-02-25; D Yeager to Hon Lasker re Extracts from Bid Conditions - certified 2017-10-06 doc 20.....	777
0796 - 0800 1975-02-28; Conference Transcript confusion NYS Plan - Lasker, certified 2017-10-25 doc 1.....	796
1975-02-28; Conference transcript Confusion NYS Plan-Lasker - certified 2017-10-06 doc 5.....	801
1975-03-05; Dennis R Yeager Affidavit of Service - certified 2017-07-25 doc 7.....	805
1976-05-17; letter from T Adams to Hon Lasker re Reassigned - certified 2017-10-06 doc 11.....	806
1976-07-12; I Pinzler Attny for Plaintiff to Hon Lasker re Summary of Conference - certified 2017-08-09-1 doc 4.....	807
1976-11-29; D Greene Attny for Plaintiff to Hon Lasker re Request Court Guidance to Further Actions - certified 2017-08-11 doc 20.....	809

1976-11-29; D Yeager Attny for Plaintiff to Hon Lasker Request to Extend Jurisdiction - certified 2017-08-09-1 doc 3.....	811
1976-12-07; to Natl Employment Law Project re Court Extension Granted - certified 2017-08-09-1 doc 2.....	813
1977-01-05; Lefkowitz AG to Hon Lasker Governor Carey's Ex Order - certified 2017-08-09-3 doc 2.....	814

Volume IV

1977-02-01; A Fleisher to Hon Lasker - Proposed Reg State and State Assisted Construction Contracts - certified 2017-08-09-1 doc 1.....	823
1977-04-07; Lefkowitz AG to Lasker Request Laskers Comments on Approach to Affirmative Action - certified 2017-08-09-4 doc 6.....	851
1977-04-08; Judge Lasker to Fleisher re 4-7-77 letter - other counsel to advise - certified 2017-08-09-4 doc 5.....	853
1977-04-13; W Colleran to Hon Lasker re Concurrence in Regulations - certified 2017-10-06 doc 17.....	854
1977-04-13; W Colleran to Lasker re Opposed to Fleishers letter proposed regulations - certified 2017-08-09-4 doc 4.....	856
1977-04-15; D Greene Attny for Plaintiff to Hon Lasker - Views of Proposed Regulations Ex Order 45 - certified 2017-08-09-4 doc 3.....	858
1977-04-28; Fleischer AAG to Hon Lasker re Review Proposed Regulations Ex Order No 45 - certified 2017-08-09-4 doc 2.....	860
1977-05-02; W Colleran to Hon Lasker re Affirmative Action Plans by Agreement - certified 2017-08-09-4 doc 1.....	861

1977-05-09; Court Appearances-Various re
Approval of Proposed Regs - Dismiss Action -
certified 2017-10-06 doc 23..... 863



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GEORGE D. ZUCKERMAN
ASSISTANT ATTORNEY GENERAL
IN CHARGE OF CIVIL RIGHTS BUREAU

February 1, 1977

Re: Percy v. Brennan
73 Civ. 4279

Hon. Morris E. Lasker
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, N.Y. 10007

Dear Judge Lasker:

Pursuant to your order of February 24, 1975, the State defendants submit herewith a copy of the proposed regulations for State and State-assisted construction and non-construction contracts. These regulations will implement Executive Order No. 45, which was attached to my letter to you of January 5, 1977. A copy of the proposed regulations has also been sent to plaintiffs' counsel.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General

By

Arnold D. Fleischer

ARNOLD D. FLEISCHER
Assistant Attorney General

ADF:pw
Enc.

cc: Isabelle Katz Pinzler, Esq.
Robert Fiske, Esq.
Walter M. Colleran, Esq.
Robert G. Benisch, Esq.
Robert J. Tink, Esq.
Beverly Gross, Esq.

**1977-02-01; A Fleisher to Hon Lasker - Proposed
Reg State and State Assisted Construction Contracts --
certified 2017-08-09-1 doc 1**

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
NEW YORK STATE DIVISION OF HUMAN RIGHTS

NOTICE OF PROPOSED AGENCY ACTION RELATING
TO REGULATIONS FOR CONTRACT COMPLIANCE

Pursuant to the provisions of the State Administrative Procedure Act (Chapter 82 of the Consolidated Laws), NOTICE is hereby given of the following proposed agency action:

Proposed action:

Promulgation of contract compliance regulations for State and State-assisted construction and non-construction contracts.

Statutory authority under which action is proposed:

Executive Law, Section 295.5 and Executive Order No 45 (January 4, 1977).

Substance of proposed action:

In order to implement Executive Order No. 45 (January 4, 1977), establishes regulations requiring that all non-exempt State and State-assisted contractors adopt a program of affirmative action acceptable to the State Division of Human Rights, prior to the award of the contract. The regulations provide for compliance reporting and review procedures and imposition of sanctions, after hearing, for non-compliance.

Express terms of proposed action may be obtained:

By writing to Elvira Kock, Bureau of Program Planning and Development, N.Y.S. Division of Human Rights, 2 World Trade Center, New York, New York 10047, Telephone: 212-488-7606.

A public hearing will be held at General Donovan Building, Room No. 1, 125 Main Street, Buffalo, on March 7, 1977 from 9:30 A.M. to 2:30 P.M.; at Empire State Plaza, Main Concourse, Room Nos. 3 and 4, Albany, on March 11, 1977 from 9:30 A.M. to 2:30 P.M.; and at the New York State Office Building, 163 West 125th Street, Room 8A, New York City, on March 14, 1977 from 9:30 A.M. to 2:30 P.M. All public hearings are scheduled to conclude at 2:30 P.M. but may be extended if warranted.

Data, views or arguments may be submitted to the agency in the following manner: Notification of intent to testify at the Buffalo hearings on March 7th should be made in writing by February 25th. Requests to testify at the Albany hearing on March 11th or the New York City hearing on March 14th should be made in writing by March 4th.

The final deadline for submission of all written comments is March 15, 1977. However, it is requested of individuals and organizations who are planning to testify at the public hearings that they submit three (3) copies of their prepared statements at least three (3) days before their scheduled appearance. Oral testimony will be limited to fifteen minutes.

Written notification of intent to testify and three (3) copies of prepared statements should be sent to Ms. Elvira Kock, Bureau of Program Planning and Development, New York State Division of Human Rights, 2 World Trade Center, 53rd Floor, New York, New York 10047 (Telephone: 212-488-7606).

REGULATIONS OF THE COMMISSIONER OF THE
STATE DIVISION OF HUMAN RIGHTS
PURSUANT TO EXECUTIVE ORDER NO. 45 (1977)
FOR STATE AND STATE-ASSISTED CONSTRUCTION CONTRACTS

**1977-02-01; A Fleisher to Hon Lasker - Proposed
Reg State and State Assisted Construction Contracts –
certified 2017-08-09-1 doc 1**

TABLE OF CONTENTS

	<u>Page</u>
Section 1 - Scope.	1
Section 2 - Coverage	1
Section 3 - Definitions.	2
Section 4 - Contract provisions.	3
Section 5 - Compliance Reports	10
Section 6 - Duties of State Agencies	11
Section 7 - Sanctions and Remedies	12
Section 8 - Separability Clause.	14
Section 9 - Incorporation by Reference	14

REGULATIONS OF THE COMMISSIONER OF THE
STATE DIVISION OF HUMAN RIGHTS

PURSUANT TO EXECUTIVE ORDER NO. 45 (1977)
FOR STATE AND STATE-ASSISTED CONSTRUCTION CONTRACTS

Exercising the authority vested in me by Executive Order 45 (1977) and by Section 295.9 of the Human Rights Law, I hereby promulgate the regulations set forth below.

REGULATIONS OF THE COMMISSIONER OF THE
STATE DIVISION OF HUMAN RIGHTS

PURSUANT TO EXECUTIVE ORDER NO. 45 (1977)
FOR STATE AND STATE-ASSISTED CONSTRUCTION CONTRACTS

Section 1. - Scope

The program promulgated hereby is intended to establish minimum standards for all areas of the State. Where a local government requires an affirmative action program of construction contractors within its geographic area, that program will be preserved and the more stringent conditions of the two programs will be applicable. Where the federal government requires an affirmative action program of construction contractors within a given geographic area, the more stringent conditions as between the State program and the Federal program will be applicable. Where a comprehensive program has been negotiated by a local government together with appropriate industry, labor and minority community groups, the Commissioner of Human Rights, through the Office of State Contract Compliance (OSCC) may approve that program if it meets at least the minimum standards of the program described herein, and includes provisions for effective administration and enforcement.

Section 2. - Coverage

The provisions of this program shall be applicable to all contractors and subcontractors performing construction work on any State or State-assisted contract involving construction. However, pursuant to Article V of Executive Order 45 (1977), any contractor or subcontractor may apply for an exemption from these provisions on the grounds that it is participating in a negotiated plan which has been approved by the Commissioner of Human Rights. Such exemption will be granted as to any trade which is determined to be meeting its minority manpower utilization commitments under the negotiated plan. If such exemption is granted, the provisions of the negotiated plan will be deemed incorporated by reference

1977-02-01; A Fleisher to Hon Lasker - Proposed
Reg State and State Assisted Construction Contracts -
certified 2017-08-09-1 doc 1

into the contract in lieu of the provisions required in Section 4 hereof, as to those trades covered by the exemption, and exemptions will be reviewed periodically.

Section 3. - Definitions

In addition to the terms defined in Executive Order No. 45 (1977), for the purpose of these regulations:

(a) Contractor - any person or entity engaged in construction under a prime contract of \$50,000 or more on a State or State-assisted construction contract, or who has contracts which, in the current 12-month period, total or can reasonably be expected to total \$50,000 or more.

(b) Subcontractor - any person or entity engaged in construction under a subcontract of \$10,000 or more in relation to a State or State-assisted construction contract.

(c) Minority - includes Blacks, Hispanics (non-European), Asian Americans and American Indians.

(d) Building and construction trades - includes but is not limited to: electrical workers; carpenters; steamfitters; metal, wire and wood lathers; painters; operating engineers; operating engineers (equipment); operating engineers (surveyors); plumbers; structural ironworkers; elevator constructors; bricklayers; asbestos workers; roofers; ornamental ironworkers; cement masons; glaziers; plasterers; teamsters; teamsters (ready-mix concrete); mosaic, tile and terrazzo workers; tapers; boilermakers; sheetmetal workers; laborers; tunnel workers; mason tenders; demolition workers; and dockbuilders.

(e) Minority workforce population - the percentage of minority group persons in that portion of the labor force which is over 18 years old and possesses a high school education or less, within the principal city or county of the labor area.

(f) Labor area - that geographic area from which an employer can reasonably be expected to recruit, and from which employees can reasonably be expected to travel to work, without changing their place of residence.

(g) Trainee - a minority group person registered in a governmentally approved on-the-job building trades training program other than a registered apprenticeship program.

(h) Apprentice - a person registered in a bona fide apprenticeship program registered with the U.S. Department of Labor or with the State Department of Labor.

**1977-02-01; A Fleisher to Hon Lasker - Proposed
Reg State and State Assisted Construction Contracts -
certified 2017-08-09-1 doc 1**

(i) Minority and female (sub) contractor or business - any firm that is owned 51 per cent or more by women or by a member or members of a minority group.

Section 4. - Contract provisions

Pursuant to Articles III and IV of Executive Order 45 (1977), every State and State-assisted construction contract and subcontract, and the bidding documents, or other solicitations of prospective contractors therefor, unless exempted under Article V of said Executive Order, shall contain subdivisions (a) through (c) hereof, as follows:

"(a) A contractor identified as an otherwise qualified low bidder or prospective contractor must submit to the State contracting agency prior to the final award of the contract, and prospective subcontractors prior to their approval by the agency, a written program of affirmative action to ensure equitable participation of minority group members and women in those activities of the contractor which are subject to Executive Order 45 (1977), which includes all its construction contracts within the State of New York during the life of the State contract. No contract may be awarded until said program has been approved by the OSCC. Failure to submit an acceptable affirmative action program shall constitute a material departure from bid requirements and the contractor may be declared nonresponsible. All affirmative action programs shall fulfill the requirements of subdivisions (1) through (5) of paragraph (b) of this section."

"(b) Requirements of affirmative action programs.

1. General

(A) The affirmative action program must be oriented toward achieving goals at least within the ranges set forth below within the timetables specified. The program must contain specific steps by which the contractor will demonstrate its good faith effort to accomplish this end. Should diligent implementation of the program fail to produce the specified goal, the steps and actions of the (sub) contractor will be subject to review and, where necessary, modification.

(B) All affirmative action programs must contain a projection of the (sub) contractor's workforce on a

**1977-02-01; A Fleisher to Hon Lasker - Proposed
Reg State and State Assisted Construction Contracts -
certified 2017-08-09-1 doc 1**

trade by trade basis and the approximate number of hours to be worked by each trade for the subject contract.

(C) The (sub) contractor shall promptly notify the OSCC and the contracting agency when any union with whom the (sub) contractor has a collective bargaining agreement has not referred for work a minority or female worker sent by the (sub) contractor or when other information indicates that the union membership procedures or referral process has impeded the (sub) contractor in its efforts to meet its goals.

(D) The (sub) contractor shall designate a company official to effectuate its equal employment opportunity and affirmative action policies.

(E) The (sub) contractor shall take appropriate legal steps in those situations where union action impairs its ability to properly implement its affirmative action objectives.

(F) Affirmative action programs shall include good faith efforts to recruit and employ women.

2. Goals and Timetables. (Select from the list below and insert in place of the bracketed language, the designated labor area in which the contract is being performed).

(A) Labor Areas over 500,000 population.

Contractors and subcontractors engaged in construction work in [the following labor areas] shall set forth goals of minority workforce utilization within at least the percentage ranges which follow below, for each building and construction trade employed by them on the project.

(Insert only the ranges applicable to the labor area named)

Erie County (including Buffalo)	Until 6/30/78. . . 11% - 14%
Nassau and Suffolk Counties.	Until 6/30/78. . . 7% - 9%
New York City (Bronx, Kings, Manhattan, Queens & Richmond Counties	Until 6/30/77. . . 28% - 32%
	Until 6/30/78. . . 33%
Rochester (Monroe, Livingston, Ontario and Wayne Counties	Until 6/30/78. . . 11% - 13%
Syracuse (Onondaga, Madison and Oswego Counties.	Until 6/30/78. . . 7% - 8.5%
Westchester County	Until 6/30/78. . . 11% - 13%

(B) Labor areas under 500,000 population.

Contractors and subcontractors engaged in construction work in [labor areas other than those identified in paragraph (1) of this subdivision] shall set forth goals of minority workforce utilization within at least the percentage ranges which the OSCC shall promulgate for those labor areas, which ranges shall be included in the bid documents and other solicitations of prospective contractors for specific construction contracts.

(C) Implementation.

(i) These goals shall express hours of on-the-job training and employment of minority workers as a percentage of the total hours to be worked by the contractor's and subcontractor's entire workforce in each building and construction trade on all projects (both State and non-State) in the labor area during the performance of its contract or subcontract. The ranges established for labor areas other than the labor areas in which the State or State-assisted project is located shall apply to the contractor's or subcontractor's construction activity in such other labor area(s) during said performance.

(ii) All classifications of workers may be used to satisfy these goals (i.e., journeymen, apprentices, helpers, trainees). The hours for minority work and training must be substantially uniform through the length of the contract, on all projects and for each of the trades. Further, the transfer of minority employees or trainees from employer-to-employer or from project-to-project for the sole purpose of meeting the contractor's or subcontractor's goal shall be a violation of these conditions.

(iii) On or before July 1, 1981, contractors and subcontractors shall make good faith efforts to employ minority journeymen, as to their numbers and as to hours of utilization, in each building and construction trade, in the same percentage as the percentage of minorities in the appropriate labor area as defined in Section 3(f).

(iv) In reaching the goals herein, every effort shall be made to find and employ qualified minority journeymen. However, where feasible, apprentices and trainees

shall be employed on all projects subject to these conditions.

(v) A contractor or subcontractor shall be deemed in compliance with the foregoing, subject to at least annual review:

(a) If the contractor or subcontractor can establish that it is a member of an employer's trade association or other employer trade organization which has as one of its purposes the expanded utilization of minority workforce, and that the minority workforce utilization rate in that building and construction trade by all member employers in such association or organization itself meets the goal on the total of all their construction projects within the geographic area; provided, however, that if the contractor or subcontractor has denied equal employment opportunity, it shall not be in compliance; or

(b) If the contractor or subcontractor can establish that it has a collective bargaining agreement with a union or other employee organization, that it utilizes that union or organization as its source for over eighty percent of its workforce needs, and that the minority workforce utilization rate in that building and construction trade itself meets the goal on all construction projects to which the union or organization has referred individuals within the geographic area; provided, however, that if the contractor or subcontractor has denied equal employment opportunity, it shall not be in compliance.

(vi) Apprentice work hours and paid classroom time may be counted toward these goals only if the apprentice is registered in a program which currently meets the State apprenticeship equal opportunity requirements contained in Title 12 NYCRR Part 600, including the following requirements:

(a) The ratio of minority apprentices to all apprentices indentured in the program is at least equal to the ratio of minority members in the labor force to the total labor force in the principal county in which the program operates.

(b) Advanced standing or credit is granted by the apprenticeship program on the basis of previously acquired experience, training, skills or aptitude.

(c) Individuals whose age exceeds the established maximum age are admitted to the program, where such action is necessary to assist the program's sponsor in achieving its affirmative action obligations.

3. Specific Affirmative Action Steps. Each contractor and subcontractor shall make every good faith effort to attain its goals within its timetables and shall institute any or all of the following specific affirmative action steps and others that may be necessary to this end:

(A) Notify community organizations, minority outreach organizations, local government employment agencies and the State Employment Service that it has employment opportunities available and shall maintain records of the organization's response.

(B) Maintain a file of the name, address and social security number of each minority and female worker referred from all sources, as well as a record of what action was taken with respect to each such referred worker, and whether the worker was sent to the union hiring hall for referral to work. The reasons for failure to employ or to send for referral, or for termination of employment shall be documented in the file.

(C) Develop on-the-job training opportunities. It shall participate in training programs which have government approval, and assist in any association or employer-group training programs relevant to the contractor's employee needs consistent with its obligations hereunder.

(D) Disseminate its EEO policy within its own organization through policy manuals, company newspapers, annual reports, etc.; by conducting staff, employee and union representatives' meetings to explain and discuss the policy; by posting of the policy; and by specific review of the policy with minority and female employees and their supervisors. The employer shall instruct any employee who has the authority to make hiring decisions, and all supervisors, of their responsibility to implement the employer's obligations hereunder.

(E) Disseminate the EEO policy externally by informing and discussing it with all recruitment sources; by advertising in news media, specifically including minority news media; and by notifying and discussing it with all subcontractors and suppliers.

(F) Make specific recruitment efforts directed at all minority organizations, trade schools, secondary schools, minority recruitment organizations and minority training organizations, within the contractor's recruitment area.

(G) Continually inventory and evaluate all minority and female personnel for promotion opportunities and encourage minority and female employees to seek such opportunities.

(H) Make certain that all facilities and company activities are non-segregated.

(I) Actively and affirmatively solicit bids for subcontracts from disadvantaged subcontractors engaged in the trades covered by these provisions, including circulation of minority contractor associations, and maintain records of these efforts.

4. Trainees

(A) Where practical, trainees shall be employed and said trainees shall be registered in an on-the-job training program approved by an agency of the State of New York, a local unit of government or the federal government. The number of training positions and length of training periods shall be set forth in the affirmative action program.

(B) In the event that the hours of trainee utilization are less than required the contractor's compensation will be decreased by an amount equal to the wages and fringe benefits which would have been paid to the trainees had they been employed, at a rate equivalent to that of first term trainees.

(C) Entry wage rates shall be not less than the wages and fringe benefits paid to apprentices in a registered apprenticeship program in that occupation and labor area or, if no such registered program exists, not less than 50 percent of journeyman's wages and fringe benefits. Increments in wage rates shall be

at least as frequent, and in such amounts, as for registered apprentices, or, where there is no apprentice program, consistent with the practice in the industry for new entrants.

(D) The contractor and subcontractor shall attempt to provide continuous employment for trainees after the completion of the contract, to enable them to complete their course of training.

(E) The contractor and subcontractor shall refer, recommend and sponsor for union membership any of its trainees who can perform the duties of a qualified journeyman or who have been certified by the training program as having successfully completed the course of training. Such trainees shall be paid full journeyman wages and fringe benefits whether or not union membership is granted after such referral, recommendation or sponsorship.

(F) Where a State or State-assisted contract is performed in the geographic area of a local government which administers an on-the-job training program in the building and construction trades, the contractor shall participate in such program.

5. Minority and Female (Sub) Contractors and Businesses.

(A) Every contractor and State-assisted applicant awarded a construction contract in excess of \$100,000 shall, where practical, make good faith efforts to utilize female and minority (sub) contractors and businesses in the performance of the contract and in the procurement of construction and related materials, as well as in the ancillary services required during construction.

(B) Every such contractor and applicant shall notify the contracting agency that it has timely solicited at least those qualified minority enterprises listed by the State Department of Commerce, Office of Minority Business Enterprise, and by the local Regional Office of the United State Small Business Administration and shall report, in such form as required by the CSCC, the results of such efforts."

"(c) General

1. In the event a contractor or subcontractor who has received an exemption in accordance with Article V ceased to participate in a negotiated affirmative action plan approved by the Commissioner of Human

Rights, or approval of said plan is withdrawn or discontinued, said contractor or subcontractor shall be deemed to be committed to the affirmative action requirements of this section for the remaining period of the contract or subcontract.

2. Any contractor or subcontractor subject to the requirements of these conditions who, together with the labor organization with whom it has a collective bargaining agreement subsequently becomes a signatory to a negotiated plan in its geographic area, either individually or through an association, may thereby meet its requirements under these provisions for any trade covered by such plan if approved pursuant to Section 1: provided, however, that the OSCC first determines that said contractor or subcontractor is not in violation of these provisions and that said contractor or subcontractor, or the labor organization with whom it has a collective bargaining agreement is not subject to a court order under Title VII of the 1964 Civil Rights Act or under Article 15 of the Executive Law or under any State or local civil rights law."

(d) Local and area programs

If the performance of the contract is subject to a local or federal affirmative action program or the (sub) contractor is participating in an approved area plan, as provided in section 1, the OSCC may direct that the bid conditions and/or the program as required therein shall apply in lieu of the requirements of subdivisions (b) and (c) of this section.

Section 5. - Compliance Reports

(a) Every contractor performing a State or State-assisted contract shall file, and shall cause each of its subcontractors to file, a compliance report at least monthly, in such form and containing such information as the OSCC may prescribe, including the name of any supplier of goods or services of over \$10,000 who employs over 50 people. Said report shall be filed with the State contracting agency within 10 days of the close of the reporting period, and a copy thereof shall be forwarded promptly by the agency to the OSCC.

(b) Unless exempted in accordance with Article V of Executive Order 45 (1977), all facilities of the contractor within the State of New York shall be included in such reports.

Section 6. - Duties of State Agencies

(a) State agencies shall include or cause to be included in every State and State-assisted construction contract and subcontract hereafter entered into, and the bid documents therefor, the following:

1. The provisions contained in (a) through (f) of Section 3.1 of Article III of Executive Order 45 (1977); and
2. The provisions contained in subdivisions (a) through (c) of Section 4 hereof, or, if so directed by the OSCC pursuant to Section 4(d), a reference to federal local bid conditions as provided in Section 1 hereof; and
3. The provisions contained in Section 7 hereof; and
4. The provisions contained in subdivisions (a) and (b) of Section 5 hereof; and
5. State-assisted construction contracts only, the provisions contained in subdivisions 4.2 and 4.3 of Article IV of Executive Order 45 (1977).

(b) State Agencies which approve or award State or State-assisted contracts involving construction, shall forward to OSCC announcements or identification of apparent low bidders for bid contracts or the names of proposed contractors for non-bid contracts; copies of the affirmative action program submitted by the apparent low bidder and prospective subcontractors; names of contractors declared nonresponsible for failure to submit an acceptable affirmative action program; copies of announcements of contract awards; copies of commencement of work orders; copies of application for approval of all subcontractors; and copies of agency contract status reports.

(c) State contracting agencies shall not award any contract or approve any subcontractor for work until the contractor or subcontractor has submitted an affirmative action program approved by the OSCC.

(d) Failure of a contractor or subcontractor to submit an acceptable affirmative action program prior to award of the contract shall result in said (sub) contractor being declared nonresponsible by the OSCC and/or the contracting agency.

(e) State Agencies shall obtain the compliance reports required by Section 5 and promptly forward copies thereof to the OSCC.

(f) State contracting agencies shall provide written on-site confirmation of all compliance reports, and shall file such additional

reports on compliance as the OSCC may require. State contracting agencies shall be responsible for the accuracy of compliance reports, and shall attest to their veracity in writing through the resident engineer or other designated personnel.

(g) The OSCC may assume or reassume jurisdiction over any matter referred by it, or may revoke any delegation of duties made by it, to any State agency if the OSCC considers it necessary or appropriate to the achievement of the purposes of Executive Order 45 (1977).

Section 7. - Sanctions and Remedies

(a) The Commissioner of Human Rights shall direct and the contracting agency shall impose on contractors and subcontractors failing to comply with the contract provisions and the affirmative action requirements of Executive Order 45 (1977) and these regulations, such sanctions and remedies as the Commissioner deems advisable among those specified in Article VII of the order, in accordance with the procedures specified herein; provided, however, that where a State-assisted contract is awarded by an agency of a local government to which Section 1 hereof applies, the determination to impose sanctions may, with OSCC approval, be made by the local government for non-compliance with its affirmative action program and such sanctions shall be in accordance with said local affirmative action program, as set forth in the contract; and further provided that the OSCC shall impose the appropriate sanctions if the local government fails to act.

(b) Contractors shall be responsible for the compliance of their subcontractors regardless of tier. Failure of its subcontractor to comply with the requirements of Executive Order 45 (1977) or these regulations may be grounds for the imposition of sanctions and remedies against a contractor. Contractors and subcontractors may not enter into any contract or contract modification with a contractor debarred from State and State-assisted construction contracts. The contractor shall carry out such sanctions against its subcontractors as directed by the OSCC and imposed by the contracting agency. Any contractor who fails to carry out such sanctions shall be deemed to be in non-compliance and shall itself be subject to these sanctions.

(c) Procedures. No sanction permitted under Section 7.1 of Executive Order 45 (1977) shall be imposed on a contractor or subcontractor without affording an opportunity for a hearing.

1. A contractor or subcontractor against whom sanctions are proposed by the OSCC or by a contracting agency with the approval of the OSCC shall have written notice thereof and of the reasons therefore, and shall be furnished with a copy of the charges preferred against it. The contractor or subcontractor shall be allowed at least two weeks

**1977-02-01; A Fleisher to Hon Lasker - Proposed
Reg State and State Assisted Construction Contracts -
certified 2017-08-09-1 doc 1**

to answer the charges against it in writing. During this period, OSCC and/or the contracting agency shall make reasonable efforts to secure compliance by methods of conference, conciliation, mediation, and persuasion. If at the end of said period, the OSCC continues to prefer said charges, a hearing upon such charges shall be held within seven days thereafter by a person designated as a hearing officer by the Commissioner of Human Rights in writing for that purpose. The hearing officer shall be an attorney licensed to practice law in the State of New York. The contractor or subcontractor against whom charges are preferred may be represented by counsel, and may summon witnesses in its behalf. The burden of proving non-compliance with the contract shall be on the OSCC. Conformity to technical rules of evidence shall not be required. The hearing officer shall make a record of such hearing which, with his or her findings concerning the charges, and his or her recommendation, if any, concerning sanctions, shall promptly be referred to the Commissioner for review and decision.

2. Failure of the contractor or subcontractor to meet its goals shall shift to it the requirement to come forward with evidence to show that it has instituted at least the specific affirmative action steps and the trainee requirements of Section 4 hereof and has made every good faith effort thereby to achieve compliance with the affirmative action requirements of the contract and the program.

3. It shall be no excuse for the failure of a contractor or subcontractor to meet the minority utilization goals that the union with which it has a collective bargaining agreement providing for exclusive referral failed to refer minority employees. Discrimination in referral for employment, even if pursuant to provisions of a collective bargaining agreement is prohibited by law. It is State policy that employers have a responsibility to provide equal employment opportunity if they wish to participate in public contracts. To the extent they have delegated the responsibility for some of their employment practices to a labor organization and, as a result, are prevented from meeting their obligations pursuant to Executive Order 45 (1977) such employers cannot be considered to be in compliance.

4. Promptly after receiving the report of the hearing officer, the Commissioner shall issue findings and direct the imposition of any appropriate sanctions permitted under Executive Order 45 (1977).

1977-02-01; A Fleisher to Hon Lasker - Proposed
Reg State and State Assisted Construction Contracts -
certified 2017-08-09-1 doc 1

(d) The procedures contained in subdivision (c) of this section shall apply to the imposition of sanctions against applicants for State assistance as provided in subdivision 4.3 of Article IV of Executive Order 45 (1977).

Section 8. - Separability Clause

If any part or provision of these regulations or the application thereof to any person or circumstances be adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the part, provision or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder hereof or the application thereof to other persons or circumstances.

Section 9. - Incorporation by Reference

These regulations shall be considered to be part of every contract and subcontract subject to Executive Order 45 (1977), whether or not they are physically incorporated in such contract.

WERNER H. KRAMARSKY
Commissioner

**1977-02-01; A Fleisher to Hon Lasker - Proposed
Reg State and State Assisted Construction Contracts –
certified 2017-08-09-1 doc 1**

REGULATIONS OF THE COMMISSIONER OF THE
STATE DIVISION OF HUMAN RIGHTS
PURSUANT TO EXECUTIVE ORDER NO. 45 (1977)
FOR STATE AND STATE-ASSISTED NON-CONSTRUCTION CONTRACTS

1977-02-01; A Fleisher to Hon Lasker - Proposed
Reg State and State Assisted Construction Contracts –
certified 2017-08-09-1 doc 1

TABLE OF CONTENTS

	<u>Page</u>
Section 1 - Definitions.	1
Section 2 - Contract Provisions.	2
Section 3 - Compliance Reports and Record Keeping.	5
Section 4 - Duties of State Agencies	5
Section 5 - Sanctions and Remedies	6
Section 6 - Separability Clause.	8
Section 7 - Incorporation by Reference	8

REGULATIONS OF THE COMMISSIONER OF THE
STATE DIVISION OF HUMAN RIGHTS
PURSUANT TO EXECUTIVE ORDER NO. 45 (1977)
FOR STATE AND STATE-ASSISTED NON-CONSTRUCTION CONTRACTS

Exercising the authority vested in me by Executive Order 45 (1977) and by Section 295.9 of the Human Rights Law, I hereby promulgate the regulations set forth below.

REGULATIONS OF THE COMMISSIONER OF THE
STATE DIVISION OF HUMAN RIGHTS
PURSUANT TO EXECUTIVE ORDER NO. 45 (1977)
FOR STATE AND STATE-ASSISTED NON-CONSTRUCTION CONTRACTS

Section 1. - Definitions

In addition to the terms defined in Executive Order No. 45 (1977) for the purpose of these rules and regulations:

(a) Contractor - any person or entity employing 50 or more persons who bids for, applies for, or who is awarded a State or State-assisted prime contract, for other than construction; provided, however, that this shall not apply to any contract for less than \$50,000 except as to those contractors who have contracts which, in the current 12-month period, total, or can reasonably be expected to total \$50,000 or more. Contractor shall also include any financial institution which serves as a depository of State funds.

(b) Subcontractor - any person or entity employing 50 or more persons performing a subcontract of \$10,000 or more under a State or State-assisted prime contract for other than construction.

(c) Minority - includes Blacks, Hispanics (non-European), Asian Americans and American Indians.

(d) Labor area - that geographic area from which an employer can reasonably be expected to recruit, and from which employees can reasonably be expected to travel to work, without changing their place of residence.

(e) Underutilization - the employment of fewer minority group persons or women in a particular job classification or function than would reasonably be expected by their availability in the labor area.

(f) Apprentice - a person registered in a bona fide apprenticeship program registered with the U.S. Department of Labor or with the State Department of Labor.

**1977-02-01; A Fleisher to Hon Lasker - Proposed
Reg State and State Assisted Construction Contracts --
certified 2017-08-09-1 doc 1**

(g) Minority and female business - any firm that is owned 51 percent or more by women or by a member or members of a minority group.

Section 2. - Contract Provisions

Pursuant to Articles III and IV of Executive Order 45 (1977) every State and State-assisted contract and subcontract for other than construction, except those referred to in subdivision (c) of this section, and the bidding documents or other solicitations of prospective contractors therefor, unless exempted under Article V of said Executive Order, shall contain subdivisions (a) and (b) hereof, as follows:

"(a). A contractor identified as an otherwise qualified low bidder or prospective contractor must submit to the State contracting agency prior to the final award of the contract, and prospective subcontractors prior to their approval by the agency, a written program of affirmative action to ensure the opportunity for equitable participation of minority group members and women in those activities of the contractor which are subject to Executive Order 45 (1977) which includes all its other non-construction contracts within the State of New York during the life of the State contract. No contract may be awarded until said program has been approved by the OSCC. Failure to submit a satisfactory affirmative action program shall constitute a material departure from bid requirements and the contractor may be declared nonresponsible. All affirmative action programs shall fulfill the requirements of subdivisions (1) through (6) of paragraph (b) of this section."

"(b). Requirements of affirmative action programs.

1. The (sub) contractor shall submit a written analysis of all job classifications, job groups and job titles, both current and projected during the life of this contract. It shall include a statement of present and projected (i) openings for hiring and promotion of all employees in specific job categories at each wage rate within each level of employment and according to major organizational units, and (ii) data indicating the ethnicity of all employees in specific job categories at each wage rate within each level of employment, and according to major organizational units, within the contractor's employee force.

2. Where there is underutilization of minority persons and women, the (sub) contractor will commit itself to specific written programs which include goals and timetables for increasing the participation of minority persons and women at all levels of employment and in all organizational units.

A. The (sub) contractor shall make every good faith effort to attain its goals within the timetables prescribed and shall institute any or all

of the following affirmative action steps and any others, as may be necessary to accomplish this end:

(i) development of recruitment and outreach programs for minority group persons and women;

(ii) a thorough evaluation of current hiring and promotion criteria and the substitution of validated criteria where required;

(iii) restructuring of job classifications, groups, titles and lines of progression to assure appropriate job assignment and maximum upward and lateral mobility within the employment structure;

(iv) establishment of a career development file to aid in the identification of minority group persons and women eligible for personnel action to expand their career opportunities;

(v) review of wage structure to remove inequities in salary differentials which are not the result of seniority or merit;

(vi) establishment of or participation in training programs and career counseling to facilitate employment and promotional opportunities for minority persons and women;

(vii) development of an affirmative action file for maintaining resumes and applications of minority group persons and women;

(viii) development of internal monitoring procedures to assure the effective participation of managers and supervisors in implementing the affirmative action program;

(ix) dissemination of information on the affirmative action program within the contractor's own organization through policy manuals, company newspapers, annual reports, etc.; by conducting staff, employee, and union representatives' meetings to explain and discuss the policy; by posting information on the affirmative action program and by specific review of the program with minority employees, females and their supervisors; and by instructing any employee who has the authority to make hiring or promotions, and all supervisors, of their responsibility to implement the employer's obligations under this affirmative action program;

1977-02-01; A Fleisher to Hon Lasker - Proposed
Reg State and State Assisted Construction Contracts --
certified 2017-08-09-1 doc 1

(x) posting of timely notices of all job openings listing qualifications and job duties.

(B) The steps listed in this subdivision are illustrative only and are not intended to limit affirmative action techniques that may be necessary to modify or expand current policies and practices. The contractor shall also eliminate any practices which are identified as discriminatory.

(C) Good faith efforts to implement these affirmative action steps shall be evaluated during the performance of the contract with reference to the progress made to overcome any underutilization identified.

3. Where no underutilization appears as a result of the analysis undertaken pursuant to subdivision 1 of this paragraph, the (sub) contractor agrees to maintain at least its current level of utilization of minority persons and women in its workforce.

4. General.

(A) The affirmation action program shall specify the unions or other employee organizations to which the (sub) contractor's employees belong. Upon request of the OSCC, the (sub) contractor shall provide a copy of any current agreement with a union or employee association which affects employment policies and practices, and any new agreement as negotiated.

(B) The (sub) contractor shall designate a company official to effectuate its equal employment opportunity and affirmative action policies.

5. (A) Every contractor and State-assisted applicant awarded a contract for other than construction, in excess of \$100,000, shall, where practical, utilize minority and female businesses in the performance of the contract and in materials-supply contracts.

(B) Every such contractor and applicant shall notify the contracting agency that it has solicited at least those qualified minority enterprises listed by the State Department of Commerce, Office of Minority Business Enterprise, and by the local Regional office

**1977-02-01; A Fleisher to Hon Lasker - Proposed
Reg State and State Assisted Construction Contracts -
certified 2017-08-09-1 doc 1**

of the United States Small Business Administration and shall report, in such form as required by the OSCC, the results of such efforts."

(c) If the contractor or subcontractor is subject to an affirmative action program under federal or local law or regulation, the OSCC may approve said program, in whole or in part, if it meets at least the minimum standards contained herein. In such case, the provisions contained in said program shall apply in lieu of the requirements of subdivisions (a) and (b) of this section.

Section 3. - Compliance Reports and Record Keeping

(a) Every contractor performing a State or State-assisted contract shall file, and shall cause each of its subcontractors to file, a compliance progress report quarterly unless required more frequently by the OSCC, in such form and containing such information as the OSCC may prescribe. Said report shall be filed with the State contracting agency within 10 days of the close of the reporting period, and a copy thereof shall be forwarded promptly by the agency to the OSCC.

(b) Unless exempted in accordance with Article V of Executive Order 45 (1977), all facilities of the contractor within the State of New York shall be included in such reports.

(c) Every non-exempt contractor shall obtain and keep on file for review by the OSCC a separate affirmative action program of the form and substance specified in subdivision (b) of section 2 hereof for each subcontractor doing substantial business with the contractor.

(d) Every non-exempt contractor and subcontractor shall advise the OSCC of all discrimination-related consent decrees, court rulings, administrative findings and/or conciliation agreements pertaining to it, and upon request shall make copies thereof available to the OSCC.

Section 4. - Duties of State Agencies

(a) State agencies shall include or cause to be included in every State and State-assisted contract and subcontract for other than construction hereafter entered into, and the bid documents therefor, the following:

1. The provisions contained in subdivisions (a) through (f) of Section 3.1 of Article III of Executive Order 45 (1977); and

2. The provisions contained in subdivisions (a) and (b) of Section 2 hereof; or, if so directed by the OSCC pursuant to Section 2(c), a reference to federal conditions in lieu thereof.

**1977-02-01; A Fleisher to Hon Lasker - Proposed
Reg State and State Assisted Construction Contracts -
certified 2017-08-09-1 doc 1**

3. The provisions contained in Section 5 hereof; and
4. The provisions contained in subdivisions (a) through (d) of Section 3 hereof; and
5. State-assisted contracts only, the provisions contained in subdivisions 4.2 and 4.3 of Article IV of Executive Order 45 (1977).

(b) State agencies which approve or award State or State-assisted contracts not involving construction, shall forward to OSCC copies of the following where utilized: announcements or identification of low bidders for bid contracts or the names of proposed contractors for non-bid contracts; copies of announcements of contract awards; copies of the affirmative action program submitted by the approved low bidder and prospective subcontractors; names of contractors declared nonresponsible for failure to submit an acceptable affirmative action program; copies of commencement of work orders; copies of application for approval of all subcontractors; and copies of agency contract status reports.

(c) State contracting agencies shall not award any contract or approve any subcontractor for work until the contractor or subcontractor has submitted an affirmative action program approved by the OSCC.

(d) Failure of a contractor or subcontractor to submit an acceptable affirmative action program shall result in said (sub) contractor being declared nonresponsible by the OSCC and/or the contracting agency.

(e) State agencies shall obtain the compliance reports required by Section 3 and promptly forward copies thereof to the OSCC.

(f) When directed by the OSCC, State contracting agencies shall provide written on-site confirmation of all compliance reports, and shall file such additional reports on compliance as the OSCC may require. State contracting agencies shall be responsible for the accuracy of such compliance reports, and shall attest to their veracity in writing.

Section 5. - Sanctions and Remedies

(a) The Commissioner of Human Rights shall direct and the contracting agency shall impose, on contractors and subcontractors failing to comply with the contract provisions and the affirmative action requirements of Executive Order 45 (1977) and these rules and regulations, such sanctions and remedies as the Commissioner deems advisable among those specified in Article VII of the order, in accordance with the procedures specified herein.

(b) Contractors shall be responsible for the compliance of their subcontractors. Subcontractors shall be liable for non-compliance to both the contractor and the contracting agency. Failure of a subcontractor to comply with the requirements of Executive Order 45 (1977)

or these regulations may be grounds for the imposition of sanctions and remedies against the subcontractor or its contractor. Contractors and subcontractors may not enter into any contract or contract modification with a contractor debarred from State and State-assisted construction contracts. The contractor shall carry out such sanctions against its subcontractors as directed by the OSCC and imposed by the contracting agency. Any contractor who fails to carry out such sanctions shall be deemed in non-compliance and shall itself be subject to these sanctions.

(c) Procedures. No sanction permitted under Section 7.1 of Article VII of Executive Order 45 (1977) shall be imposed on a contractor or subcontractor without affording an opportunity for a hearing.

1. A contractor or subcontractor against whom sanctions are proposed by the OSCC or by a contracting agency with the approval of the OSCC shall have written notice thereof and of the reasons therefor, and shall be furnished with a copy of the charges preferred against it. The contractor or subcontractor shall be allowed at least two weeks to answer the charges against it in writing. During this period, OSCC and/or the contracting agency shall make reasonable efforts to secure compliance by methods of conference, conciliation, mediation and persuasion. If at the end of said period, the OSCC continues to prefer said charges, a hearing upon such charges shall be held within seven days thereafter by a person designated as a hearing officer by the Commissioner of Human Rights in writing for that purpose. The hearing officer shall be an attorney licensed to practice law in the State of New York. The contractor or subcontractor against whom charges are preferred may be represented by counsel, and may summon witnesses in its behalf. The burden of proving non-compliance with the contract shall be on the OSCC. Conformity to technical rules of evidence shall not be required. The hearing officer shall make a record of such hearing which, with his or her findings concerning the charges, and his or her recommendation if any concerning sanctions, shall promptly be referred to the Commissioner for review and decision.

2. Failure of the contractor or subcontractor to meet its goals shall shift to it the requirement to show that it has instituted at least the affirmative action steps contained in Section 2 hereof and that it has made every good faith effort thereby to achieve compliance with the affirmative action requirements of the contract and the program.

3. It shall be no excuse for the failure of a contractor or subcontractor to meet its affirmative action obligations that the union with which it has a collective bargaining agreement providing for exclusive referral or other agency or organization utilized for job referrals, failed to refer minority employees. Discrimination in referral for employment, even if pursuant to provisions of a collective bargaining agreement is prohibited by law. It is State policy that employers have a responsibility to provide equal employment opportunity if they wish to participate in public contracts. To the extent they have delegated the

**1977-02-01; A Fleisher to Hon Lasker - Proposed
Reg State and State Assisted Construction Contracts -
certified 2017-08-09-1 doc 1**

responsibility for some of their employment practices to a labor organization or other agency and, as a result, are prevented from meeting their obligations pursuant to Executive Order 45 (1977), such employers cannot be considered to be in compliance.

4. Promptly after receiving the report of the hearing officer, the Commissioner shall issue findings and direct the imposition of any appropriate sanctions permitted under Executive Order 45 (1977).

Section 6. - Separability Clause

If any part or provision of these rules and regulations or the application thereof to any person or circumstances be adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the part, provision or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder hereof or the application thereof to other persons or circumstances.

Section 7. - Incorporation by Reference

These regulations shall be considered to be a part of every contract and subcontract subject to Executive Order 45 (1977), whether or not they are physically incorporated in such contract or subcontract.

WERNER H. KRAMARSKY
Commissioner

1977-04-07; Lefkowitz AG to Lasker Request
Laskers Comments on Approach to Affirmative
Action - certified 2017-08-09-4 doc 6



STATE OF NEW YORK

DEPARTMENT OF LAW

LOUIS J. LEFKOWITZ
ATTORNEY GENERAL

TWO WORLD TRADE CENTER
NEW YORK, N.Y. 10047
TELEPHONE: 488-7412

GEORGE D. ZUCKERMAN
ASSISTANT ATTORNEY GENERAL
IN CHARGE OF CIVIL RIGHTS BUREAU

April 7, 1977

Re: Percy v. Brennan
73 Civ. 4279

Hon. Morris E. Lasker
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, N.Y. 10007

Dear Judge Lasker:

In December, 1976 Your Honor once more extended jurisdiction in this action for the purpose, as originally set forth in your order of February 24, 1975, of receiving, reviewing and ruling upon any new affirmative action program for public construction in New York City entered into by any defendant in this action, prior to its becoming effective. Accordingly, the State defendants have previously submitted to you and to plaintiffs' counsel copies of both Executive Order No. 45 and the proposed regulations for State and State-assisted construction and non-construction contracts.

I have now been advised that the State Division of Human Rights has completed public hearings with regard to the proposed regulations implementing Executive Order No. 45. The period within which written comments regarding the proposed regulations may be submitted by the public has also been completed. The State Division of Human Rights is currently reviewing the testimony and comments in order to determine whether any of the procedural modifications to the proposed regulations suggested therein should be adopted.

1977-04-07; Lefkowitz AG to Lasker Request
Laskers Comments on Approach to Affirmative
Action - certified 2017-08-09-4 doc 6


To: Hon. Morris E. Lasker
Re: Percy v. Brennan

April 7, 1977
-----2

Before such changes, if any, are made, and before the proposed regulations are officially promulgated, we respectfully request Your Honor's comments upon the basic approach to affirmative action that is reflected in the proposed regulations. If Your Honor concurs in the substance of the proposed regulations, it is respectfully suggested that an order approving the proposed regulations and dismissing this action as against the State defendants would be a satisfactory resolution of this matter.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General
By


ARNOLD D. FLEISCHER
Assistant Attorney General

ADF:pw

cc: Isabelle Katz Pinzler, Esq.
Robert Fiske, Esq. ✓
Walter M. Collieran, Esq. ✓
Robert G. Benisch, Esq. ✓
Robert J. Fink, Esq. ✓
Beverly Gross, Esq.

April 8, 1977

Arnold D. Fleischer, Esq.
Assistant Attorney General
Two World Trade Center
New York, New York 10047

Perry v. Brennan
73 Civ. 4279

Dear Mr. Fleischer:

I have your letter of April 7th.

By this letter, I am asking other counsel
in the case to advise me by April 18th of their
views in the matter.

I will then inform the parties the appropriate
procedure to be followed in the circumstances
you describe.

Very truly yours,

NEL/cv

cc: Isabel Katz Pincus, Esq.
Gennison Young, Jr., Esq.
Walter M. Colleran, Esq.
Robert G. Benisch, Esq.
Robert J. Pink, Esq.
Beverly Gross, Esq.

4/18

DORAN, COLLERAN, O'HARA, POLLIO & DUNNE, P. C.

1140 AVENUE OF THE AMERICAS

JOHN L. DORAN
WALTER M. COLLERAN
RICHARD L. O'HARA
BENEDICT J. POLLIO
JOHN R. DUNNE
ROBERT A. KENNEDY
THOMAS J. LILLY
ALBERT L. BASES

NEW YORK, N. Y. 10036

212 986-3737

1461 FRANKLIN AVENUE
GARDEN CITY, N. Y. 11530

516 CH B-5757

JULIUS R. LIPPMAN
COUNSEL

April 13, 1977

HUGO F. RICCA, JR.
JOHN J. SULLIVAN
JOSEPH BONACORE
JOHN R. URBAN
ALAN J. REARDON
JOHN F. MILLS
ROBERT J. AURIGEMMA
WILLIAM B. HOLMES, JR.
JOSEPH M. INCORVAIA
WILLIAM M. SAVINO

Hon. Morris E. Lasker
United States Court House
Foley Square
New York, N.Y. 10007

Re: Percy v. Brennan
73 Civ. 4279

Dear Judge Lasker:

We are in receipt of your letter of April 8, 1977 requesting a response from counsel to the letter of Arnold D. Fleischer, Esq., New York State Assistant Attorney General dated April 7, 1977.

Please be advised that we are strenuously opposed to the suggestion in Mr. Fleischer's letter seeking your concurrence in the proposed regulations at this time. The New York Building and Construction Industry Board of Urban Affairs Fund, along with the leading labor and management state-wide associations in this field have commenced an action against Gov. Carey to declare the issuance of Executive Order 45 as unconstitutional, illegal and void. It is our position that the Governor has exceeded his authority by entering into the legislative field, an area reserved exclusively for the legislature under the New York State Constitution.

Page 1 of 2.

DORAN, COLLERAN, O'HARA, POLLIO & DUNNE, P. C.

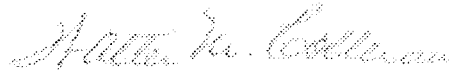
April 13, 1977

Hon. Morris E. Lasker

In a similar situation the Court of Appeals of the State of New York upheld an action we brought against the City of New York invalidating its rules and regulations establishing affirmative action programs containing quotas. *Broderick v. Lindsay*, 39 N.Y. 2d 641 (1976). A second attempt by the City was likewise ruled invalid (*Matter of Fullilove v. Beame*, N.Y.L.J., April 5, 1977).

Under the circumstances recited above we feel it would be most inappropriate for this court to act until the validity of the Governor's action is resolved.

Very truly yours,



Walter M. Colleran

WMC:mh

cc: Arnold D. Fleischer, Esq.
Isabelle Katz Pinzler, Esq.
Dennison Young, Jr., Esq.
Robert G. Benisch, Esq.
Robert J. Fink, Esq.
Beverly Gross, Esq.

DORAN, COLLERAN, O'HARA, POLLIO & DUNNE, P. C.

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JULIUS R. LIPPMAN
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April 13, 1977

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ALAN J. REARDON
JOHN F. MILLS
ROBERT J. AURIGEMA
WILLIAM B. HOLMES, JR.
JOSEPH M. INCORVAIA
WILLIAM M. SAYING

Hon. Morris E. Lasker
United States Court House
Foley Square
New York, N.Y. 10007

Re: Percy v. Brennan
73 Civ. 4279

Dear Judge Lasker:

We are in receipt of your letter of April 8, 1977 requesting a response from counsel to the letter of Arnold D. Fleischer, Esq., New York State Assistant Attorney General dated April 7, 1977.

Please be advised that we are strenuously opposed to the suggestion in Mr. Fleischer's letter seeking your concurrence in the proposed regulations at this time. The New York Building and Construction Industry Board of Urban Affairs Fund, along with the leading labor and management state-wide associations in this field have commenced an action against Gov. Carey to declare the issuance of Executive Order 45 as unconstitutional, illegal and void. It is our position that the Governor has exceeded his authority by entering into the legislative field, an area reserved exclusively for the legislature under the New York State Constitution.

Page 1 of 2.

1977-04-13; W Colleran to Lasker re Opposed
to Fleishers letter proposed regulations -
certified 2017-08-09-4 doc 4

DORAN, COLLERAN, O'HARA, POLLIO & DUNNE, P. C.

April 13, 1977

Hon. Morris E. Lasker

In a similar situation the Court of Appeals of the State of New York upheld an action we brought against the City of New York invalidating its rules and regulations establishing affirmative action programs containing quotas. Broderick v. Lindsay, 39 N.Y. 2d 641 (1976). A second attempt by the City was likewise ruled invalid (Matter of Fullilove v. Beame, N.Y.L.J., April 5, 1977).

Under the circumstances recited above we feel it would be most inappropriate for this court to act until the validity of the Governor's action is resolved.

Very truly yours,



Walter M. Collieran

WMC:mh

cc: Arnold D. Fleischer, Esq.
Isabelle Katz Pinzler, Esq.
Dennison Young, Jr., Esq.
Robert G. Benisch, Esq.
Robert J. Fink, Esq.
Beverly Gross, Esq.

1977-04-15; D Greene Attny for Plaintiff to
Hon Lasker - Views of Proposed Regulations
Ex Order 45 - certified 2017-08-09-4 doc 3

National Employment Law Project

423 West 118th Street
New York, N. Y. 10027
(212) 866-8591

April 15, 1977

Honorable Morris E. Lasker
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Percy, et al. v. Brennan, et al.

Dear Judge Lasker:

As an attorney for the plaintiffs in the above-titled action, I am writing this letter in response to your Honor's recent request for counsels' views on the suggestions of the State defendants contained in their April 7, 1977 letter relating to the proposed regulations implementing Executive Order 45.

As we have indicated in letters to Governor Carey and at public hearings on the proposed regulations, plaintiffs believe that, on paper, the proposed regulations for State and State-assisted construction and non-construction contracts are adequate. However, the sufficiency of the proposed regulations cannot be assessed solely on the basis of the written document. Collateral practical assessments must also be made. In this vein, it has come to our attention that, to date, no funds have been allocated or budgeted for enforcement of these proposed regulations.

Experience has demonstrated that without rigorous enforcement activities and watch-dog capabilities even the best of affirmative action plans is virtually worthless. Therefore, if Executive Order 45 and the proposed regulations are to have any actual, beneficial effect on the equal employment opportunities of minorities on State and State-assisted construction, adequate staff and resources must be allocated for vigorous, centralized enforcement activities.

While it is apparent from both the Executive Order and the proposed regulations that enforcement is envisioned, neither are clear, in practical terms, as to how it is to be effectuated. For example, Section 4(c)(ii) of the proposed

1977-04-15; D Greene Atty for Plaintiff to
Hon Lasker - Views of Proposed Regulations
Ex Order 45 - certified 2017-08-09-4 doc 3

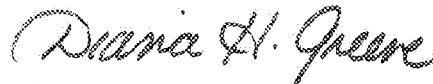
Honorable Morris E. Lasker
April 15, 1977
Page 2

regulations specifically forbids a contractor to pursue the age-old "contract compliance" game of moving a single minority employee from job site to job site solely for purposes of paper compliance. Without adequate enforcement capabilities this and similar practices cannot be discovered and ended; mere delegation of the duty for on-site inspection to a contracting state agency is not sufficient to ensure compliance with the terms and intent of the proposed regulations. Similarly, proper allocation must be made for the training of a staff large enough to review both the proposed affirmative action plans of apparent low bidders and the contract recipient's monthly compliance reports with skill and sophistication. Thus plaintiffs cannot accept the proposed regulations as fully adequate to ensure equal employment opportunities in the construction trades for minorities in New York City without better provision for enforcement.

Second, the State defendants indicate in their letter that procedural modifications to the proposed regulations may be adopted. It would appear that the proposed regulations reviewed by plaintiffs and by this Court are not the regulations which are to be officially promulgated. Because plaintiffs have no knowledge of the content of the procedural modifications being considered by defendants nor how such modifications might affect the regulations, they obviously can make no final comment as to the adequacy of the proposed regulations. Indeed, this Court would appear to be similarly handicapped.

For the above reasons, plaintiffs respectfully request that an order approving the proposed regulations and dismissing this action not be issued at this time and that the State defendants be requested to submit any modified regulations to the plaintiffs' attorneys and to this Court prior to promulgation.

Very truly yours,



Diana H. Greene
Attorney for Plaintiffs

Cc

Arnold D. Fleischer, Esq.
Dennison Young, Jr., Esq.
Walter M. Colleran, Esq.
Robert G. Benisch, Esq.
Robert J. Fink, Esq.
Beverly Gross, Esq.

1977-04-28; Fleischer AAG to Hon Lasker re
Review Proposed Regulations Ex Order No 45 -
certified 2017-08-09-4 doc 2



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NEW YORK, N.Y. 10047
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GEORGE D. ZUCKERMAN
ASSISTANT ATTORNEY GENERAL
IN CHARGE OF CIVIL RIGHTS BUREAU

April 28, 1977

Re: Percy v. Brennan
73 Civ. 4279

Hon. Morris E. Lasker
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, N.Y. 10007

Dear Judge Lasker:

I am writing to comment upon the letter of
Walter M. Colleran, Esq., dated April 13, 1977.

It is the view of the State defendants that your
Honor's review of the proposed regulations implementing
Executive Order No. 45 is and should be unaffected by
the pending challenge in State court to the Executive
Order. Such review arises out of the issues presented
in this case, is contemplated by your Honor's Order of
February 24, 1975, and is the specific purpose of the
several extensions of jurisdiction that have been
ordered herein.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General

By


ARNOLD D. FLEISCHER
Assistant Attorney General

ADF:pw
cc:

Isabelle Katz Pinzler, Esq.
Dennison Young, Jr., Esq.
Walter M. Colleran, Esq.
Robert G. Benisch, Esq.
Robert J. Fink, Esq.
Beverly Gross, Esq.

1977-05-02; W Colleran to Hon Lasker re
Affirmative Action Plans by Agreement -
certified 2017-08-09-4 doc 1

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JULIUS R. LIPPMAN
COUNSEL

May 2, 1977

HUGO F. RICCA, JR.
JOHN J. SULLIVAN
JOSEPH BONAGORE
JOHN R. URBAN
ALAN J. REARDON
JOHN F. MILLS
ROBERT J. AURIGEMA
WILLIAM B. HOLMES, JR.
JOSEPH M. INCORVAIA
WILLIAM M. SAVINO

Hon. Morris E. Lasker
United States Court House
Foley Square
New York, N.Y. 10007

Re: Percy v. Brennan 73 Civ. 4279

Dear Judge Lasker:

Mr. Fleischer's letter of April 28, 1977 compels a response.

In my opinion he completely misconstrues the scope of your Order of February 24, 1975. That Order dealt specifically with voluntary affirmative action plans reached by agreement between the defendants commonly known as "hometown plans". It prohibited the defendants from entering into any such plan without first submitting it to the Court for approval. It had nothing to do with programs initiated by the State of New York pursuant to Executive Order or federal government programs per se. This is amply illustrated by reference to the contents of the two documents referred to and relied upon in your Order, namely the letters of the U. S. Attorney dated January 10, 1975 and the Industrial Commissioner of the State of New York dated January 27, 1975, both of which refer only to negotiated plans.

Similarly, the correspondence accompanying the proposed orders reflects the same thrust. Robert G. Benisch, Esq. in his letter dated February 11, 1975 objected strenuously to both the theory and content of the order proposed by counsel to the plaintiffs which would have set this Court as the reviewing agency of both the Federal and State governments regarding the establishment of affirmative action programs. The position of New York State at that time, as expressed in a letter dated February 14, 1975 by Lloyd G. Milliken, Assistant Attorney General, was substantially the same as that expressed by Mr. Benisch. As pointed out earlier, this Court in its Order of February 24, 1975 did not adopt plaintiff's proposals, but limited its relief to voluntary affirmative action programs.

1977-05-02; W Colleran to Hon Lasker re
Affirmative Action Plans by Agreement -
certified 2017-08-09-4 doc 1

DORAN, COLLERAN, O'HARA, POLLIO & DUNNE, P. C.


May 2, 1977

-2-

Hon. Morris E. Lasker

Clearly, Executive Order No. 45 and the rules promulgated thereunder issued by Governor Carey does not fall into this category, and we seriously question the jurisdiction of this Court to act in the premises, particularly under the allegations of the original complaint herein.

Very truly yours,



Walter M. Colleran

WMC:am

cc: Arnold D. Fleischer, Esq.
Isabelle Katz Pinzler, Esq.
Dennison Young, Jr., Esq.
Robert G. Benisch, Esq.
Robert J. Fink, Esq.
Beverly Gross, Esq.

1977-05-09; Court Appearances-Various re
Approval of Proposed Regs - Dismiss Action -
certified 2017-10-06 doc 23

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 ALBERT E. PERCY, et al.,

4 Plaintiffs,

6 vs.

7 PETER J. BRENNAN, Secretary of Labor, et al.,

8 Defendants.

: 73 Civ 4279

10 May 9, 1977
10:00 a.m.

11 B E F O R E :

12 HON. MORRIS E. LASKER,

13 District Judge

14 A P P E A R A N C E S :

15 FRENCH, FINK, MARKLE & MC CALLION, ESQS.,
16 Co-Counsel for Board of Urban Affairs
110 E 42nd Street
17 New York, New York

18 ROBERT J. FINK, ESQ.

18 WALTER M. COLLERAN, ESQ.,

of counsel

19 LOUIS J. LEFKOWITZ, ESQ.

20 Attorney General, State of New York
2 World Trade Center
21 New York, New York

22 ARNOLD FLEISCHER, ESQ.,

Assistant Attorney General

23 ADRIAN P. BURKE, ESQ.,

24 Corporation Counsel
City of New York
Municipal Building
25 New York, New York

BEVERLY GROSS, ESQ.,

Assistant Corporation Counsel

1 EN

2 A P P E A R A N C E S : (cont'd)

3 ROBERT B. FISKE, JR., ESQ.,
4 United States Attorney for the
5 Southern District of New York
6 One St. Andrew's Plaza
7 New York, New York
8 DENNISON YOUNG, ESQ.
9 PATRICK H. BARTH, ESQ.,
10 Assistant United States Attorneys

11 ISABELLE KATZ PINZLER, ESQ.,
12 National Employment Law Project, Inc.,
13 423 West 118th Street
14 New York, New York

15 THE COURT: There has been a discussion
16 among all parties here this morning as to whether, first,
17 there was a legal basis for honoring the request specified
18 in the State's letter of April 7, 1977 that the Court
19 "approved the proposed regulations and dismissed this
20 action as against the State defendants," and whether
21 there would be any legal basis for doing so.

22 Counsel for the Plaintiffs and others
23 have pointed out that the Court has extended jurisdiction
24 of this matter in the past against the possibility that
25 the State might propose regulations which would be clearly
at odds with the objectives of the litigation, and that
the State and the private defendants might have worked
together to achieve a "voluntary" plan; in which case,
the Plaintiffs here would not have been represented in

1 EW 3

2 that process and wished to be protected by being able to
3 refer the matter to the Court.

4 In fact, such a voluntary process has not
5 occurred, as I understand it; is that correct?

6 MR. COLLERAN: That's correct.

7 THE COURT: And the regulations which have
8 now been developed by the State have been developed by
9 them alone.

10 Plaintiff's Counsel has also indicated
11 that at least the preservation of the proposed regulations
12 do not prompt the same anxieties on the part of the
13 Plaintiffs as they believed might have been the case at
14 an earlier time.

15 Under the circumstances of the fact
16 that some of the hypothetical underpinnings of the
17 extensions of jurisdiction in the past no longer seem to
18 exist, this case is four years old, that the major
19 propositions which it was intended to present to the
20 Court have long since been disposed of, and in light of
21 the fact that orders have been issued which, in the
22 opinion of the Court, have lasting force and which,
23 insofar as I know, may be enforced by further return to
24 the Court if the orders are violated, it is believed
25 there is no reason to continue the existence of the case.

1 EW

2 It's in the best interests of justice
3 to dismiss without prejudice such elements of the case as
4 have not been disposed of otherwise to date.

5 MR. YOUNG: Your Honor, that includes,
6 of course, the Federal defendants, I assume?

7 MS. PINZLER: I would assume so.

8 THE COURT: Yes..
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