

Here Comes

You wouldn't have thought the Labor Department has a nearly secret army of major thugs and petty meddlers. But that's how the affirmative action state stays in business.

BY JAMES BOVARD

On April 29, 1994, Kentucky's Commonwealth Aluminum Corp. was banned from bidding on federal contracts by the Office of Federal Contract Compliance Programs (OFCCP), a little-known yet extremely powerful branch of the Labor Department. The OFCCP sought to strike a blow for handicapped rights, condemning the company for refusing to hire several individuals with serious back injuries and hernias for heavy-lifting jobs at its aluminum processing

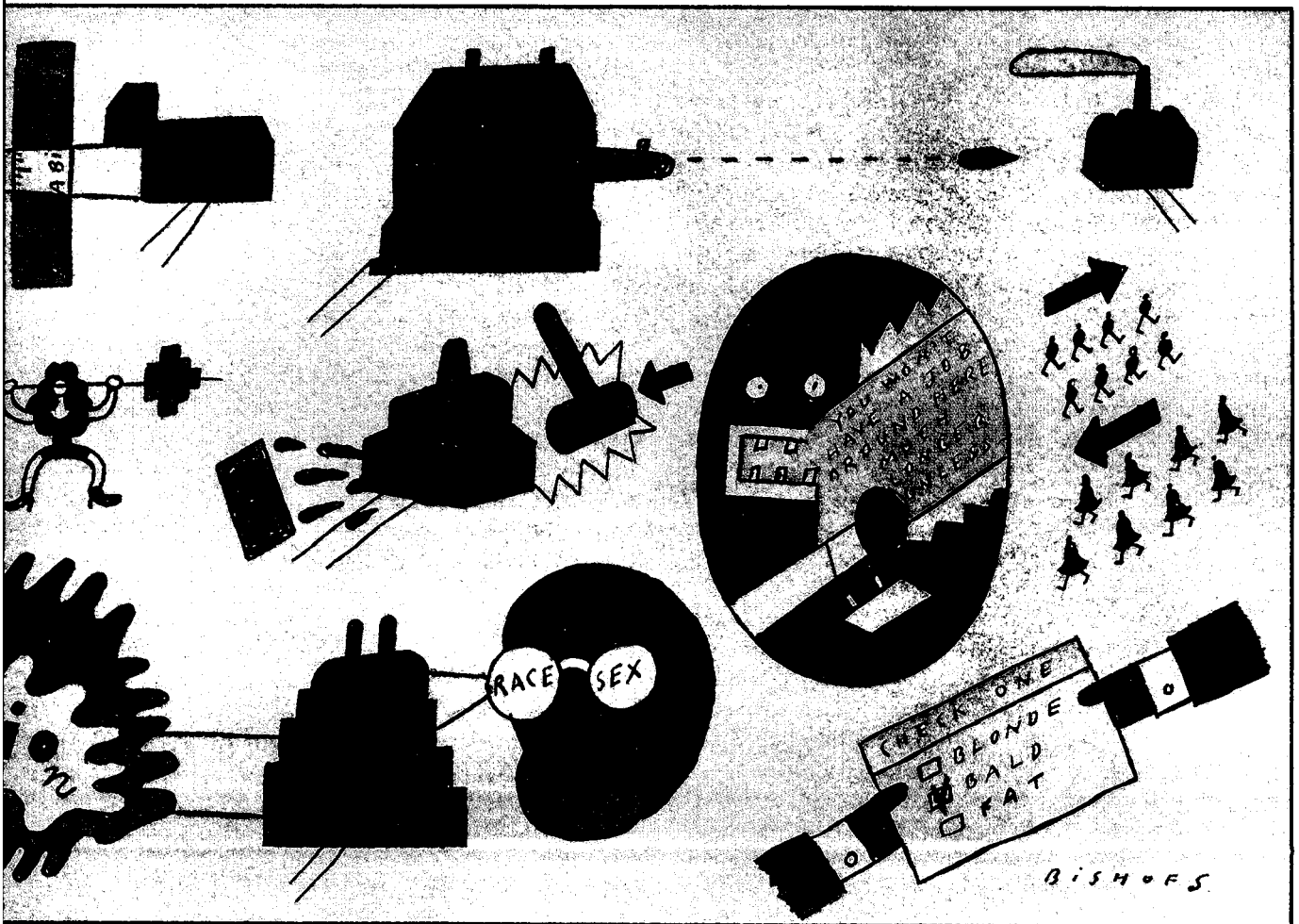
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plant. One deserving applicant, according to the Labor Department, was "blind in the left eye, had 60 percent hearing loss in the left ear and an 18 percent permanent back disability." Yet the OFCCP hounded Commonwealth, demanding that it provide back pay and retroactive seniority benefits to the applicants—even though they never worked at the company.

Commonwealth appealed the OFCCP's finding to a Labor Department administrative law judge, who vindicated the company. A senior Labor Department political appointee, however, overturned the judge's decision. The OFCCP then banned Commonwealth from bidding on federal contracts.

Goon Squad



MARIE BISCHOFF

The company took its complaint to a federal court, and federal judge Jennifer Coffman spiked the OFCCP, ruling that the government had acted "if not unconscionably, perhaps unfairly." From start to finish, it took Commonwealth twelve years to get justice from the government.

Welcome to the byzantine intrigue of the OFCCP, the agency responsible for forcing affirmative action and other nanny-state obligations on federal contractors. It requires all those who do business with the government to give preference in hiring and promotion to women and certain racial and ethnic groups, and has the power to bar private companies from federal contracts. With more than 200,000 compa-

nies and institutions (together employing more than 25 million people) that do business with the U.S. government, the OFCCP enjoys more coercive power and less judicial scrutiny than any other of the nation's quota police.

And under Bill Clinton, that power has been systematically stretched and exploited. In speeches Clinton denounces affirmative action that seeks to "impose change by leveling draconian penalties on employers who didn't meet certain imposed, ultimately arbitrary, and sometimes unachievable quotas." But that is exactly what the OFCCP has done on his watch. During his administration, the OFCCP has cut off government contracts to twice as many companies as it did under

George Bush. In congressional testimony last year, OFCCP Director Shirley Wilcher declared that the agency now finds violations in an incredible 73 percent of the more than 4,000 reviews it conducts each year.

Wilcher told *Newsday* in 1994, "We see whether or not minorities or women are underutilized in an organization, based on a very elaborate formula. We look at the availability of our 'protected groups' in the labor force...[and] argue that the...employer really needs to have a goal to achieve parity with the available work force." If the employer does not achieve parity, then the OFCCP condemns them for "bad faith"—and demands exorbitant amounts of back pay for people not hired, as well as even more bureaucratic control over hiring and promotion.

That's the kind of power that even Assistant Secretary of Labor Bernard Anderson, who oversees the OFCCP, calls a "nuclear bomb." And the key to that power lies not only in its ability to ban contractors from federal consideration, but also in the arcane doctrine of the "exhaustion of administrative remedies." Before a federal contractor can get a federal judge to rule on the legality of the OFCCP's demands, the company must spend as much as five years in the tar pit of Labor Department appeals processes. Labor lawyers estimate that it can easily cost a company half a million dollars or more before an OFCCP case reaches federal court. That means there have been few court rulings on the proper scope and power of the program and, as a result, OFCCP officials have had free rein to twist the law to suit their purposes. As Peter Kirsanow, a Cleveland labor lawyer, puts it, those purposes are clear: "The OFCCP...is a racial spoils system."

Take the case of Carolina Steel in Greensboro, North Carolina. An OFCCP compliance officer arrived at the company in 1993 to begin analyzing its hiring and personnel practices. Carolina Steel had a significantly higher percentage of blacks on its payroll than were in the local labor force. However, the OFCCP capitalized on the company's location to find it guilty.

Carolina Steel's main office is a block and a half from the local unemployment office. Because unemployment compensation recipients are required to submit a certain

number of job applications each week, Carolina Steel was deluged with them. The OFCCP judged the company not on whether it had a higher percentage of blacks on its payroll than in the local job market, but instead on the large number of those black applicants who were not hired. At the time of

the OFCCP audit, Carolina Steel was hiring for an isolated work site fifteen miles out of Greensboro; since there was no public transportation to the site, workers were required to provide their own transportation. Since a higher percentage of black applicants did not own cars, a higher percentage of them were not considered for jobs at that site.

That was all that was necessary for the OFCCP to convict the company. The agency also knowingly double- or triple-counted some blacks in its "applicant flow analysis," since some people filed multiple applications at the firm. Sadie Cox, the company's human resources director, observed, "The OFCCP was totally inflexible. They would not listen to anything that we had—they would not consider the statistics that showed we are in compliance."

The OFCCP then made an extremely high settlement demand that would have destroyed the company. At the time, Carolina Steel employed 500 people—the OFCCP specifically intended to direct the settlement money to provide wind-falls for people who had never worked a day at its mills. After two years of haggling, the OFCCP issued a press release announcing the company had agreed to pay \$300,000 to twenty-two of the rejected job applicants. Even this claim was patently false. Carolina Steel had agreed to pay only about \$120,000, and that was scattered among 264 applicants—many of whom later remained unhired because they failed drug tests. Carolina Steel CEO Len Wise said, "We don't think that we were fairly treated under the law, but we settled in order to get them off our back." The workers didn't seem to think it was fair, either; a local television station interviewed the company's black employees—not one of them said they thought Carolina Steel was racially biased.

The OFCCP has its roots in Executive Order 11246, issued by President Lyndon Johnson in 1965. That order requires federal contractors to "take affirmative action to ensure that applicants are employed without regard to their race, creed, color or national origin." President Nixon upped the ante in 1969, imposing "goals and timetables" for racial and ethnic hiring on federal contractors who have "underutilized" minority groups. The mandatory hiring goals were instated after white-dominated unions had offered fierce resistance to hiring blacks. Since the 1970's, the agency has expanded its power with one ruling after another, and the OFCCP is now symbolic of the corruption and deception at the heart of affirmative action.

Nowadays, the agency routinely begins its investigation of a federal contractor by "discovering" the "underrepresentation" of women or certain racial or ethnic groups in particular jobs. It then requires the contractor to establish "goals and timetables" to increase its minority hiring. Agency director Wilcher brazenly lied to Congress last June about this, claiming that "the numerical goals approach...is not based on racial or gender preferences" and that, under OFCCP regulations, "selections for employment or promotion must be made without regard to race or gender."

Yet OFCCP documents make explicit the agency's agen-

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da. A September 1994 discussion paper on affirmative action requirements for construction contractors stated: "OFCCP's experience has demonstrated that utilization goals [for minorities and women] are the most concrete and effective system for implementing the affirmative action obligation contained in the Executive Order." In other words, the demand for goals and preferences is automatic—even when there is no evidence of racial bias in the past or present practices of the company.

Large companies can more easily withstand the random strictures enforced by the OFCCP. But for many products, from nuclear submarines to mail-processing equipment, the federal government is a monopoly buyer. And the companies that manufacture those products have only two choices: meeting the government's whimsical demands—or going under.

Those demands can be inscrutable, contradictory, and downright bizarre. Indeed, the agency's methods often amount to bureaucratic carpet-bombing. Jennifer Taylor, personnel director of City Utilities of Springfield, Missouri, testified in February to the House Committee on Economic and Educational Opportunities about her company's nightmare OFCCP audit. A compliance officer descended upon her firm in 1995 and spent almost an entire year going through its files and documentation. After he went through the company's 250-page affirmative action plan and found no violations, he ordered the utility to completely recalculate its personnel analyses, hoping that the revised version would yield grounds to condemn its hiring and promotion policies. The official, Taylor testified, demanded "documentation and reasons why virtually every minority and female considered for promotion and new hire was not selected for nearly every opening." Though the company has roughly the same number of minorities on payroll as in the local labor market, the OFCCP demanded that the company recruit in the future from the Kansas City area—170 miles away. Taylor told the committee, "We must ignore a readily obtainable source of local labor, which is more motivated to remain with us because of geographical preference, simply because of their race." Though the OFCCP inspector could not even gin up enough evidence to file a Notice of Violation, the inspection cost the company over \$26,000 and tied up key personnel throughout 1995.

Even when OFCCP officials admit they have no policy, companies are sometimes still found guilty. New Jersey personnel expert Mary Jane Sinclair consults for a company that has a high percentage of temporary workers. Sinclair contacted OFCCP headquarters about how to account for the temps in the company's annual affirmative action plan. OFCCP officials were mystified by her questions, and informed her that guidance was not yet available on that subject. But soon after, the local compliance officer demanded that the temps be included in the plan—and then announced that the company was guilty of not hiring enough blacks. The firm in question has spent tens of thousands of dollars providing training and recruitment for low-income blacks, and has almost three

times the percentage of blacks on its payroll than the percentage of the local population. Yet, Sinclair says, the OFCCP compliance officer became "obsessed" with those who had not been hired—and threatened to seek a huge settlement for the "victims."

Former OFCCP Director Ellen Shong Bergman notes that, because of vague or sometimes nonexistent regulations, the OFCCP is "free to

find that a contractor has violated the Executive Order if it fails to perform the availability analysis in exactly the way the particular compliance officer wishes—always in a way that results in the highest availability percentage for minorities or women, irrespective of how inaccurate that might be." According to one former high-ranking OFCCP official, "The way the regs are, they can always find a *prima facie* case of numerical disparity."

Not surprisingly, the virtual mandate to find disparity inevitably leads to preposterous situations—ordering companies to hire men with hernias to perform heavy lifting, for example. On May 23, 1995, the OFCCP triumphantly announced that the Jack B. Kelley trucking firm of Amarillo, Texas, had agreed "to pay \$76,749 in back wages to five qualified applicants that were denied jobs based on physical examinations." The company's drivers routinely handle hazardous waste, missile propellants, sulfuric acid, and nitric acid. Drivers and maintenance personnel must be able to move heavy loads while wearing respirators that make breathing significantly more difficult. According to Lee Drury, who handled the OFCCP's charges for the company, two of the applicants the company rejected were heavy smokers who showed sharply diminished lung capacity as well as possible signs of emphysema. The OFCCP condemned the company for not hiring them. Another case involved a man who suffered from epileptic seizures; even though the seizures could not be fully controlled, the OFCCP ruled that the man should have been hired and put behind the wheel of a truck full of hazardous waste.

The OFCCP also penalized the company for not hiring a man who, due to a recent operation, lacked the strength in his hands and arms to drive a large truck. Even though Department of Transportation regulations someone in that condition from driving a heavy truck, the OFCCP found the company guilty, claiming its own rulings trumped DOT safety regulations. If the company had hired the man and he

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had subsequently been involved in a fatal accident, the company would have likely been found guilty of negligence in hiring him.

Drury describes the year-long investigation and settlement negotiations as a “nightmare,” and notes that none of the individuals in question had complained either to the company or the government about not being hired. The OFCCP located the individuals by searching the company’s files; Drury says that two of the individuals “called us and brought it to our attention that we may not have been treated fairly. They told me, ‘We don’t want any hard feelings. We didn’t ask for your money.’ Two of these guys said they felt bad about taking our money.”

The OFCCP’s arbitrariness has understandably caused a general paranoia among contractors, who are often afraid to fight the agency and all its bureaucratic might. Asked about her members’ problems with the OFCCP, Diane Generous, of the National Association of Manufacturers, skirts the issue: “Our concern is the paperwork.” As Wayne State law professor Kingsley Browne puts it, “Everybody knows what is going on. The problem is that the business community has been completely spineless on this issue.”

But that “spinelessness” is rooted in the OFCCP’s wanton disregard for fair play and even the law. Former Director Bergman told Congress last year: “There is an institutional tolerance for compliance officers who can cajole, defraud or bully contractors into behavior that goes beyond the agency’s legitimate authority, and sometimes goes beyond that permitted by any law. Some such compliance officers and like-minded managers even take on heroic status within the agency because they succeed in implementing the wishful thinking of many others. Never, never have I seen or heard of such an employee being dismissed; sometimes they are promoted. There are not, and never have been, any meaningful consequences to individual employees of the OFCCP who engage in intimidating contractors or misrepresentation of law or policy. Contractors...are fearful of retaliation—and with a few managers of the agency, their fear is well founded.” Bergman notes that some high-ranking officials routinely and openly lie about what federal law requires contractors to do.

Furthermore, many OFCCP compliance officers abuse their power on the work site. One lawyer told me, “They used to show up and demand coffee and donuts and demand to be taken to lunch.” He noted a different form of abuse when an OFCCP agent was “on location” at a California movie studio. “The investigator was so enthralled that she basically moved in. She would show up every morning with a huge bag of popcorn and a pack of Cokes. And every time the company needed to talk to her, they would find her on a movie set someplace.”

Almost every expert interviewed for this story complained about the extremely poor training and preparation of many of the compliance officers. One lawyer complained, “We have had investigators who can’t read.” Expert after expert stated that OFCCP compliance officers routinely execute gross abuses of their power. One human resources director

complained of OFCCP officers “just coming on site and scaring everyone to death in time and effort.” Another noted that the officers “wield a lot of power and they know it—very often they don’t act in compliance with the law, and they attempt to coerce and intimidate employers into doing what they think they should do.”

Some officials even arm-twist businesses to make payments to activist political groups such as the NAACP, the Urban League, and the Mexican-American Legal Defense Fund. Says former director Bergman: “The OFCCP, on an individual basis—on a district office by district office basis—has at some time in the past pressured contractors to make contributions of one sort or another. When I was director, I had an incident when an agency employee took issue with the size of the contribution”—the OFCCP official believed the company should have kicked in even more.

Despite the flagrant abuses, however, Shirley Wilcher refuses to admit that her agency does anything but good; she announced earlier this year, for example, that “the employer is never, never required to hire a person who does not have the qualifications needed to perform the job successfully or hire an unqualified person in preference to another applicant who is qualified.” What she didn’t mention is how the OFCCP reconciles its brand of affirmative action and competence—by harshly punishing companies that have high standards for hiring. While Labor Secretary Robert Reich tours the country preaching the need for better trained workers, OFCCP is turning high standards for workers into a very expensive liability for government contractors.

In 1994 the agency announced that it had wrung a \$173,684 settlement from Siecor, a North Carolina company that produces fiber-optic cables and optical instruments for the U.S. Air Force. The settlement was allegedly for the back wages of 514 women and 238 minorities to whom Siecor had denied employment. In a press release, the OFCCP declared that “from January 1992 through Sept. 1993, Siecor failed to hire 752 qualified applicants because of their low scores on a test which had not been properly validated and was not job related.” The OFCCP press release proudly noted that Siecor “has stopped using the test that led to the hiring disparities and has agreed to review its application procedures annually to ensure equity.”

Last year, the agency reached a settlement with Prestolite Wire Corp., an automotive-parts manufacturer, compelling it to pay over \$1.2 million to 231 job applicants who were not hired allegedly because they were black or handicapped. Illegal job tests were the crux of the OFCCP’s case: Prestolite issued a press release confessing that it “had retained the services of an expert testing firm during 1993 to administer certain pre-employment tests and was not aware that the tests may have had a discriminatory impact on minority applicants.”

But, as Herman Belz, author of that unheralded masterpiece *Equality Transformed*, observes, “Since 1966, the underlying purpose of the [federal civil rights] test guidelines was to place enough obstacles in the way of employee selec-

tion so that employees would choose to hire by race rather than objective criteria of merit." Since blacks and Hispanics tend to score significantly lower on written tests of cognitive ability than do whites, the OFCCP routinely presumes that practically any written test can be evidence of discrimination. Indeed, the OFCCP Compliance Manual is written based on the assumption that any hiring standards that do not generate the correct diversity of employees is presumptively illegal. In the agency's view, the fact that a company believes its workers need to read at a certain level is an injustice to every illiterate person who applies for the job.

The OFCCP announced last year: "No distinction is made between minimum and other qualifications in an evaluation of the total selection process" for hiring and promotion. Former director Bergman noted that one OFCCP district director penalizes contractors for "failure to select a woman, Black, or Hispanic who is as qualified as the least qualified incumbent, irrespective of superior qualifications of other non-minority applicants."

In other words, if a company has the ill fortune to have one incompetent person on its payroll, then the OFCCP seeks to drag down the company's hiring to that person's level. Essentially, then, it becomes a federal crime if a company tries to raise its hiring standards above what they may have been when the least competent person was taken on board.

This war on hiring standards may well be a reason for the much lower rate of productivity growth of American workers since the 1960's. As Peter Brimelow and Leslie Spencer reported in *Forbes*, "The civil rights revolution has virtually aborted the use of tests devised by industrial psychologists, which in the 1950's promised to make employee selection a science... Today, industrial psychologist John Hunter estimates that total U.S. output would be about \$150 billion higher if every employer in the country were free to use tests and select on merit. That's about 2.5% of GNP."

But for the OFCCP, the GNP seems to be an inconvenient number best not thought about; the agency is far more interested in puffing up its own "numbers"—the dollar value of its settlements and the number of cases it handles. In fact, under Bill Clinton the OFCCP explicitly measures its success by the amount of coercion it brings to bear on federal contractors. An agency report last year proclaimed, "A record \$40 million for 12,574 individuals was recovered with \$14.4 million in back pay for nearly 11,000 victims of discrimination. The 75 enforcement recommendations to the Solicitor of Labor greatly exceeded the 46 of the previous year. The Solicitor in turn filed 30 administrator complaints, compared to 17 in 1993. Most notably the Department ordered five debarments, more than in the last five years combined."

The concern for the public-relations angle leads the agency routinely to misstate its "successes" (as it did in the Carolina Steel case). On November 9, 1994, the OFCCP announced that Humphrey Inc., a defense contractor, would be coughing up as much as \$147,000 in back pay to black job applicants who were "not hired by reason of race." In reality, Humphrey paid only \$30,000 to settle the case; the

OFCCP knowingly inflated its settlement numbers, as one party involved with the case said, to "put a feather in their cap."

On April 17, 1995, it declared that it had secured \$80,337.53 for "five victims of race or gender discrimination" at the Oklahoma State University in Stillwater, Oklahoma. OSU attorney Scott Fern, however, stated that the "press release was not an accurate press release. In fact, \$36,000 of that had

nothing to do with the OFCCP investigation." And in 1994, the OFCCP claimed it had achieved a \$72,743.41 affirmative action settlement from Seattle City Lights, a municipal utility. The small print of the press release showed that only \$2,882.41 went to one disabled veteran. The rest of the money was to be spent on training the company's managers on affirmative action obligations and hiring a "manager of veterans' affairs with an annual salary rate of \$42,699 to \$49,861." The OFCCP, in its yearly calculation of victories for victims of discrimination, counted the entire amount. Yet more than 95 percent of the settlement went for paper-pushing and personnel meddling, not to victims of discrimination.

The OFCCP's preoccupation with settlement numbers is also reflected in how its compliance officers are evaluated. The amount of money gained in conciliation agreements is one of the most important measures for whether an OFCCP employee is promoted or receives bonus awards. Congress long since prohibited the IRS from imposing "production quotas" on its auditors—but the OFCCP's similar abuse has received little or no attention. The more baseless accusations an OFCCP agent makes against a private contractor, the higher up the career ladder that person can move.

Nothing has possessed the OFCCP of late, however, as much as the so-called "glass ceiling"—invisible barriers to the advancement of women or minorities into the top ranks of corporate power. The agency's fascination with the glass ceiling began in 1991 with Labor Secretary Elizabeth Dole. Counting votes for the upcoming election, Republicans decided that sending out feds to pummel corporations for supposed bias against women could help George Bush overcome the gender gap in the presidential race.

Ever since, it has remained the OFCCP's pet project. One glass-ceiling episode earlier this year gives fair indica-

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The agency's war on hiring standards may be a reason for slower growth in U.S. productivity since the 1960's.

Where There's Smoke There's P. J. O'Rourke

Churchillian oratory—American style—from the Oxford Union

