

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

SEP 14 2011 11:20

IN THE MATTER OF:

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, U.S.
DEPARTMENT OF LABOR

Plaintiff,

v.

Case No. 2010-OFC-00008

TYSON FRESH MEATS, INC.,

Defendant.

original

CONSENT DECREE AND ORDER

Plaintiff, United States Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP"), instituted this action by filing an administrative complaint against Tyson Fresh Meats, Inc. ("Tyson"), on September 14, 2010, alleging violations of the obligations imposed upon federal contractors and subcontractors by Executive Order 11246 (30 Fed. Reg. 12319), as amended by Executive Orders 11375 and 12086 (32 Fed. Reg. 14303) and 43 Fed. Reg. 46501, respectively (hereinafter "Executive Order 11246" or "the Executive Order").

Both OFCCP and Tyson desire to resolve this action and all issues which were or could be raised herein without the further time and expense of contested litigation. They therefore have entered into a complete and satisfactory compromise and settlement of the claims raised in the Administrative Complaint, as set forth herein. Tyson denies that its employment practices

LMN
JIS

were discriminatory, as alleged by OFCCP, and fully acknowledges that through this settlement it is waiving its right to appeal or further defend this action.

I. JURISDICTION AND PROCEDURAL HISTORY

1. This proceeding is authorized by Sections 208 and 209 of Executive Order 11246 and the regulations issued pursuant thereto at 41 C.F.R. Part 60-1, et seq. and 41 C.F.R. Part 60-30.

2. Defendant Tyson is engaged in beef processing as well as producing fresh cuts of commodity boxed beef for sale to retail, wholesale and food service customers in the United States and internationally.

3. Tyson, a subsidiary of Tyson Foods, Inc., is located in Joliet, Illinois, and is a Delaware corporation with offices in Geneseo, Illinois.

4. Tyson has been a Government contractor or subcontractor within the meaning of Executive Order 11246 and is now, and at all relevant times has been, subject to the contractual obligations imposed on Government contractors and subcontractors by Executive Order 11246 and its implementing regulations issued thereunder.

5. Tyson is, and at all relevant times has been, subject to the affirmative action requirements of 41 C.F.R. Part 60-2.

6. The issues resolved by this Decree were initially identified during a pre-award compliance review of Tyson by OFCCP. OFCCP notified Tyson of its intention to conduct the compliance review by letter dated July 21, 2004. On November 1, 2006, OFCCP issued a Notice to Show Cause to Tyson alleging that, during the period January 1, 2003 through June 30, 2004, Tyson utilized a hiring process and selection procedures which allegedly discriminated against a class of over 750 female applicants for entry-level "No Jobber" positions on the basis of their

Wm
DIS

gender. In addition, OFCCP alleged in the Notice to Show Cause that Tyson (1) failed to implement an internal audit and reporting system to monitor all personnel activity to ensure that non-discriminatory policies were carried out as required by 41 C.F.R. Part 60-2.17(d), and (2) failed to develop action-oriented programs to specifically address the adverse impact found by it in the Laborer Job Group as required by 41 C.F.R. Part 60-2.17(c).

7. On September 14, 2010, OFCCP filed an Administrative Complaint against Tyson in this matter.

II. GENERAL PROVISIONS

8. This Decree constitutes full and final settlement and resolution of all issues, actions, causes of action and claims arising, or that could have arisen, out of the Administrative Complaint filed herein and shall have the same effect as if made after a full hearing. This Decree shall be binding upon the parties as to all issues, actions, causes of action, and claims within the scope of the Administrative Complaint which have been or could have been advanced by OFCCP.

9. This Decree constitutes settlement of disputed claims and does not constitute an admission by Tyson of any violation of Executive Order 11246 or its implementing regulations or of any violation of any other law, order, or regulation. Tyson further denies that it unlawfully discriminated against any applicant for employment or class of applicants for employment. Tyson has entered into this Decree for its convenience and to avoid the costs and time associated with litigation.

10. Subject to the performance by Tyson of all duties and obligations contained in this Decree, all alleged deficiencies which were or could have been raised or identified in the Administrative Complaint shall be deemed fully resolved by this Decree.

LMN
D/S

11. Nothing herein is intended to relieve Tyson from compliance with the requirements of Executive Order 11246, its implementing regulations as 41 C.F.R. Part 60, and/or any other statute, regulation, or ordinance. Compliance with this Decree shall constitute compliance only with respect to those issues which are within the scope of this Decree.

12. Tyson agrees not to retaliate against any beneficiary of this Decree, or against any person who has provided information or assistance to OFCCP regarding the issues resolved in this Decree, or who files a complaint or participates in any manner in any proceeding against Tyson under Executive Order 11246 regarding the issues resolved in this Decree.

13. The Effective Date of this Decree shall be the date on which this Decree is signed by the Administrative Law Judge.

III. SPECIFIC PROVISIONS

14. For purposes of this Decree, the affected class members are the class of female first-time applicants who applied for open No Jobber positions in the Laborer Job Group during the period from January 1, 2003, to June 30, 2004, who were not hired. This group was identified by OFCCP's hiring analysis which showed a statistically-significant disparity that negatively affected such female applicants. OFCCP found that of the 974 first-time female applicants, 205 or 21% were hired; whereas of 1966 first-time male applicants, 771 or 39.2% were hired. This resulted in a disparity in hiring that OFCCP found was statistically significant at 9.85 standard deviations, yielding a shortfall of 118 females. In addition to the statistical analysis, OFCCP found inconsistencies in the selection process that support OFCCP's statistical findings. Accordingly, OFCCP determined that Tyson allegedly engaged in a pattern or practice of discrimination against first-time female applicants who applied for No Jobber positions during

hnp
DIS

the review period. These persons (hereinafter referred to as "the class" or "class members") are identified on Attachment A, appended hereto and incorporated by reference herein.

15. Tyson shall notify the class members listed on Attachment A of the terms of this Decree within forty-five (45) calendar days of the Effective Date of this Decree. Tyson shall mail the Notice of Settlement to Class Members (hereinafter "Notice," appended hereto and incorporated by reference herein as Attachment B) to inform the class members of the settlement, and shall include the Information Verification and Employment Interest Form (hereinafter "Interest Form," appended hereto and incorporated by reference herein as Attachment C) and a Release of Claims (hereinafter "Release," appended hereto and incorporated by reference herein as Attachment D).

16. Each class member listed on Attachment A (or her legal representative in the event she is deceased) shall be given thirty-three (33) calendar days from the postmarked date of the Notice to respond, and such response must be postmarked within the 33-day time period.

17. The name, address, and Social Security Number for those individuals who do not timely respond (e.g., unclaimed mail, undeliverable mail, and incorrect addresses) shall be sent to OFCCP's Milwaukee District Office within fifteen (15) calendar days after the time period for filing a response to the Notice has expired. OFCCP shall have thirty (30) calendar days from receipt of the list to provide to Tyson an updated list of addresses. Within fifteen (15) calendar days of receiving the new addresses from OFCCP, Tyson shall send to each class member for whom OFCCP has supplied an updated address another Notice with Attachments. Each class member receiving the second mailing (or her legal representative in the event she is deceased) shall be given thirty-three (33) days from the postmarked date of the Notice to respond, and such response must be postmarked within the 33-day time period. The final list of Class Members

who timely return complete and signed copies of Attachments C and D pursuant to the deadlines set forth above (hereinafter "Eligible Recipients") shall be sent to OFCCP's Milwaukee District Office within fifteen (15) calendar days after the time period for filing a response to the second mailing has expired.

18. If a Class Member is not located and/or does not timely return a completed Interest Form and Release (Attachments C and D), she shall be ineligible to receive any relief pursuant to this Decree.

19. All class members identified on Attachment A who timely complete and submit an Interest Form and an executed Release in accordance with the provisions of this Decree shall constitute the Eligible Recipients and will equally share in the monetary settlement. OFCCP and Tyson agree that Tyson shall have no further liability for back pay, interest, or any other relief under this Decree to any Class Member identified on Attachment A who cannot be located within the time frames enumerated above or who does not timely complete and submit an Interest Form and an executed Release and is therefore not an Eligible Recipient.

A. Monetary Relief

20. Within fifteen (15) calendar days of the Effective Date of this Decree, Tyson shall deposit One Million Two Hundred Forty-Four Thousand Four Hundred Five Dollars (\$1,244,405.00) into a federally-insured interest-bearing account at the prevailing interest rate. This amount, less Twenty-Nine Thousand Five Hundred Dollars (\$29,500.00) (the "Hiring Bonus"), will be deemed the "Settlement Fund." Tyson shall notify OFCCP within five (5) business days of the inception of the account that this action is complete and will identify to OFCCP a person who can be contacted to provide the current balance of the account and the amount of accrued interest. OFCCP shall designate to Tyson an individual who shall have the

LMN
DJS

authority to make inquiries and obtain account information directly from the financial institution at which the Settlement Fund account is located.

21. In settlement of all claims for back pay, interest and other monetary relief, Tyson will pay One Million Two Hundred Fourteen Thousand Nine Hundred Five Dollars (\$1,214,905.00) to the Eligible Recipients identified in Paragraphs 16-19 above and Twenty-Nine Thousand Five Hundred Dollars (\$29,500.00) to Hired Class Members identified in Paragraph 29 below. The back pay (\$656,455.80) and interest amount (\$587,949.20) (plus additional interest that accrues on the interest-bearing account), less legal deductions required by law on the portion representing back pay only (such as federal, state and/or local taxes and FICA), will be equally distributed among the Eligible Recipients. Tyson will pay to the Internal Revenue Service ("IRS") the employer's share of social security withholdings on the back pay amount.

22. Within thirty (30) calendar days of determination of the Eligible Recipient list, Tyson shall distribute the Settlement Fund equally among the Eligible Recipients. This monetary relief is not contingent upon an Eligible Recipient's acceptance of any job offer.

23. Within five (5) business days of Tyson's receipt of a check to an Eligible Recipient returned as undeliverable, Tyson shall notify OFCCP of this fact either via email or facsimile. OFCCP shall attempt to locate the Eligible Recipient and if OFCCP obtains an alternate address within 30 calendar days of Tyson's notification to OFCCP, Tyson shall re-mail the check. Any check that remains uncashed 120 calendar days after the initial date the check was mailed to the Eligible Recipient shall be void. With respect to the uncashed funds, Tyson shall make a second distribution to all Eligible Recipients who cashed their first check if the amount of the uncashed funds would result in a payment of \$30.00 or more to each of the located Eligible Recipients. If the total amount of the uncashed funds would result in a payment of less

than \$30.00 to each Eligible Recipient, Tyson shall use those uncashed funds to increase the total amount of the Hiring Bonus paid to hired individuals in lieu of seniority.

24. The Settlement Fund shall be closed within thirty (30) calendar days following the 120-day period allowed for class members to cash checks.

25. The parties may modify any time frame set forth in this Decree by mutual agreement. In addition, OFCCP or Tyson may petition the Administrative Law Judge to extend any of the above time periods for no more than thirty (30) calendar days in order to permit a class member to receive a share of the Settlement Fund, when the interest of justice would be served by such extension and for good cause shown.

B. Non-Monetary Relief

26. As No Jobber positions become available, Tyson will offer No Jobber positions to Eligible Recipients who timely returned the Interest Form expressing an interest in employment (hereinafter referred to as "Interested Class Members") until a total of 118 Interested Class Members have been hired into No Jobber positions or until the list of Interested Class Members is exhausted, whichever occurs first.

27. Tyson shall establish a priority employment list for these Interested Class Members. Offers will be determined by the return date of each Interested Class Member's Interest Form and Release until the requisite number of hires is made or the list of Interested Class Members is exhausted. The parties agree that any Interested Class Member who has previously been hired by Tyson at the Joslin facility during the review period and subsequently until the signing of this Decree may be counted as a hire toward the preferential hiring obligations in this Decree.

LMN
DJS

28. Interested Class Members must meet the following hiring qualifications and criteria before being hired into a position: 1) completing an updated employment application; 2) completing the interview process; 3) being eligible for rehire (if a former employee); 4) passing a drug test and post-offer health assessment; 5) being eligible to work in the United States; and 6) agreeing to accept the work, hours and overtime, and shift requirements according to Tyson's needs and assignments. If an Interested Class Member is not hired based upon her failure to meet any of these job-related qualifications, Tyson will provide OFCCP with documentation supporting such non-hire.

29. When making an offer to an Interested Class Member, Tyson shall send a letter containing the conditional job offer via regular first-class mail. The offer letter will notify the Interested Class Member that

a. She must respond, verbally or in writing, to the offer within ten (10) calendar days after the postmarked date of the offer or the offer will be withdrawn by Tyson. Tyson shall mail or e-mail to OFCCP a copy of the job offers made in accordance with this Decree every two weeks until Tyson's hiring obligations are met.

b. If the Interested Class Member accepts the conditional offer, the Interested Class Member will be required to complete an updated employment application, complete the interview process, pass a drug test and post offer-health assessment, be eligible for rehire (if a former employee), provide documentation of eligibility to work in the United States, and agree to accept the work, hours and overtime, and shift requirements according to Tyson's needs and assignments before she can be employed by Tyson.

LMN
DIS

c. Upon the Interested Class Member's completion of an updated employment application and interview, a successful drug screen and post-offer health assessment, eligibility for rehire, proof of eligibility to work in the United States, and agreement to accept the work, hours and overtime, and shift requirements according to Tyson's needs and assignments, the Interested Class Member will be provided up to fourteen (14) calendar days from the date of acceptance of the offer in which to start work, or an alternative time frame if mutually acceptable to both Tyson and the Interested Class Member.

d. In lieu of retroactive seniority, Tyson will pay each Interested Class Member who is hired into a No Jobber position under this Decree a Hiring Bonus which represents the value of retroactive seniority. The total amount of the bonus will be at least Twenty-Nine Thousand Five Hundred Dollars (\$29,500.00), plus any remaining non-distributed funds from the Settlement Fund, and will be equally divided among the hired Class Members. This amount will be paid on the first payroll date after the last hire under this Decree has occurred. Tyson shall send Attachment E, appended hereto and incorporated by reference herein, together with the hiring bonus checks.

30. The envelope in which the written offer is mailed will prominently state "URGENT – OPEN IMMEDIATELY." If the Interested Class Member rejects the offer, fails to complete an updated employment application and interview, is not eligible for rehire (if a former employee), fails to provide proof of eligibility for employment, does not take or pass Tyson's drug screen and/or post-offer health assessment, and/or does not agree to accept the work, hours and overtime, and shift requirements according to Tyson's needs and assignments, Tyson will have no further obligation to employ that Interested Class Member. Tyson shall pay and/or

provide to each class member it hires the same rate of pay, shift differentials, opportunity for overtime, and benefits as are currently paid and/or provided to other similarly-situated No Jobbers.

31. Tyson will continue this employment procedure until a total of 118 Interested Class Members are hired or the list of all Interested Class Members is exhausted, whichever occurs first. At that time, Tyson will have no further employment obligation to Interested Class Members, even if the above-described process results in fewer than 118 Interested Class Members being hired.

32. The parties agree that any Interested Class Member who has previously been hired by Tyson at the Joslin facility during the review period and subsequently until the signing of this Decree may be counted as a hire toward the hiring obligations in this Decree.

C. Other Provisions

33. Tyson has implemented and agrees to continue (1) to implement and maintain an internal audit and reporting system to monitor all personnel activity to ensure that non-discriminatory policies are carried out as required by 41 C.F.R. Part 60-2.17(d); and (2) to develop and maintain action-oriented programs to specifically address any adverse impact found by it in the Laborer Job Group as required by 41 C.F.R. Part 60-2.17(c).

34. Tyson agrees to prepare and submit follow-up Consent Decree Progress Reports semi-annually for a period of twenty-four (24) months. These reports shall be submitted to District Director, OFCCP, Milwaukee District Office, 310 W. Wisconsin Avenue, Suite 1115, Milwaukee, WI 53202. For the period ending December 31, 2011, the report will be due on January 31, 2012. For the period ending June 30, 2012, the report will be due on July 31, 2012. For the period ending December 31, 2012, the report will be due on January 31, 2013. For the

period ending June 30, 2013, the report will be due on July 31, 2013. These reports shall consist of the following:

(A) The names of all Interested Class Members hired, stating the job title, rate of pay, starting date, benefits credited to that class member, copies of offer letters, and payment in lieu of seniority (Hiring Bonus) made to any hired Interested Class Member.

(B) The names of all Interested Class Members who refused a bona fide offer of employment, the date of the offer, the job position offered, the rate of pay offered, and the date of refusal.

(C) For each No Jobber position for which an Interested Class Member was considered but not selected, the reasons for the non-selection.

(D) Tyson shall provide documentation of the monetary payment provided to each Eligible Recipient, including copies of cancelled checks disbursed to Eligible Recipients or other equivalent documentation verifying that Eligible Recipients were paid, and a listing of any class members terminated during the life of the Decree and the reasons for the termination.

(E) The total number of applicants and hires, identified by gender, for the No Jobber position during the reporting period. The parties agree that Interested Class Members who are hired pursuant to this Decree will not be included in this total.

IV. IMPLEMENTATION AND ENFORCEMENT

35. This Decree shall constitute the final administrative order in this case and shall have the same force and effect as an order made after a full hearing and final review by the Secretary of Labor.

36. The entire record upon which this Decree is based shall consist solely of the Administrative Complaint, this Decree and Order, and Attachments A-E hereto.

37. The parties waive any and all further procedural steps provided in 41 C.F.R. Part 60-30 for a final administrative order.

38. The parties waive any right to challenge or contest the validity of the provisions of this Decree.

39. This Decree shall be binding on Tyson, its successors, assigns, divisions and subsidiaries, and on OFCCP. This Decree is not intended to be admissible evidence in any proceeding other than a proceeding involving this Decree.

40. Each party agrees to pay its own fees, costs, and other expenses incurred at any stage of these proceedings.

41. The Office of Administrative Law Judges shall retain jurisdiction of this proceeding for the sole purpose of enforcing implementation of this Decree in accordance with its terms. The Office of Administrative Law Judges shall retain jurisdiction of this case for a period of two (2) years following the Effective Date of the Decree.

42. Tyson agrees that OFCCP may review compliance with this Decree. If at any time during the term of this Decree, OFCCP believes that Tyson has violated any portion of this Consent Decree, Tyson will be promptly notified in writing. This notification will include a statement of the facts and circumstances relied upon by OFCCP in forming that belief. Tyson will have fifteen (15) calendar days in which to respond in writing to the allegations of violation, except in those circumstances in which OFCCP alleges that such a delay would result in irreparable injury.

mm
DJ-

43. Enforcement proceedings for violation of this Consent Decree may be initiated at any time after the fifteen (15) calendar day period has elapsed (or sooner if irreparable injury is alleged), upon filing with the Office of Administrative Law Judges a motion for an order of enforcement and/or sanctions. The Administrative Law judge may, if he or she deems it appropriate, schedule an evidentiary hearing on the motion. The issues in a hearing on the motion shall relate solely to the issues of the factual and legal claims made in the motion.

44. Violation of this Decree may subject Tyson and its successors, assigns, divisions or subsidiaries to the sanctions set forth in the Executive Order and its implementing regulations and other appropriate relief.

45. If a motion for an order of enforcement or clarification is unopposed by Plaintiff or Defendant, as appropriate, the motion may be presented to the Administrative Law Judge without hearing, and the proposed order may be implemented immediately. If said application or motion is opposed by any party, the party in opposition shall file a written response within twenty (20) calendar days of service of such motion.

WHEREFORE, the parties move that an Order be entered adopting the above Consent Decree as the final disposition of this matter.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

LINDA S. CHAPMAN
ADMINISTRATIVE LAW JUDGE

LMN
DIS