

U.S. Department of Labor

Office of Administrative Law Judges
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**Issue Date: 14 September 2011**

Case Number: 2011-OFC-00009

In the Matter of:

OFFICE OF FEDERAL CONTRACT COMPLIANCE
PROGRAMS, UNITED STATES DEPARTMENT
OF LABOR,

Plaintiff,

v.

TYSON FRESH MEATS, INC.,

Defendant.

**NOTICE OF DOCKETING AND
ORDER APPROVING CONSENT DECREE**

The parties are hereby notified that the above-captioned case has been duly filed and docketed.

This case arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended by Executive Order 11375 (32 Fed. Reg. 14303); and Executive Order 12086 (43 Fed. Reg. 46501); and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 as amended 38 U.S.C. § 4212 and the rules and regulations issued pursuant thereto. On September 12, 2011, the United States Department of Labor filed an Administrative Complaint and Consent Decree and Order with the Office of Administrative Law Judges.

A review of the Consent Decree shows that it is in compliance with 41 C.F.R. § 60-30.13(d) and it resolves all issues in this matter. Accordingly, the Consent Decree incorporated by reference is APPROVED and ADOPTED in its entirety.

SO ORDERED,

A handwritten signature in black ink, appearing to read "Stephen L. Purcell".

STEPHEN L. PURCELL
Chief Administrative Law Judge

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

IN THE MATTER OF:

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

TYSON FRESH MEATS, INC.,

Defendant.

Case No. 2011-DFC-9

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"), concurrently with this Consent Decree and Order 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") and the Vietnam Era Readjustment Assistance Act of 1974 (hereinafter "VEVRAA"), as amended, 38 U.S.C. 4212, and the rules and regulations issued pursuant thereto.

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

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the Administrative Complaint, as set forth herein. Tyson denies that its employment practices were discriminatory, as alleged, 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 and VEVRAA, and 41 C.F.R. Part 60-250.65.

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

3. Tyson is a subsidiary of Tyson Foods, Inc., and at all times material hereto operated locations in Denison, Iowa (hereinafter "Tyson Denison"); Waterloo, Iowa (hereinafter "Tyson Waterloo"); and West Point, Nebraska (hereinafter "Tyson West Point"), and is registered to do business as a Delaware corporation.

4. Tyson has been a Government contractor or subcontractor within the meaning of Executive Order 11246 and VEVRAA 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 and VEVRAA 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. Parts 60-2 and 60-250.44.

6. The issues resolved by this Decree for Tyson Denison were initially identified during a Compliance Review of Tyson Denison by OFCCP, beginning on May 3, 2003, with the

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of over 191 female applicants for entry-level "No Jobber" positions on the basis of their gender. In addition, the Notice to Show Cause alleged that Tyson West Point: 1) failed to perform an in-depth analysis of its total employment process to determine whether and where impediments to equal employment opportunity existed as required by 41 C.F.R. 2.17 (b)(2) and (4); 2) failed to preserve personnel and employment records and have available for inspection records that would disclose the impact of its selection procedures on female applicants as required by 41 C.F.R. 60-1.12(a); 3) failed to implement an internal audit and reporting system that monitors its applicant data or selection process as required by 41 C.F.R. 2.17(d); and 4) failed to list all its suitable employment openings with the state employment office as required by 41 C.F.R. 250.5(a)2. Tyson West Point is no longer in operation.

9. OFCCP has with this Consent Decree and Order filed an Administrative Complaint against Tyson in this matter alleging violations at all three locations.

II. GENERAL PROVISIONS

10. 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.

11. This Decree constitutes settlement of disputed claims and does not constitute an admission by Tyson of any violation of Executive Order 11246 or VEVRAA or their 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.

12. 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.

13. Nothing herein is intended to relieve Tyson from compliance with the requirements of Executive Order 11246, Section 503, of the Rehabilitation Act of 1973, as amended (hereinafter Section 503), VEVRAA and their implementing regulations at 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.

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

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

III. SPECIFIC PROVISIONS

16. Tyson Denison and Tyson Waterloo have implemented and agreed to continue 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 41 C.F.R. 60-2.17(b)(2) and (4). Tyson West Point closed February 15, 2006.

17. For purposes of this Decree, the affected class members for Tyson Denison are female first-time applicants who applied for open No Jobber positions in the Laborer Job Group

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during the period from January 1, 2002, to December 31, 2002, who were not hired. This group was identified by OFCCP's refined hiring analysis which showed a statistically significant disparity that negatively affected such female applicants. OFCCP found that of the 184 female applicants, 20 or 10.8% were hired; whereas of 417 male applicants, 68 or 16.3% were hired. This resulted in a disparity in hiring that was statistically significant at 2.18 standard deviations yielding a shortfall of 8 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 Denison allegedly engaged in a pattern or practice of discrimination against first-time female applicants who applied for No Jobber positions during 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.

18. For purposes of this Decree, the affected class members for Tyson Waterloo are female first-time applicants who applied for open No Jobber positions in the Laborer Job Group during the period from January 1, 2003, to December 31, 2003, who were not hired. This group was identified by OFCCP's refined hiring data which showed a statistically significant disparity that negatively affected female applicants. OFCCP found that of the 799 female applicants, 250 or 31% were hired; whereas of 1,361 male applicants, 693 or 50% were hired. This resulted in a disparity in hiring that was statistically significant at 8.88 standard deviations yielding a shortfall of 98. In addition to the statistical analysis, OFCCP found inconsistencies in the selection process that support OFCCP's statistical findings. Accordingly, OFCCP determined that Tyson Waterloo allegedly engaged in a pattern or practice of discrimination against first-time female applicants who applied for No Jobber positions during the review period. These persons

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(hereinafter referred to as "the Class" or "Class Members") are identified on Attachment B, appended hereto and incorporated by reference herein.

19. For purposes of this Decree, the affected class members for Tyson West Point are female 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 refined hiring analysis which showed a statistically significant disparity that negatively affected such female applicants. OFCCP found that of the 242 female applicants, 45 or 18.5% were hired; whereas of 414 male applicants, 127 or 30.6% were hired. This resulted in a disparity in hiring that was statistically significant at 3.74 standard deviations yielding a shortfall of 20 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 West Point allegedly engaged in a pattern or practice of discrimination against 197 female applicants who applied for No Jobber positions during the review period. These persons (hereinafter referred to as "the Class" or "Class Members") are identified on Attachment C, appended hereto and incorporated by reference herein.

20. Tyson shall notify the class members listed on Attachments A, B, and C 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 D) 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 E) and a Release of Claims (hereinafter "Release," appended hereto and incorporated by reference herein as Attachment F).

21. Each class member listed on Attachments A, B, and C (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.

22. 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 the proper OFCCP District Office within fifteen (15) calendar days after the time period for filing a response to the Notice has expired. The list of individuals for Tyson Waterloo shall be submitted to the District Director, OFCCP, Milwaukee District Office, 310 W. Wisconsin Ave., Suite 1115, Milwaukee, WI 53202 and the lists of individuals for Tyson Denison and Tyson West Point shall be submitted to the District Director, OFCCP, Omaha District Office, 111 South 18th Plaza, Suite 2231, Omaha, NE 68102. 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 E and F pursuant to the deadlines set forth above (hereinafter "Eligible Recipients") shall be sent to the appropriate OFCCP District Office within fifteen (15) calendar days after the time period for filing a response to the second mailing has expired.

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

24. All class members identified on Attachments A, B, and C 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 Attachments A, B, and C 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

25. Within fifteen (15) calendar days of the Effective Date of this Decree, Tyson shall deposit Nine Hundred Eighty Thousand, Five Hundred Ninety-Five Dollars (\$980,595.00) into a federally-insured interest-bearing account at the prevailing interest rate. This amount 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 authority to make inquiries and obtain account information directly from the financial institution at which the Settlement Fund account is located.

26. In settlement of all claims for back pay, interest and other monetary relief, Tyson will pay Nine Hundred Eighty Thousand, Five Hundred Ninety Five Dollars (\$980,595.00) to the Eligible Recipients identified in Paragraph 24 above. The back pay and interest amount (plus

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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. The back pay and interest on \$980,595.00 is based upon the following facilities and Denison's back pay of \$59,500.00 and interest of \$50,400.00, Waterloo's back pay of \$369,225.00 and interest of \$330,360.00, and West Point's back pay of \$87,100.00 and interest of \$84,010.00. Tyson will pay to the Internal Revenue Service ("IRS") the employer's share of social security withholdings on the back pay amount.

27. 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.

28. 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 will attempt to locate the Eligible Recipient and if OFCCP obtains an alternate address within thirty (30) calendar days of Tyson's notification to OFCCP, Tyson will remail the check. Any check that remains uncashed one hundred twenty (120) 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 pay for additional training on non-discriminatory hiring practices.

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

30. 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) days in order to permit a class member to receive a share of the Settlement Fund, where the interest of justice would be served by such extension and for good cause shown.

B. Non-Monetary Relief

31. As No Jobber positions become available, Tyson Denison will offer No Jobber positions to Eligible Recipients who returned the Interest Form expressing an interest in employment (hereinafter referred to as "Interested Class Members") until a total of eight (8) Interested Class Members have been hired into No Jobber positions or until the list of Interested Class Members for Denison is exhausted, whichever occurs first.

32. As No Jobber positions become available, Tyson Waterloo will offer No Jobber positions to Eligible Recipients who returned the Interest Form expressing an interest in employment (hereinafter referred to as "Interested Class Members") until a total of ninety-eight (98) Interested Class Members have been hired into No Jobber positions or until the list of Interested Class Members for Waterloo is exhausted, whichever occurs first.

33. 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 applicable 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.

34. For any additional hires required under this Agreement, 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.

35. 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

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requirements according to Tyson's needs and assignments before she can be employed by Tyson.

(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 (if a former employee), 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.

36. 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.

37. The parties agree that any Interested Class Member who has previously been hired by Tyson at the applicable 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.

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C. Other Provisions

38. Tyson agrees to prepare and submit follow-up Consent Decree Progress Reports bi-annually for a period of twenty-four (24) months. Tyson West Point shall be required to submit reports in response to subpart (D) only. The reports for Tyson Waterloo shall be submitted to the District Director, OFCCP, Milwaukee District Office, 310 W. Wisconsin Ave., Suite 1115, Milwaukee, WI 53202 and the reports for Tyson Denison and Tyson West Point shall be submitted to the District Director, OFCCP, Omaha District Office, 111 South 18th Plaza, Suite 2231, Omaha, NE 68102. For the period from the date of the signature of this agreement ending December 31, 2011, the report will be due on January 31, 2012; for the period from January 1, 2012, ending June 30, 2012, the report will be due July 31, 2012; for the period from July 1, 2012, ending December 31, 2012, the report will be due January 31, 2013; for the period from January 1, 2013, ending June 30, 2013, the report will be due 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, and benefits credited to each Class Member.

(B) The name 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 OF THE DECREE

39. 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.

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

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

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

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

44. 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.

45. 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

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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) 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.

46. Enforcement proceedings for violation of this Consent Decree may be initiated at any time after the fifteen (15) 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.

47. 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.

48. 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) 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: _____

ADMINISTRATIVE LAW JUDGE