

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 September 2010

Case No.: 2009-OFC-00008

In the Matter of:

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

Plaintiff,

v.

COCA-COLA BOTTLING COMPANY
CONSOLIDATED,

Defendant.

ORDER APPROVING CONSENT FINDINGS

This cause of action is filed pursuant to Executive Order 11246 (30 Fed. Reg. 12319), as amended, and is governed by the implementing Regulations found at Code of Federal Regulations, Title 41, Chapter 60. On September 9, 2009, the Regional Solicitor, Atlanta, Georgia, upon referral by the Office of Federal Contract Compliance Programs, U.S. Department of Labor (Plaintiff), filed an "Administrative Complaint" with the Office of Administrative Law Judges against the above-named Defendant under the provisions of the 41 CFR § 60-30.5. On September 24, 2009, the Defendant filed its "Answer to Complaint and Affirmative Defenses" with the Office of Administrative Law Judges pursuant to 41 CFR §60-30.6.

Pursuant to an Order issued on October 30, 2009, the Plaintiff filed the "Plaintiff's Bill of Particulars" which alleges that Defendant hired individuals into Route Sales Trainee positions at its Black Satchel Road, Charlotte, North Carolina, facility during the period from January 1, 2002 through December 31, 2002, in an intentional manner which amounted to disparate treatment discrimination. Plaintiff alleges that a prima facie case of intentional discrimination by Defendant is established by statistical analysis of the pool of applicants to the trainee positions and that Defendant has failed to take corrective action. Defendant denies the alleged conduct.

On September 10, 2010, the Parties jointly filed "Consent Findings and Order" and thereby stipulate, agree and consent, pursuant to 41 CFR § 60-30.13, to entry of findings as follows:

1. This matter arises under Sections 208 and 209 of Executive Order 11246, as amended, and regulations issued pursuant thereto (hereinafter “Executive Order 11246”) at 41 CFR Part 60-1, et seq. and 41 CFR Part 20-30.
2. Coca-Cola Bottling Company Consolidated (Defendant) makes, sells, and delivers carbonated and noncarbonated beverages.
3. At all relevant times, the Defendant has maintained its corporate headquarters in Charlotte, North Carolina and has operated a sales and distribution facility on Black Satchel Road in Charlotte, North Carolina.
4. The Defendant has fifty (50) or more employees, and has one or more Government contracts or subcontracts with a value in excess of \$50,000.00.
5. The Defendant 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.
6. The Defendant is, and at all relevant times has been, subject to the affirmative action requirements of 41 CFR Part 60-2.
7. The issues resolved by this Order were initially identified during the Office of Federal Contract Compliance Programs (Plaintiff) compliance evaluation of Defendant’s Black Satchel Road facility. Plaintiff alleges the Defendant’s hiring practices at its Black Satchel Road facility resulted in discrimination against minority applicants for Sales Support positions during the period January 1, 2002 through December 31, 2002, and therefore the Defendant did not meet its obligations as a Federal contractor under Executive Order 11246 and its implementing regulations.
8. The Defendant denies that it unlawfully discriminated against any applicant for employment or class of applicants for employment.
9. Nothing in the Order is intended to relieve the Defendant from compliance with the requirements of Executive Order 11246; Section 503 of the Rehabilitation Act of 1973, as amended, 29 USC §793 (Section 503); the Vietnam Veteran’s Readjustment Assistance Act of 1974, as amended, 38 USC §4212 (VEVRAA); and their implementing regulations or any other statute, regulation or ordinance.

IDENTIFICATION OF MEMBERS / BENEFICIARIES

10. For the purposes of this Order, the affected class members are the class of minority applicants who (1) applied for Sales Support positions at the Defendant’s Black Satchel Road facility between January 1, 2002 and December 31, 2002; (2) were not offered employment; and (3) may be otherwise qualified under the Defendant’s hiring criteria.

Said individuals being further identified in Attachment "A" to this Order which is hereby incorporated by reference.

11. The Defendant agrees:

- a. It shall notify the class members of this settlement within twenty (20) business days of the effective date of this Order by mailing a "Notice of Settlement to Class Members" (substantially similar to Attachment "B" to this Order), to each identified class member to inform that person of the settlement, together with an "Information Verification and Employment Interest" form (substantially similar to Attachment "C" to this Order), and a "Release of Claims" form (substantially similar to Attachment "D" to this Order).
- b. It shall provide the Plaintiff a list of class members who have not responded to the "Notice of Settlement to Class Members" within sixty (60) days of the effective date of this Order.
- c. Within 130 days of the effective date of this Order, it shall provide the Plaintiff with a "Final List of Participating Class Members", which includes the identity of all class members who responded to the "Notice of Settlement to Class Members" by submitting a completed "Information Verification and Employment Interest" form and an executed "Release of Claims" form within 120 days of the effective date of this Order.
- d. It shall provide copies of completed "Information Verification and Employment Interest" forms and an executed "Release of Claims" forms received from class members to the Plaintiff upon Plaintiff's written request.

12. The Parties agree:

- a. After notice to the Plaintiff by the Defendant of class members who have not responded to the "Notice of Settlement to Class Members", the Plaintiff shall conduct a search to attempt to locate those class members who did not respond and the Defendant shall send to such class members located by the Plaintiff another "Notice of Settlement to Class Members", "Information Verification and Employment Interest" form, and a "Release of Claims" form.
- b. If a class member is not located and/or does not return a completed "Information Verification and Employment Interest" form and an executed "Release of Claims" form within 120 days of the effective date of this Order, that class member shall be no longer entitled to any relief pursuant to this Order.
- c. All class members identified on Attachment A who complete an "Information Verification and Employment Interest" form and an executed "Release of Claims" form in accordance with the provisions of this Order shall constitute the "Final List of Participating Class Members" and will equally share in the monetary settlement.
- d. The Plaintiff shall approve the "Final List of Participating Class Members" and return the list to the Defendant or work with the Defendant to revise the

“Final List of Participating Class Members” so that it can be approved by Plaintiff within 140 days of the effective date of this Order.

- e. The Defendant shall have no further liability for back pay, interest, or any other relief under this Order to any class member identified on Attachment A who cannot be located within the timeframes enumerated above, or to any class member who does not submit a completed “Information Verification and Employment Interest” form and an executed “Release of Claims” form and is therefore not included in the “Final List of Participating Class Members.”

MONETARY BENEFITS

13. In settlement of all claims for back pay, interest and monetary relief, the Defendant will pay the total amount of \$495,000.00 to the class members identified in the “Final List of Participating Class Members” as set forth herein. This total amount, referred to as the “Back Pay Fund” is a negotiated amount that represents:
 - a. \$300,000.00 in back pay; and,
 - b. \$195,000.00 in interest and monetary relief.
14. Within thirty (30) days after the Defendant receives notice of Plaintiff’s approval of the “Final List of Participating Class Members”, the Defendant shall distribute the “Back Pay Fund” equally among the class members on the “Final List of Participating Class Members”. This monetary relief is not dependant on a class member’s acceptance of any job offer by the Defendant.
15. Each class member’s share of back pay will be reduced by withholding for federal income tax, state and/or local income tax, and FICA. The Defendant shall ensure an IRS W-2 for the respective share of back pay paid is issued to each class member receiving a share of back pay.
16. The Defendant shall ensure an IRS Form 1099 for the respective share of interest and monetary relief paid is issued to each class member receiving a share of interest and monetary relief.
17. Where a check to a class member on the “Final List of Participating Class Members” is returned to the Defendant as undeliverable, the Defendant will notify the Plaintiff of such fact within five (5) business days to receipt of the returned check. Plaintiff will then attempt to locate the class member, and if Plaintiff obtains an alternate address within thirty (30) days of notification by Defendant, Defendant will re-mail the undelivered check to the alternate address.
18. Within 100 days after the Defendant initially mails the required checks to class members on the “Final List of Participating Class Members,” the Defendant will provide Plaintiff with a list of class members who have not yet cashed their respective check. Plaintiff will attempt to locate these class members within thirty (30) days and have them cash their respective check. Where Plaintiff identifies any of these class members as not

having received their respective check within the thirty (30) days, the Defendant will mail a second check to these class members.

19. Any check that remains un-cashed 120 days after the initial date mailed to class members (or the second date if Plaintiff locates a class member) shall be void.
20. With respect to the unclaimed funds, the Defendant shall use those funds to train managers at its Black Satchel Road facility about equal employment and non-discrimination in hiring and employment.
21. The Parties may modify any time frame set forth in this Order by mutual agreement and may petition the Administrative Law Judge to extend any of the time periods for no more than thirty (30) days in order to permit a class member to receive their respective share of the "Back Pay Fund" when the interests of justice would be served by such extension and for good cause shown.

OTHER RELIEF BENEFITS

22. The Defendant will offer Sales Support positions to qualified class members on the "Final List of Participating Class Members" who returned the "Information Verification and Employment Interest" form expressing an interest in employment until the first occurrence of (1) 23 interested class members have been hired into the Sales Support positions; (2) the list of interested class members is exhausted, or (3) 24 months have passed from the effective date of this Order. The Parties agree that upon occurrence of the first described event, the Defendant will have no further employment obligation to interested class members, even if the employment procedure described herein results in fewer than 23 interested class members being hired. Should the Defendant have fewer than 23 vacancies available for Sales Support during the 24-month period from the effective date of this Order, the Defendant will confirm this fact to Plaintiff upon request.
23. The Parties agree that class members interested in being hired into a position with Defendant must meet the Defendant's hiring qualifications and criteria before being hired into a position, including (1) completing an updated employment application; (2) completing the interview process; (3) passing a drug screening test; (4) passing a background check; (5) being eligible for rehire if a former employee; (6) being eligible to work in the United States; and (7) agreeing to accept work, hours and overtime, and shift requirements according to the Defendant's needs and assignments. If an interested class member is not hired based upon their failure to meet any of these job-related qualifications, or for any other job-related reason not listed herein, the Defendant will provide Plaintiff with documentation supporting such non-hire.
24. When making an offer under paragraph 22 of this Order, the Defendant shall send a letter containing the conditional job offer via regular first-class mail that will notify the interested class member:

- a. He or she must respond to the offer, verbally or in writing, within ten (10) calendar days after receipt of the offer, or within thirty (30) days after the mailing if the letter is returned unclaimed, or the offer will be withdrawn by the Defendant.
- b. If the class member accepts the conditional offer, the class member will be required to complete an updated employment application, complete the interview process, pass a drug screening test, pass a background check, be eligible for rehire if a former employee, be eligible to work in the United States, and agree to accept work, hours and overtime, and shift requirements according to the Defendant's needs and assignments before he or she can be employed by the Defendant.
- c. Upon the interested class member's completion of an updated employment application and interview, a successful drug screen and background check, proof of eligibility for rehire and to work in the United States, and agreement to accept work, hours and overtime, and shift requirements according to the Defendant's needs and assignments, the interested class member will be provided up to fourteen (14) days from the date of acceptance of the offer in which to start work.
- d. The Defendant will provide each class member it hires retroactive seniority for seniority-based benefits of vacation and layoff only, by adjusting the company service date for hired class members to July 1, 2002, the midpoint of the hiring period at issue, subject to the standard 90-day eligibility requirements for new hires.
- e. If the interested class member rejects the conditional offer, fails to complete an updated employment application and interview, fails to provide proof of eligibility for employment, does not take and pass Defendant's drug screen and/or background check, and/or does not agree to accept work, hours and overtime, and shift requirements according to the Defendant's needs and assignments, the Defendant will have no further obligation to employ that interested class member.
- f. The Defendant 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 paid and/or provided to other similarly-situated Sale Support employees who are hired at or around the same time as the class member.

PROGRESS REPORTS

25. The Defendant further agrees to prepare and submit a semi-annual follow-up "Consent Decree Progress Report" for a period of twenty-four (24) months to the District Director, OFCCP, Whitehall Corporate Center I, 3800 Arco Corporate Drive, Suite 465, Charlotte, North Carolina 28273-3412, on the following dates: January 15, 2011; July 15, 2011; January 15, 2012; and, July 15, 2012. These reports shall consist of the following:
 - a. The names of all class members hired with an indication of the respective job title, rate of pay and starting date of each named class member hired.
 - b. The names of all class members who refused a bone fide offer of employment, the date of the respective offer, the job position offered, the rate of pay offered, and the date of refusal.
 - c. The names of all class members who were considered for a Sales Support position but not selected and the reason for the respective non-selection.

- d. The amount of monetary benefits provided to class members on the “Final List of Participating Class Members” along with the following documentation related to the monetary benefits provided to class members: (1) a list of the names of each class member receiving a check; (2) the respective check number; (3) the dollar amount of the respective check; (4) the date of the respective check; and, (5) the date the respective check was cashed. The Plaintiff retains the right to request copies of cancelled checks disbursed by Defendant to class members, or other equivalent documentation verifying that class members were paid.
- e. The total number of applicants and hires for Sales Support positions at Defendant’s Black Satchel Road facility during the reporting period with a breakdown of the total number by race and ethnicity provided in the form of a flow log containing each applicant’s name, date of application, race/ethnicity, job applied for, job hired for (if applicable), date of hire (if applicable), and reason for non-hire (if applicable).
- f. The results of Defendant’s analysis as to whether the total selection process for Sales Support positions at Defendant’s Black Satchel Road facility has an adverse impact on any group as defined in 41 CFR §60-3.15A(2). If the Defendant determines that the selection process has an adverse impact on any group based on race or ethnicity, the report shall include any remedial actions taken by the Defendant.

IMPLEMENTATION AND ENFORCEMENT

- 26. The Defendant agrees it will not to retaliate against any beneficiary of this Order, or against any person who has provided information or assistance to the Plaintiff regarding the issues resolved by this Order, or who files a complaint or participates in any manner in any proceeding against the Defendant under Executive Order 11246 regarding the issues resolved in this Order.
- 27. The Parties agree that the Plaintiff shall be solely responsible for enforcement of compliance with the terms of this Order.
- 28. The Defendant acknowledges that violation of this Order may subject the Defendant, and its successors, assigns, divisions, or subsidiaries to sanctions set forth in Executive Order 11246 and its implementing regulations and to appropriate relief.
- 29. The Defendant agrees that Plaintiff may review compliance with this Order and that the Defendant will provide Plaintiff with all documents reasonably related to such review and that, upon reasonable notice to Defendant, Plaintiff may come on-site at the Black Satchel Road facility as is necessary to review compliance with this Order.
- 30. The Plaintiff will promptly notify Defendant in writing of any violation of the terms of this Order that Plaintiff believes has occurred during the term of this Order. The written notification will identify the term(s) of the Order alleged to have been violated and the

facts that demonstrate the violation. The Defendant will have fifteen (15) days after receipt of the written notification in which to respond to the allegations of violation, except in those circumstances where the Plaintiff alleges that such delay would result in irreparable injury and time of less than fifteen (15) days is of the essence.

31. Enforcement proceedings for violation of this Order may be initiated at any time after the time period provided in paragraph 30 has elapsed by filing a “Motion for an Order of Enforcement and/or Sanctions” with the Office of Administrative Law Judges. Any evidentiary hearing on the “Motion of Enforcement and/or Sanctions” shall relate solely to the issues of the factual and legal claims made in the motion.
32. Either Party may file a “Motion for Clarification” with the Office of Administrative Law Judges where a condition and/or term of this Order requires further definition in the interests of justice. The documentary evidence considered on a “Motion for Clarification” shall consist solely of the “Administrative Complaint,” the “Defendant’s Answer to Complaint and Affirmative Defenses,” the “Plaintiff’s Bill of Particulars,” and the joint “Consent Findings” including exhibits thereto.
33. If a “Motion for an Order of Enforcement and/or Sanctions” or a “Motion for Clarification” is unopposed by Plaintiff or Defendant, the motion may be presented to an Administrative Law Judge without hearing and the proposed order may be implemented immediately. If the motion is opposed by a party, the party in opposition shall file a written response within twenty (20) days of service of the motion.
34. The Office of the Administrative Law Judges shall retain jurisdiction of this proceeding for the sole purpose of enforcing implementation of this Order in accordance with its terms for a period of twenty-four (24) months, or until thirty (30) days after Defendant satisfies its obligations described in this Order.
35. Subject to the performance by the Defendant of all duties and obligations contained in this Order, all alleged deficiencies which were or could have been raised or identified in the Administrative Complaint shall be deemed fully resolved by this Order.
36. The Parties agree:
 - a. This Order 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 the Plaintiff.
 - b. This Order constitutes settlement of disputed claims and does not constitute an admission by the Defendant of any violation of Executive Order 11246 or its implementing regulations or any violation of any other law, order or regulation.
 - c. This Order constitutes 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.

- d. This Order shall be binding on the Defendant, its successors, assigns, divisions and subsidiaries, and upon the Plaintiff and its agents, officers and employees.
- e. This Order is not intended to be admissible evidence in any proceeding other than a proceeding involving this Order.

37. The Parties further agree that:

- a. The entire record on which this Order is issued shall consist solely of the “Administrative Complaint,” the “Defendant’s Answer to Complaint and Affirmative Defenses,” the “Plaintiff’s Bill of Particulars,” and the joint “Consent Findings” including exhibits thereto; and,
- b. Each Party shall bear its own costs, fees (including attorney fees) and expenses as were incurred by it in connection with any stage of these proceedings.

38. The Parties waive:

- a. All further procedural steps in this matter, including the right to challenge or contest the obligations entered into in accordance with this Order; and,
- b. Any right to challenge or contest the validity of the provisions of this Order entered herewith.

After review of the filed Administrative Complaint, Defendant’s Answer to Complaint and Affirmative Defenses, Plaintiff’s Bill of Particulars, and the joint Consent Findings, this Administrative Law Judge finds that the Consent Findings are in compliance with 41 CFR § 60-30.13, are in the best interests of all the Parties, and adequately resolve all pending issues for this matter.

ORDER

IT IS HEREBY ORDERED that **the Consent Findings are ADOPTED AND APPROVED** as the final Administrative Order pursuant to the provisions of 41 CFR § 60-30.13 and as set forth herein. This Order is effective upon the date of issue set forth.

A

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia