



Issue Date: 30 July 2010

CASE NO.: 2010-OFC-1

IN THE MATTER OF

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

Plaintiff

v.

SIMMONS FIRST NATIONAL BANK

Defendant

CONSENT DECREE AND ORDER

Pursuant to 41 C.F.R. § 60-30.13, the parties to this action, plaintiff, United States Department of Labor, Office of Federal Contract Compliance Programs (“OFCCP”) and defendant, Simmons First National Bank (“Simmons”), have negotiated and executed this Consent Decree and Order (“Decree”), including all attachments hereto. This Decree and Order constitutes a full and final resolution of this action and all issues arising from the compliance evaluation of Simmons initiated by OFCCP on or about October 24, 2005.

Both OFCCP and Simmons desire to resolve this action and all issues 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 filed in this matter.

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. Simmons is engaged in banking.

3. At all relevant times, Simmons has maintained its corporate headquarters in Pine Bluff, Arkansas, and has operated branches throughout the state of Arkansas.

4. Simmons has fifty (50) or more employees and is an issuing and paying agent for U.S. Savings Bonds.

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

7. The issues resolved by this Decree were initially identified during OFCCP's compliance evaluation of Simmons. OFCCP notified Simmons of its intention to conduct the evaluation by letter dated October 24, 2005. OFCCP alleges that Simmons discriminated against Black applicants for Teller and Entry-Level Clerical positions during the period from January 1, 2004 through December 31, 2005, and against Black applicants for Skilled Clerical positions during the period from January 1, 2005 through December 31, 2005, and that therefore Simmons did not meet its obligations as a Federal contractor under Executive Order 11246 and its implementing regulations.

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 Simmons of any violation of Executive Order 11246 or its implementing regulations or of any violation of any other law, order, or regulation.

10. Subject to the performance by Simmons 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.

11. Nothing herein is intended to relieve Simmons from compliance with the requirements of Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793 (“Section 503”), the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended, 38 U.S.C. § 4212 (“VEVRAA”), and their implementing regulations or of 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. Simmons further 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 Simmons under Executive Order 11246 regarding the issues resolved in this Decree.

13. This Decree shall become final and effective when signed by the Administrative Law Judge (“Effective Date”).

III. SPECIFIC PROVISIONS

14. The parties desire to enter into a just and reasonable resolution of this matter without further proceedings. To that end, they have negotiated in good faith and have executed this Decree with the following specific provisions.

A. Affected Class Members

15. For purposes of this Decree, the affected class members are the class of Black applicants who 1) applied for Teller or Entry-Level Clerical positions at Simmons between January 1, 2004 and December 31, 2005 or applied for Skilled Clerical positions at Simmons between January 1, 2005 and December 31, 2005; 2) were not hired; and 3) are otherwise qualified for the subject positions. These persons (hereinafter referred to as “the class” or “class members”) are identified on Attachment A, appended hereto and incorporated by reference herein.

16. Simmons shall notify the class members of this settlement within ten (10) business days of the Effective Date of this Decree. Simmons shall mail the Notice of Settlement to Class Members (“Notice,” appended hereto as Attachment B) to each class member to inform him or her of the settlement. Such mailing shall include the Notice; an Information Verification and Employment Interest Form (“Interest Form,” appended hereto as Attachment C); a Simmons’ application; and a Release of Claims (“Release,” appended hereto as Attachment D).

17. Within sixty (60) days of the Effective Date of this Decree, Simmons shall provide to OFCCP a list of class members who have not yet responded to the Notice. After Simmons has provided this list to OFCCP, OFCCP shall conduct a search to attempt to locate those class members who did not respond. If any class member is located through OFCCP's efforts, Simmons shall send to such class member another Notice, Interest Form, application form and Release within five (5) business days of receiving the class member's address from OFCCP.

18. Within 130 days of the Effective Date of this Decree, Simmons shall provide to OFCCP a Final List of Participating Class Members ("Final List"), which includes all class members who responded to the Notice by submitting a completed Interest Form and an executed Release within 120 days of the Effective Date of this Decree. Within 140 days of the Effective Date of this Decree, OFCCP shall approve the Final List and return the list to Simmons or work with Simmons to revise the Final List so that it can be approved by OFCCP. If a class member is not located and/or does not return a completed Interest Form and Release within 120 days of the Effective Date of this Decree, the class member shall be no longer entitled to any relief pursuant to this Decree.

19. Also within 130 days of the Effective Date of this Decree, Simmons shall provide a separate list to OFCCP of all class members who submitted a signed Release and a completed Interest Form indicating a current interest in a Teller or clerical job at Simmons along with a completed application ("Interested Class Member List"). This list shall rank all class members in order from most qualified to least qualified based on Simmons' review of the class members' updated applications. This list shall constitute the class members who are eligible to be considered for a position under the terms of this Decree.

20. All class members identified on Attachment A who complete and submit an Interest Form and an executed Release in accordance with the provisions of this Decree shall constitute the Final List and will equally share in the monetary settlement. OFCCP and Simmons agree that Simmons 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 timeframes enumerated above or who does not complete and submit an Interest Form and an executed Release and is therefore not on the Final List. Simmons agrees to provide copies of executed Releases and Interest Forms to OFCCP upon request.

B. Monetary Relief

21. In settlement of all claims for back pay, interest and other monetary relief, Simmons will pay \$360,187.00 ("Back Pay Fund"), plus interest that accrues on this amount, to the Black class members identified in Paragraphs 15-20 above. Of his amount,

referred to as “The Back Pay Fund,” \$311,562.00 represents back pay, and each class member’s share of this payment will be reduced by withholding for federal income tax, state and/or local income tax, and the class member’s share of FICA. Each class member shall receive an IRS Form W-2 for his or her share of the back pay. Forty-eight thousand six hundred and twenty-five dollars (\$48,625.00) of this payment constitutes interest, and each class member will receive an IRS Form 1099 for his or her share of this interest amount.

22. Within fifteen (15) calendar days after the Effective Date of this Decree, Simmons will deposit the total Back Pay Fund into a federally insured interest-bearing escrow account. The interest that accrues on the total Back Pay Fund from the Effective Date of the Decree to the date on which the Back Pay Fund is withdrawn to be distributed to class members on the Final List will inure to the benefit of the class members. OFCCP shall be entitled to designate an individual who shall have the authority to make inquiries and obtain information (such as account balance) from the financial institution at which the Back Pay Fund account is located. Simmons will identify to counsel for OFCCP a person who can be contacted who will be able to provide the current balance of the account and other necessary account information.

The interest earned on the Back Pay Fund following the Effective Date of this Decree shall be distributed to affected class members in equal proportions.

23. Within thirty (30) calendar days after Simmons receives notice of OFCCP’s approval of the Final List, Simmons shall distribute the Back Pay Fund and the interest that has accrued on the Back Pay Fund equally among class members on the Final List. This monetary relief is not contingent on a class member’s acceptance of any job offer by Simmons.

24. Within five (5) business days of Simmons’s receipt of a check to a class member on the Final List returned as undeliverable, Simmons shall notify OFCCP of this fact via e-mail and/or facsimile. OFCCP will attempt to locate the class member and if OFCCP obtains an alternate address within 30 days of Simmons’s notification to OFCCP, Simmons will re-mail the check. Furthermore, within 60 days after Simmons initially mails the checks to class members on the Final List, Simmons will provide OFCCP with a list of class members who have not yet cashed their checks. OFCCP will attempt to locate these class members and have them cash their checks. With respect to any of these class members who OFCCP locates who did not receive their check, Simmons will mail a second check to these class members. Any check that remains uncashed 120 days after the initial date mailed to class members shall be void.

25. With respect to the uncashed funds, Simmons shall make a second distribution to all class members who cashed their checks if the second distribution would amount to a payment of at least \$20.00 to each of those class members. If the distribution of

uncashed funds would result in a payment of less than \$20.00 to each of the class members who cashed their first check, those funds will be used to train employees of Simmons on their rights and responsibilities under the non-discrimination statutes, including Executive Order 11246, Section 503 and VEVRAA.

26. The parties may modify any time frame set forth in this Decree by mutual agreement. In addition, OFCCP or Simmons 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 his or her share of the Back Pay Fund, when the interest of justice would be served by such extension and for good cause shown.

C. Non-Monetary Relief

27. As Teller or Clerical positions become available, Simmons will offer these positions to class members on the Interested Class Member List in the order they appear on that list until 30 interested class members have been hired into Teller or Clerical positions or until the Interested Class Member List is exhausted, whichever occurs first.

28. Interested class members must meet Simmons's hiring qualifications and criteria before being hired into a position, including 1) completing an updated employment application; 2) passing a background check; and 3) agreeing to accept the work and hours required for the open position. If an interested class member is not hired based upon his or her failure to meet any of these job-related qualifications, or for any other job-related reason not listed above, Simmons will provide OFCCP with documentation supporting such non-hire.

29. When making an offer to an interested class member, Simmons 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. He or she must respond, verbally or in writing, to the offer within ten (10) calendar days after receipt of the offer, or within fifteen (15) days after mailing if the letter is returned unclaimed, or the offer will be withdrawn by Simmons.
- b. If the class member accepts the conditional offer, the class member will be required to pass a background check and agree to accept the work and hours required by the open position before he or she can be employed by Simmons.

c. Upon the interested class member's passing a background check and agreeing to accept the work and hours required by the open position, 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. Each interested class member who is hired shall receive retroactive seniority to the date of his or her application for purposes of benefits and job retention.

The envelope in which the written offer is mailed will prominently state "URGENT — OPEN IMMEDIATELY." If the interested class member rejects the offer, fails the background check, and/or does not agree to accept the work and hours required for the open position, Simmons will have no further obligation to employ that interested class member. Simmons shall pay and/or provide to each interested 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 Teller or Clerical employees who are hired at or around the same time as the class member. The current wage rate for a Teller position is \$10.68 per hour.

30. Simmons will continue this employment procedure until 30 interested class members are hired or the list of all interested class members is exhausted, whichever occurs first. At that time, Simmons will have no further employment obligation to interested class members, even if the above-described process results in fewer than 30 interested class members being hired.

D. Other Provisions

31. Simmons 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, 525 5. Griffin Street, Suite 512, Dallas, Texas 75202, 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, stating the job title, rate of pay, starting date, and proof of retroactive seniority.

(B) The name of all 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 Teller or Clerical position for which a class member was considered but not selected, the reason for the non-selection and any documentation supporting that reason.

(D) The amount of monetary benefits provided to class members on the Final List. Simmons shall provide the following documentation relating to the monetary benefits provided to class members: 1) a list of each class member receiving a check; 2) the check number; 3) the dollar amount of the check; 4) the date of the check; and 5) the date the check was cashed. OFCCP reserves the right to request copies of cancelled checks disbursed by Simmons to the class members, or other equivalent documentation verifying that class members were paid.

(E) The total number of applicants and hires for Teller and Clerical positions at Simmons during the reporting period with a breakdown by geographic location and race, provided in the form of an applicant 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 if not hired, the reason.

(F) For Teller and Clerical positions, the results of Simmons's analysis as to whether its total selection process has an adverse impact on any group as defined in 41 C.F.R. § 60- 3.1 5A(2). The parties agree that hires made pursuant to this Decree will not be counted as applicants or hires for purposes of Simmons' adverse impact analysis. If Simmons determines that the selection process has an adverse impact on any group, the report shall include any remedial actions taken by Simmons.

IV. IMPLEMENTATION AND ENFORCEMENT

32. 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.

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

34. The parties waive all further procedural steps, including the right to challenge or contest the obligations entered into in accordance with this Decree.

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

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

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

38. 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 and one-half (2 ½) years following the Effective Date of the Decree, or until thirty (30) days after Simmons satisfies its obligations described herein, whichever is later.

39. Simmons agrees that OFCCP may review compliance with this Decree and that Simmons will provide OFCCP with all documents reasonably related to such a review. Simmons also agrees that, upon reasonable notice, OFCCP may come on-site to review compliance with this Decree.

40. If at any time during the term of this Decree OFCCP believes that Simmons has violated any of the terms contained in this Decree, OFCCP shall promptly notify Simmons in writing of its alleged nonperformance. This notification will identify the term(s) of the Decree alleged to have been violated and the facts that demonstrate the violation. Simmons will have fifteen (15) days in which to respond in writing to the allegations of violation, except in those circumstances where OFCCP alleges that such a delay would result in irreparable injury.

41. Enforcement proceedings for violation of this 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.

42. If a motion for an order of enforcement or clarification is unopposed by OFCCP or Simmons, 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.

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

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

So ORDERED this 30th day of July, 2010, at Covington, Louisiana.

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C. RICHARD AVERY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file exceptions (“Exception”) with the Administrative Review Board (“Board”) within fourteen (14) days of the date of issuance of the administrative law judge’s recommended decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Any request for an extension of time to file the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the Exception is due. *See* 41 C.F.R. § 60-30.28.

On the same date you file the Exception with the Board, a copy of the Exception must be served on each party to the proceeding. Within fourteen (14) days of the date of receipt of the Exception by a party, the party may submit a response to the Exception with the Board. Any request for an extension of time to file a response to the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the response is due. *See* 41 C.F.R. § 60-30.28.

Even if no Exception is timely filed, the administrative law judge’s recommended decision, along with the record, is automatically forwarded to the Board for a final administrative order. *See* 41 C.F.R. § 60-30.27.