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ABSTRACT

This document explores some of the interrelationships between the collective bargaining process and equal employment issues. The National Labor Relations Act, the federal collective bargaining statute, is the focal point of the labor law discussion because it has had significant impact on the drafting and interpretation of state labor legislation and stands on an equal footing with federal equal employment laws. The federal labor statute, applicable to private colleges and universities is discussed, underscoring the Act's application to discrimination in employment based on race, sex, religion, national origin or color. Next, four federal equal opportunity laws -- Title VII of the 1964 Civil Rights Act, the Equal Pay Act, Executive Order 11246 as amended, and Title IX of the 1972 Educational Amendments -- are briefly described, emphasizing their impact on labor relations matters. Finally, some suggestions for higher education collective bargaining in the context of equal employment obligations are given. To the extent possible, an attempt is made to shape the principle of law, which arises in an industrial setting, to conceptually fit a situation involving faculty organizing or collective bargaining and campus equal employment issues. Much of the discussion is applicable to both faculty and nonfaculty employees. (Author/KE)

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SPECIAL REPORT #23
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THE APPLICATION OF NON-DISCRIMINATION LAW AND REGULATIONS TO COLLECTIVE BARGAINING IN HIGHER EDUCATION

The increased intensity of anti-discrimination enforcement measures has forced colleges and universities to reassess their operational procedures affecting students and employees. In recent months it has become clear that the powerful forces of anti-discrimination and collective bargaining intersect at a number of critical points that need clarification, understanding and a deep desire to find equitable solutions to the legitimate concerns of each party.

To help meet this need ACBIS has prepared two papers, one technical and legalistic* for those who need to review the various court decisions, and this one which is a relatively simple list of suggestions for handling problems which may arise during the several phases of collective bargaining.

The staff wishes to recognize the help of Susan Fratkin, National Association of State Universities and Land Grant Colleges, who reviewed and made valuable suggestions for this report.

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* ACBIS Monograph #1

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PRIOR TO NEGOTIATIONS

General: Most labor laws add a new dimension to the prohibitions against discrimination: that of discrimination (in terms of employment, discharge, salary, promotion, work hours, work assignments, work loads, office space, etc.) against a person on the basis of membership or non-membership in a union or the performance of union duties, or participation in union activities (such as helping to organize a union, campaigning for a union during the pre-election period, writing articles for a union newspaper generally derogatory to the employer, etc.). Such discrimination may result in an unfair labor charge before the NLRB (for private colleges) or an appropriate public employment relations board (for public colleges) which has the power to order appropriate remedies, and/or an action before the courts.

See, e.g. Jubilee Mfg. Co., 202 NLRB 272 (1973).

During election campaigns: Employers and unions have an excellent opportunity during election campaigns to reaffirm their support for equal opportunity employment and benefits. Union officials should provide examples of ways in which women and minorities have benefited from membership in their particular union, both at the local and national levels. Where such information is not available, the employer and employees have every right (and duty) to request that the union provide it. Where there is evidence that a union seeking certification as the bargaining agent, has participated in discriminatory practices, either knowingly or de facto, the employer should bring such evidence to the attention of the proper administrative board (NLRB or PERB). The employer should be careful however, a) not to make public charges against the unions unless they have a basis in fact, b) not to attempt to sway voters by making unfair statements about the union's willingness or capacity to serve minority groups, c) not to direct statements at minority employees to the effect that they will lose benefits by joining a union. Such actions may result in a finding of employer unfair labor practice.

See e.g. Pacific Maritime Assn., 209 NLRB No.88 (1974).

See, e.g. Media Mailers, Inc, 191 NLRB 251 (1971); and, Boyce Machinery Corp., 141 NLRB 756 (1963).

Unions, on the other hand, also have the right and duty to point out during the

campaign, inadequacies or inconsistencies in the employer's affirmative action program or in past employment practices. All such discussions should be accurately and fairly stated.

Note. After the election of a union, the employer or employees may (and should) present to NLRB or PERB any serious evidence of union discrimination. Union discriminatory practices could lead to a range of penalties including decertification.

See, NLRB Rules and Regulations, 29 C.F.R. 102, 60(a).

Review of current policies and practices: Prior to negotiating the first contract (or later contracts when appropriate) the employer and union should each or jointly conduct a careful review of employment policies and employee data in order to identify possible areas of discrimination that can be remedied prior to, or in the process of negotiating a new contract free of illegal implication, (e.g. by a clause perpetuating past "benefits" or by inclusion of new "benefits" that are applied unequally to the members.)

Membership on the bargaining teams: It may be helpful after all circumstances are considered, for the employer to appoint someone from the institution's affirmative action office to the bargaining team or to a "back up" committee that reviews issues being considered at the bargaining table. Both the employer and the union should consider the feasibility of including women and minorities on their respective bargaining teams.

DURING NEGOTIATIONS

General: Both the employer and union should be wary of negotiating separate subcontracts for groups of employees within the same bargaining unit lest such contracts be interpreted as evidence of unnecessary or unfair practices tantamount to discrimination. In general, all members of a certified bargaining unit, should be covered by the same contact, and no clause in that contract should discriminate against any group or individual within that membership. Contract clauses held by a "board" or a court to be discriminatory, could be nullified with both

See, e.g. Blanton v. Southern Bell Telephone & Telegraph Co. 49 F.R.D. 16212 F.E.P. Cases 602 (N.D. Ga., 1970).

the union and employer subject to severe penalties. In other words, equal employment rights of an individual cannot be lost through careless bargaining processes, an inequitable clause in a negotiated contract, or by unfair grievance settlements.

"Good faith bargaining": The federal statute (NLRA) and most of the existing state labor laws require both parties to negotiate "in good faith." Should either party refuse to negotiate issues related directly to strengthening equal opportunity employment practices (equal opportunity for employment, pay, promotion, job assignments, etc.) it may be subject to a charge of an unfair labor practice before the board.

See e.g. Farmers' Cooperative Compress, 169 NLRB 290 (1968), enforced in pertinent part, 416 F.2d 1126 (C.A.D.C., 1973), cert. denied 396 U.S.903.

THE NEGOTIATION OF CONTRACTUAL CLAUSES

Preamble to contract: A college or university may wish to include a statement to the effect that it is an equal opportunity employer and operates on affirmative action plans for future empolyment. The union may wish to affirm its support of the campus affirmative action plan. Both parties may wish to state that the negotiated agreement shall in no way interfere with the operation of the A.A. plan.

Both parties benefit by a preamble stating that the union has a history of non-discriminatory service and is, therefore, well qualified to provide "equal representation" (required by law) for all members of the bargaining unit regardless of race, creed, sex, age, etc. Enforcement agencies and arbitrators scrutinize the histories of both the union and the institution whenever a charge of discrimination is being adjudicated. An individual may lodge a charge of discrimination against a union and/or the employer relative to a perceived inequity resulting from lack of union support (unequal representation) at the bargaining table or at grievance hearings, or from unequal enforcement of institutional policy and/or benefits by the employer.

If the preamble is excluded, by the contract, as a grievable clause then alternative or additional clauses should be included in the grievable body of the contract to insure that a discrimination complaint is grievable under contractual grievance procedure.

Appointments, tenure, promotion: If a review of appointment policies, and employee classifications has not been recently completed, the parties may wish to include in the contract a clause that requires such a review with a stated purpose that both parties will work cooperatively to seek remedies for any policies and practices (and for persons negatively affected by such practices) that may, directly or indirectly, permit or promote discrimination. Such a review should pay particular attention to such areas as salaries, ranks, part-time faculty benefits, summer employment opportunities, anti-nepotism practices, rigid adherence to questionable qualifications for appointments and/or promotions, etc.

College calendar: Calendars need careful scrutiny in terms of favoring one group over another. The parties may wish to negotiate a contractual clause establishing a joint committee to screen proposed calendars for discrimination in such matters as favoring certain religious holidays over others. (Other concerns, although not supported by law, rule, regulation or decision, include establishing vacation periods uncoordinated with local school holidays, creating working difficulties for mothers and vacation periods that prevent students from obtaining equal opportunities for vacation jobs.)

Grievance procedures: The contract should establish a procedure that provides the basic due process requirements of notice, hearing and opportunity to confront witnesses and expedites the processing of discrimination charges. Such process may or may not be separate from those designed for other types of grievances. In no case should the union and employer "slough off" their responsibilities for expediting discrimination cases by indicating (as some have in the past) that such cases shall be taken directly to human rights commission or to the courts. Both agencies have often been undermanned and ordinarily have had serious backlogs of cases which exacerbate rather than resolve serious problems. The least an employer and union might do, would be to include in the contract local level hearings or other legitimate means in an immediate attempt to resolve complaints and provide appropriate remedies at the informal stages where possible.

See, Title IX of the 1972 Education Amendments, 20 U.S.C. 1681 (1972).

Leaves of absence and health benefits: Leaves of absence, hospitalization and surgical plans should permit no special exemption from benefits (such as "no coverage" for pregnancy related disabilities) that may discriminate against a particular group of employees. In addition a denial of a leave of absence because of age (too young, too inexperienced, too near retirement, etc.) is questionable. Legitimate purposes for leaves of absence should be clearly stated together with criteria for judging the merit of applications for leaves. The process of awarding and denying leaves should also be stipulated in a manner that helps to guarantee fair and equal consideration of applications for everyone. Women and minorities should have fair and equal representation on committees that recommend or approve such benefits.

See e.g. EEOC Sex Discrimination Guidelines, 29 C.F.R. Chap. XIV, Part 1604, Sec. 1604.9.

Management rights: A management rights clause may be used to further emphasize the employer's committment to equal employment opportunity and affirmative action by restating the employer's intent not to discriminate in directing the work force, transfer, discipline, etc. The clause may also refer to (not necessarily incorporate by reference) the institution's affirmative action plan and state the employer's intent to discharge its management rights in conformity with that plan. In the alternative the managements rights clause may refer to or be appended to non-discrimination clauses in the contract.

Non-discrimination clauses: Some parties like to include in the contract a separate clause affirming both the institution's and union's belief in and adherence to the principle and practice of non-discrimination. Such a clause, no matter how well intentioned, will not protect either party against a specific charge of discrimination. It does apparently have two plausible virtues: (1) It may establish a general tone and atmosphere that encourage both parties and their constituents to seek out and eliminate unfair practices, and (2) it may encourage those being discriminated against to enter complaints and seek redress. To achieve these virtues the clause should make reference to specific contract grievance steps that are designed to expedite the identification and processing of complaints without causing

See, e.g. Edmund A. Gray, Inc., 142 NLRB 590 (1963).

undue exposure or embarrassment to those who believe they may have a just complaint.

General working conditions: If the parties are really serious they will agree to establish a joint committee to study the non-dollar working conditions of faculty. Is there discrimination in assigning offices, types and levels of courses, off campus courses, early morning and late afternoon courses, committee work, parking spaces, extra-pay opportunities, student advisement, travel funds, clerical services, student assistants, etc.? This type of discrimination can have subtle deleterious effects and often exists as a matter of tradition rather than as a matter of reason.

Part-time faculty: Part-time faculty members are commonly injured by traditional discriminatory practices. Largely consisting of faculty wives or other community women whose special talents are taken for granted, their salaries are often low. They may seldom be given opportunity for tenure, promotion, full time employment, adequate office space, clerical help, etc. A special clause in the contract should deal adequately with this important segment of the university's human resources.

Past practices or benefits: Many contracts include a clause designed to preserve to the faculty all benefits prior to bargaining. Such a clause could inadvertantly perpetuate past discriminatory practices, especially where only part of the faculty enjoyed certain benefits. Both parties would share the guilt of discrimination. It would seem wise to specify that past discriminatory benefits would not be preserved. It should also be made clear that the clause preserving benefits shall not be used by the union or management as a barrier to eliminating past discriminatory practices.

See e.g. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Personnel committees: One of the more significant ways in which faculty members can help to eliminate discrimination is in sharing the decision-making responsibilities relative to appointments, promotions, salary increases, etc. The contract could well include a statement to the effect that in appointing (or electing) such committees, care will be exercised to see that women and minorities are given fair representation.

Personnel files: One of the extremely sensitive areas commonly subjected to discriminatory practices in the past has been in the reporting and keeping of personnel records. The contract should bar any unnecessary records of irrelevant data such as one's marital status, political activities, religion, social groups, etc. The contract should also provide open and equal accessibility to one's own files with full opportunity of adding to one's own file valid information and rebuttal of critical statements found therein. Data necessary for affirmative action reporting should be collectable and kept by the A.A. office not the personnel office.

"Recognition of agent": In the clause whereby the institution agrees to give official recognition and the right of exclusive representation to a particular union, the union should, in turn, agree to represent equally and fairly each and every member of the bargaining unit regardless of race, creed, age, sex, etc.

See, e.g. Miranda Fuel Co., Inc., 140 NLRB 181 (1962) enforcement denied, 326 F.2d 172 (C.A.2, 1963).

Retirement plans: Where the law permits bargaining of retirement plans, the contract should provide, to the extent possible, equal costs to the participant, equal access to membership classifications, equal service requirements for benefits and equal benefits.

See e.g. EEOC Guidelines supra.

Retrenchment: To the extent that traditional union practices of "last hired, first fired" may lower the percentage of employed women and minorities recently achieved under an affirmative action plan, those practices ought to be modified. The contract should openly recognize the priority of affirmative action goals and may well establish a joint committee of the parties to review the required number of lay-offs, the most appropriate departments for retrenchment, and the best means to achieve retrenchment with the least harm to institutional programs, affirmative action goals, and other humane priorities (See Temple University contract for one approach.)

See e.g. Watkins v. Steelworkers, 369 F. Supp. 1221, (D.C. La., 1974); and Waters v. Wisconsin Steel __ F.2d ___, 8 F.E.P. Cases 577 (C.A. 7, 1974).

Salary schedules; merit salary increases; promotions, etc.: The contract should omit all references to special groups within a salary schedule that may be construed as discriminatory. Differences in salaries and ranks should be clearly determined on

the basis of distinguisable meritorious training or service attributes. Even though both union and employer agree to salary payments that are found to discriminate, courts have generally held that the employer actually benefits from lower salaries and therefore is liable for paying back wages and other penalties assessed by the court or administrative board. A union is not penalized unless it withholds dues unequally or otherwise benefits directly from discriminatory practices. Salary factoring on the basis of favored departmental or school status should be avoided especially where favored departments or schools consist predominently of white males while disfavored departments are primarily staffed by women and minorities.

See e.g. Regulations of the Department of Labor for the Office of Contract Compliance, 29 C.F.R. Sec. 800.

Affirmative action plan note in contract: The contract could well indicate that 1) there shall be an effective affirmative action plan in operation, 2) the plan shall be approved by the appropriate governmental agency, 3) the purpose of the plan shall be to assure equal employment opportunity, 4) the union and employer will jointly and cooperatively participate in plan review and revision, 5) the union will support the employer's efforts to administer the plan fairly, 6) the union and employer will negotiate any differences of opinion as to interpretation and administration of the plan in order to assure equity for women and minorities, 7) the plan objectives shall not be modified by necessary job retrenchments, 8) complaints of discrimination will be adjudicated quickly and fairly in accordance with procedures established in this article or elsewhere in the contract.

See e.g. Rider College - AAUP contract

DURING THE ADMINISTRATION OF THE NEGOTIATED CONTRACT

Fair representation: Fair representation, required by most labor laws, is the direct responsibility of a union to see that its services (e.g. in negotiating better salaries and working conditions, in reviewing and processing complaints and grievances, in assigning members to union committees, etc.) are managed and provided in a manner equitable to all of its members regardless of sex, race, religion, etc. The employer, however,

also can be held liable if he condones unfair representation and, therefore, should take appropriate steps to help union officials (and others when necessary) to be informed of reports or complaints that may lead to unfair labor charges or to litigation in the courts or to hearings before human rights commissions. Failure of the employer to take appropriate action may provide an appearance of support for union discrimination.

See e.g. NLRB Rules and Regulations, 29 C.F.R. 102, 60 (a).

Picketing, strikes, etc. in support of a grievance: A union may not use concerted activities in support of a grievance while that grievance is being processed through the steps as negotiated in a contract under NLRA. This is also probably true of a contract negotiated under a state labor law.

See, e.g. Emporium Capwell Company v. Western Edition Community Organization, U.S. (1975); 88LRRM2660.

Grievance procedure and remedy of discrimination: The range of grievances that may be pursued under a negotiated contract usually includes complaints of discrimination. Should a charge of discrimination be denied by the final arbiter at the final step, it does not preclude the grievant from pursuing the complaint through the courts or other means such as a human rights commission. Nevertheless, the briefs prepared and the reasoning of the arbitrator are always important evidence to be considered carefully by the courts.

See, e.g. Emporium Capwell supra.

Undue delay in the processing of grievances caused by, and/or urging a grievant to rely solely upon the internal grievance procedure by either the union or the administration, resulting in the grievant's failure to file a timely petition before an enforcement agency may be found to be discriminatory in itself, compounding the potential charge against union or administration.

Liability of employer for employee actions: Under NLRA, the employer is responsible for discriminatory action against an employee or potential employee even when such action is taken as a result of recommendations by a committee of employees who are acting under the authority of a contract and/or institutional policy. Similarly a union is held responsible for its illegal action or for failure to take steps necessary to prevent or remedy illegal actions, such as discrimination, even when such illegal action is recommended by rank and file members acting in

accordance with contractual or non-contractual procedures (e.g. a union committee may recommend that a grievance charge involving discrimination not be processed through the contractual grievance procedure; such recommendation does not relieve the union from making a proper decision.)

See, e.g. EEOC Decision 74-93, 6426 CCH 4132 EEOC Decisions 4132.

An illegal contract provision. An unfair labor practice may also be charged against a party that attempts to bargain an illegal provision (including discrimination) within a contract. Should such a provision be included in a contract, it provides neither party valid reason for a discriminatory practice. Rather, it may constitute bona fide evidence against both parties as an act of discrimination.

See, e.g. Blanton, supra.

Should an employer discover an illegal clause in the contract, and the union refuses to cooperate in correcting the clause, the employer may unilaterally change the conditions of employment to conform with equal employment standards.

See, e.g. Savannah Printing Specialties & Paper Products, local 604 v. Union Camp Corp., 305 F.Supp. 632 (S.D.Ga., 1972).

Affirmative action plan and the union contract: The faculty union should be invited to help revise (or prepare) the institution's AA plan in order to facilitate future negotiations and to avoid, if possible, conflicts between the Plan and the contract. This is especially important in designing plans for retrenchment and re-employment since the potential conflict between the "seniority rights" principle established in union contracts and the demand of government for retaining larger percentages of women and minorities may have explosive repercussions. If the certified union is not consulted in preparing the AA plan, it may reasonably initiate an unfair labor charge.

See, Executive Order 11246 as amended by E.O. 11375, Section 202.

After an AA plan has been established, it would be wise to include in future negotiated contracts a clause supporting the Plan and providing consultation procedures for adjudicating any future conflicts that may arise between the Plan and other clauses in the contract. Such conflicts, when not satisfactorily ameliorated at the local campus level, are sometimes adjudicated by NLRB or by courts. The few existing cases indicate that affirmative action requirements are likely to be given priority over negotiated agreements.

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