

CARTON 10:35 THE BROTHERHOOD OF SLEEPING CAR PORTERS

HOWDEN, ED (3 of 5)

N.D.

Source: Ed Howden
5/07



MEET AT THE AIRPORT on his recent arrival in San Francisco were WILLIE MAYS and his wife. The comparable outfielder of the San Francisco Giants signed a pact the next day at Seals Stadium for between \$5,000 and \$70,000 for the 1958 season, becoming the

highest paid player in the history of the Giants and the second highest paid player in the National League. Pictured here with the "Say Hey Kid" (left) are Edward Howden of the Council for Civic Unity (who helped Mays in the settlement of the recent controversy over buying a

home), Howden's son, Johnathan (in arms) who doesn't seem to be too interested in baseball players at this date, his son, Mike, an ardent fan of Willie Mays; Jefferson Beaver, president of the San Francisco-Oakland Urban League; and Mrs. Mays.

—E. F. Joseph photo

from Ed Hansen 5/07

1) E#

2) Ret. S.S.

Honorable William Becker, Assistant to
the Governor for Human Rights
Governor's Office
State Capitol
Sacramento, California

18 March 1965

AFFIRMATIVE ACTION

- Aileen C. Hernandez, Assistant Chief
Division of Fair Employment Practices

Since I recognize that you have a deep interest in the affirmative action program of the Fair Employment Practice Commission, I will try to keep you informed of these activities as they develop. I am meeting tomorrow morning with the two consultants assigned full-time to affirmative action -- Bob Hine in Los Angeles and Hugh Taylor in San Francisco. We will be considering a broad range of affirmative actions and will attempt to prepare a detailed report for the Commission's action at its April meeting. The Commission indicated last month that it would like to spend whatever time is necessary at its April meeting to consider in some detail the present affirmative action program, as well as recommendations for future activities.

At this point, I do not know just when this discussion will take place in April, but we are meeting April 5, 6, and 7 in San Francisco. If you have any specific ideas that you would like the Commission to consider, please let me know in advance so that we can include your points in our report. Incidentally, if your schedule permits, you might want to be on hand during this discussion.

ACH/ss

File
memo to
Affirmative
Action
Committee

Hugh Taylor
Robert Hine

6 January 1965

EVALUATION OF AFFIRMATIVE
ACTION ASSIGNMENT

Aileen C. Hernandez

- Division of Fair Employment Practices

Since 1 July 1964, you have been assigned to special duty as the affirmative action consultants in your respective areas. I would like now to get your written evaluation of this assignment with your recommendations as to changes or improvements that might be instituted to make the affirmative action program more meaningful.

In making this evaluation, please give me a detailed account of:

1. Affirmative Actions In Process: (Evaluation of each, please)
 - a. Your estimation of the validity of the affirmative action authorization
 - b. Your evaluation of the effect of the FEPC involvement in this action -- potential number of jobs, attitudes of employer, etc.
 - c. Your suggestions for future steps to be taken in this action
2. Affirmative Actions to be Recommended and Plans for Implementation:
 - a. Why this recommendation as opposed to others
 - b. Specific recommendations for procedure
3. Strengths and Weaknesses of Current Affirmative Action Program
 - a. Is it having an effect on employment for minorities?
 - b. What recommendations do you have for improving our approach to affirmative actions?
 - c. What organizational changes would you recommend to make the program more meaningful?

Please submit the report to me no later than 27 January 1965.

Aileen C. Hernandez
S.A.S.

ACH/ss

cc: Henry, Lucks
Howden

Memorandum

To : Aileen C. Hernandez, Assistant Chief

Date : January 22, 1965

Subject: Evaluation of Affirmative
Action Assignment

From : Department of Industrial Relations Hugh Taylor, Consultant

AFFIRMATIVE ACTIONS IN PROCESS

FEP64-A005a, Bank of America

This has perhaps been the most successful and most spectacular affirmative action program yet engaged in. The number of jobs gained with this company alone makes the program worthwhile.

FEP63-A002a, ^{CANTALOUPE} Cantaloupe Sheds

This is a meaningful action. We have the complete cooperation of the Packinghouse Workers Union. We are beginning to get some cooperation from some of the owners, but the results are not yet startling but are positive. Efforts will be made to secure a spot on the agenda of the union and owners at contract renewal time in March of 1965.

FEP63-A013a, Merced Human Relations

This has been handled by Consultant Lisker. He has been working with the Human Relations Committee. The committee's main involvement is in minority employment opportunities. There appears to have been success.

FEP64-A010a, All Major Banks

This is a statewide affirmative action. Efforts to work through the Superintendent of Banks while promising have not yet been fruitful, and it appears that all contact will have to be made directly with the banks and information supplied to Mr. O'Kane. Again, this promises to be a very fruitful action and promises to produce jobs.

FEP64-A011a, Defense Installations

This is engaged at the request of the Secretary of Defense. Meetings have been held North and South with the defense installations. Follow-through visits have been made in the North to Hamilton Air Force Base, Presidio, Castle Air Force Base and Lemoore Naval Base. There has been written contact with other of the bases and some major problems have been brought to our attention by our own investigation and by some of the defense installations as well. This action could demand all of the time of one consultant for at least a year.

FEP63-A005a, Firestone

This is a new plant that is doubling its size. It is located in Salinas in Monterey County with a significant Mexican-American population and with a very small Negro population in the immediate vicinity. The company has agreed to embark on a positive program to seek minorities, and as a result,

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have 26.4% Mexican-Americans employed. This is very significant in that the company has very seldom hired Mexican-Americans in any of its plants and had a feeling that they were too small to work as tiremakers. This notion has been dispelled by the tremendous success that they have had with their Mexican-American employees. The company has a training program in which it is actively seeking to recruit Negroes as well as Mexican-Americans, as well as all others. It probably represents the greatest single affirmative action by way of benefiting the Mexican-American community. It is one which the Mexican-American representative might very well make use of. The action is well worth continuing.

FEP64-A003a, Southern Pacific

This started out to be confined to the Sacramento Area and in a meeting with the company on December 15th, Consultants Taylor and Posey got the company to agree to extend it to a statewide basis, and this action appears to have the potential of getting Negroes and Mexican-Americans into many of the indentured trades through its training and apprenticeship programs. This is a very significant affirmative action which should pay good dividends in terms of securing training as well as jobs for minority communities.

The following affirmative actions ought to be placed on the INACTIVE LIST. They are:

FEP63-A006a	Monterey Laborers Union
FEP63-A007a	Brunswig Drug
FEP63-A010a	McKesson and Robbins
FEP64-A011a	Port of Sacramento
FEP63-A012a	Proctor and Gamble
FEP63-A008a	California State Department of Employment

In addition to the Commission's approved affirmative action, there are two other affirmative action type programs which I would describe as (1) affirmative action based upon case complaint, and (2) affirmative action informally entered into by virtue of the compelling circumstances; and as a part of a proposal for the affirmative action program, I would like to propose a third kind of affirmative action program, which I designate as affirmative action combination housing and employment.

Affirmative Action Case Connected

The affirmative action consultant has worked with various other consultants in affirmative action programs that they have developed out of cases they have had with certain companies.

Fairchild Semi-Conductor Company in San Rafael represents this kind of affirmative action approach which has not been listed as an affirmative action. Taylor and Williams had met with the management of this company at a dinner party and spent several hours discussing the program with them and found this to be a very meaningful approach in that we are able to spread understanding throughout most levels of the company and to get cooperation from most levels of the company and do far more than you can ordinarily do in a specific case type of situation.

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Standard Oil of California represents this type of affirmative action approach. While Consultant Taylor has not met with Standard, he has met with Consultant Beane and Commissioner Dellums to plan this approach and feels that progress has certainly been made in this case and that more promises to be made as more work is done.

Pacific Gas and Electric

This action grew out of cases that Consultant Murphy has had with PG&E, and Consultant Murphy is using the affirmative action consultant to help persuade management to get more involved, and this also promises to be a worthwhile program.

INFORMAL AFFIRMATIVE ACTION PROGRAM

In June, 1964, the parole agents from the Department of Corrections in Northern California complained that no Negroes had been promoted in Northern California since the middle 1950's. There are eight Negro parole agents in Northern California. Consultant Taylor met with the Chief of the Parole Division and suggested that he call a meeting of all Negro parole agents to explain why they haven't been promoted. This meeting was held immediately, and as of November 1, 1964, five of the eight Negro parole agents in Northern California were promoted, representing the first time since the early 1950's that there had been any such promotion among Negroes in Northern California. In addition, the Department was criticized for concentrating all of its Negroes and Mexican-Americans in the two urban areas and not dispersing them throughout its entire California operations, and again as of November 1st, they had employed a Negro parole agent in Merced, California, and a Negro Supervisor of Paroles in Fresno, representing firsts in both areas.

Department of Finance, Budget Division

The Chief of the Budget Section, Mr. Beach, contacted the affirmative action consultant and asked for assistance in breaking a pattern which contained no Negroes in the professional categories with the Division of the Budget. I met with Mr. Beach and found out what he needed. I got copies of his job specifications. Three men were referred to the Division of Budget by consultant, and one Mr. Isaiah Dow of San Francisco was hired and went to work on November 9, 1964, as the first Negro ever to work in a professional category in the Budget Division of California. We have been asked to continue to refer prospects, and we sought the assistance of minority specialists in San Francisco and in Sacramento in this matter.

Crown Zellerbach Company also represents this type of affirmative approach. They have asked us to help suggest sources for recruitment. We have as well as meeting many of their personnel people, and their pattern has improved.

City of Berkeley

The affirmative action consultant has been meeting with the personnel manager of the City of Berkeley and the assistant city manager of the City of Berkeley over a period of at least a year and has been encouraging them to take overall

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looks at their own performance, and as a result, many firsts by way of city action have occurred including the racial breakdown on certifications to new job openings and by means of racial breakdown as to job hires and now by request to the Commission which has been approved to study cultural bias in testing.

AFFIRMATIVE ACTION COMBINED HOUSING AND EMPLOYMENT

This is a new aspect of the affirmative action program which needs to be inaugurated in my view. The target of this type of program would be those well-known areas in the North such as Napa County and all of the cities in Napa County which do not permit Negroes to live in the county or its cities. This would also entail working with some of the many cities in Los Angeles County that do not permit Negroes to live in them such as Burbank, Glendale, Bell, Bell Garden, Southgate, Lynwood, Norwalk, Downey, etc. In these kind of cities we have industry and many of them will only hire people who live within a certain radius of the plant. This is a built-in discriminatory device which the city is a part of. We could meet with the mayors, city managers, etc. of these cities as well as with some of the community leaders of these communities and devise methods of breaking down one of the most sinful discriminatory patterns that exists anywhere, and which all of us are very much aware of. This affirmative action program I would give the highest priority, higher than the Bank of America or any other program we are engaged in.

AFFIRMATIVE ACTIONS TO BE RECOMMENDED AND PLANS FOR IMPLEMENTATION

The affirmative actions to be recommended are by and large the same as of November 24th, 1964, when they were listed as:

(1) Teamsters Local 85, San Francisco.

This local has 6,500 members, about 1,500 non-members who work out of its halls, or a total of 8,000 teamsters working in San Francisco. Only twenty of these 8,000 teamsters are Negroes. This is a very prime objective of the affirmative action program and should be included in the program for the labor unions. The most compelling need for this particular affirmative action is the fact that it requires no skills and only a strong back. There is a ready-made labor market in the minority community. There should perhaps be as many as 1,000 Negroes working out of this union, and certainly 1,000 Negroes could be found within a week.

(2) The State Office Building, Fresno - State Office Building, San Francisco

There is a need to deal with each of these State Office Buildings as a unit rather than through their departments, the reason being that they hire from referrals that are made locally and many of the offices have no Negroes at all working, and we have had rather extensive experience with Negro candidates who have been referred to as many as twenty different offices in Fresno and who never secured a job. It therefore appears that each of these State Office Buildings should be treated as a separate unit even if we are also working with the Department.

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(3) The Major Oil Companies Other Than Standard Oil

This includes Union, Flying A, Richfield Oil, Texaco Oil and Mobile Oil. They should be dealt with in the same way that we are dealing with Standard. Even though these companies do not operate their own stations, they do influence the conduct of the franchise holder, who does operate the station.

(4) The State Government at the Department Level is also a prime target for future affirmative action. We are working with the Department of Corrections and the Department of Youth Authority, Alcoholic Beverage Control and the Department of Professional and Vocational Standards. We have received outstanding cooperation from the Department of Corrections and the Department of Youth Authority. Many of the other State Departments hire absolutely no Negroes in any professional capacity. This includes Beaches and Parks which we are now working with, Fish and Game, Division of Forestry and until recently, the Department of Finance.

(5) The dual housing and employment affirmative action that was previously discussed should be the next affirmative action presented to the Commission for approval, and I would recommend the County of Napa in Northern California along with an appropriate group of Southern California cities to be selected by the Southern California staff.

(6) There are various other groups of employers such as retail merchants in the downtown areas of large cities. There are the electronic industries which are largely unexplored yet located down the Peninsula and in San Francisco and scattered around in Los Angeles County. There are many cities and counties that should be worked with in the way that Berkeley and San Diego have been worked with.

The agricultural picture in California, now that the bracero program has been eliminated, presents a possible affirmative action program above and beyond what we already have in the packing sheds.

STRENGTHS AND WEAKNESSES OF CURRENT AFFIRMATIVE ACTION PROGRAM

Effect on Employment for Minorities

The effect on employment for minorities has been dramatic in some instances. This would certainly include Firestone in terms of Mexican-American employment, Spreckels Sugar Company in terms of Negro employment, and Crown Zellerbach, Bank of America, State of California also in terms of Negro employment. The greatest effect on employment for minorities appears to be in its potential rather than what has so far been realized. In almost every one of the several types of affirmative actions that we have going, the gains within the next five years promise to be dramatic and substantial.

RECOMMENDATIONS FOR IMPROVING APPROACH TO AFFIRMATIVE ACTION

We need an affirmative action unit with at least five consultants and a supervisor. It would suffice if this unit was statewide rather than area-wide. The need for an affirmative action unit is that the affirmative action

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program is a flexible, almost constantly changing type of approach, and there is a need for continuous, ongoing evaluation of the program. Another reason for the recommendation of a unit with one overall supervisor is that there is a need, perhaps greater than case connected work, to unify the actions North and South. Another reason for this recommendation is that a great deal of contact in the field is needed to make certain that the program is effective. To accomplish this, there is need for much more personnel than we now have in the affirmative action program.

ORGANIZATIONAL CHANGES

To make the program more meaningful, the affirmative action program should within present organization structure be supervised by the same person statewide and not by each area supervisor. This person could be one area supervisor or it could be the Assistant Chief, or it could be some other person. This change would not need to be made if there was an affirmative action supervisor as proposed above. A second organizational change would be that someone in the Information and Education Section should be devoting full time to surveying new industry in the California communities to make recommendations for affirmative action programming.

OTHER SUGGESTIONS

FEPC Advisory Councils as created appear to be a useful device in solving some of our personnel problem.

HT:cl

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3. Department of Defense Installations - FEP64-B006a

A meeting has been held with representatives of the various installations in Southern California. A follow-up meeting is anticipated, as well as individual contacts in various areas. This program can have broad impact in many areas, relating to both jobs and housing. Intermittent contacts over an extended period will probably occur.

4. Hotel Employers - Los Angeles - FEP64-B003a

Regular pattern surveys have been received from the major hotels in Los Angeles. They indicate slow progress in public contact jobs. A recent meeting was held with a representative of the hotels and on February 9, 1965, Commissioner Zook will meet with the General Managers of the major Los Angeles hotels to urge more rapid progress in integrating public contact positions. This effort could result in a large number of jobs, several hundred, if, as expected, smaller hotels follow the lead of the majors in employment. Follow-up will continue over an extended period, though the pattern surveys will be reduced to 2 per year.

5. Airport Employment - FEP61-B333v

Meetings have been, and are being held with various concessionaires and carriers, relative to improvement of pattern in public contact areas. Progress has been noted in some areas. All people contacted thus far have at least been cooperative. Our most recent concentration is on PSA, with whom we met on January 15, 1965. Contacts are expected to continue over a number of months. This effort has already resulted in jobs, and future efforts will undoubtedly result in more jobs. It is difficult to estimate the number of jobs involved, however a reasonable estimate would be at least 100 new jobs, overall. Though this case is docketed as a 1421, it is being treated as an affirmative action.

6. Southern California Trucking Industry - Teamsters Union - FEP64-B114v and FEP64-B115v

Though several contacts have been made regarding this matter, results have been negligible. An attempt has been made, since July, 1964, to have a statewide meeting involving both truckers and teamsters to discuss our concerns, and to offer assistance in improving what I would consider a bad situation. A memo was written by me recently, indicating that John Annand, Local Teamster official, feels that there is some resistance to such a meeting from San Francisco Teamsters. The memo recommended that contact be established in San Francisco.

Success in this effort requires some top level contacts with the union. Apparently the truckers will participate if the union will. I can foresee a large number of new jobs available if our efforts in this area are successful. Effort beyond the statewide meeting will have to continue over an extended period, in contacts with various locals, and with various trucking companies.

7. Bank of America - FEP64-B005a

The final draft of the second public report on this effort was completed on January 25, 1965. Remarkable progress has been made in expanding job

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opportunities for minorities. I anticipate continuing contact with bank officials, locally and in the more remote areas, for the next 12 months. This project has reached the point where I visualize only limited time being required.

8. All Major Banks - FEP64-B005a

State Superintendent of Banks was to have arranged initial meeting, however to date this has not been accomplished. Follow-up is to take place in San Francisco, followed by the FEPC moving without the benefit of the State Superintendent's assistance. If the Bank of America is a valid reference, substantial numbers of jobs can occur.

9. Private Employment Agencies Statewide - FEP63-B264v

Vast amounts of data have been received in response to questionnaire; data is now being tabulated in San Francisco. Numerous contacts have been made in response to questions and requests. This project could involve one person, full-time, for 6 months. Substantial changes can result, through intensive work, though the result in terms of jobs would be an indirect one.

10. Southern California Edison Company - FEP64-B004a

This project was ill-advised, in terms of being an affirmative action. The company clearly indicated their unwillingness to provide a pattern survey, and were very pious in their pronouncements. I believe that there are serious problems at this company which can best be solved through some good complaints. I do not believe affirmative action is appropriate here.

11. Standard Oil Company

This is a Northern California case, however I recently met with local personnel and refinery officials, along with Consultant Beane. This is an industry where the past lily-white pattern persists. Automation is seriously affecting expansion of jobs. Management is receptive, and a limited number of jobs can result. Continued contact is planned.

In addition to the above cases, the Los Angeles School investigation is continuing. School visits are being made, and another public report will be made. While I do not foresee any sizable change in terms of numbers of people, largely because this is not really the problem, attitudinal changes can be expected and this is what we are seeking.

B. AFFIRMATIVE ACTIONS TO BE RECOMMENDED, AND PLANS FOR IMPLEMENTATION1. Selected Major Insurance Companies

This would require some preliminary investigation to determine size of work force, etc. I would propose selecting 3 or 4 large companies for action. This industry, to my knowledge, employs a substantial number of clerical people, with only moderate skills. Further, it is a growing industry and, based upon my observations, employs few minority group people. I believe that recruits might be available, in reasonable numbers, from high schools

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and junior colleges for this industry. A brief written agreement should be obtained first, spelling out -- in Bank of America form, but less comprehensive -- what affirmative action involves. Future action would involve consultative aid, evaluation, etc. I believe the dividends in terms of jobs here are large.

2. Petroleum Industry

A broad program with the principal petroleum producers, in addition to Standard Oil, where, I believe, minorities are virtually excluded. Principal effort to be in the area of entrance level jobs in the refineries, and clerical positions. Here too, I would advise written agreement, followed by efforts to improve overall pattern, through contacts -- first with top management, then with personnel people.

The above 2 areas, coupled with trade unions, to me, represent expanding industries with potential jobs at a level where people are available; consequently, these were selected as opposed to some others. The trade union problem, I gather, is presently under consideration, and is certainly deserving of our strenuous efforts. Any approaches relative to unions, I feel, must be carefully planned and executed if we are not to get lost in a maze.

3. Strengths and Weaknesses of Current Affirmative Action Program

a. I believe that our affirmative action efforts are improving jobs for minorities. I cite Bank of America, with its effect also on other banks, Airport Concessionaires and Airlines where substantial improvement has been noted. Additionally, though progress has been limited, I see changes occurring in other areas -- Hotels, Van de Kamp's, Defense Installation awareness -- where we have been involved directly. I feel also that there are many side effects to our efforts, of which we will never be fully aware.

b. The principal improvement I would recommend is the written agreement, similar to the Plans for Progress, or Bank of America Memo. This serves two purposes: (1) It clarifies what the relationship is between the employer and FEP and, (2) I believe that a written agreement has a good psychological effect on the signer. Beyond this, I feel that our approach is good, and I have had great success with one Commissioner in pursuing affirmative actions (Zook).

c. To make a real dent in the job at hand, we must have some organizational change. We need an overseer, or supervisor -- North and South -- concerned only with affirmative action, coupled with added staff -- 3 people in each area -- to pursue this on a full-time basis. Though it is perhaps illogical, due to the budget factor, I foresee real benefit from a departmentalization, from State staff down, to pursue this. My presentation at Monterey detailed this.

Finally, as I stated at Monterey, we need to begin publicly talking about the unemployment problem totally, the effect of automation, and what, in my opinion, is a contracting rather than expanding job market. Further, I feel we need to become intimately involved with the various Anti-Poverty groups, North and South, to find out what people are being re-trained to do, where they expect to work, and have some regular conversation back and forth. One

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man in San Francisco and one man in Los Angeles can't begin to scratch the surface, and affirmative action, in my opinion, is the road to travel. "I'd rather fight than switch".

RAH:fbh-3

cc: Lucke

DATELINE FREEDOM

Excerpts from last Saturday's KCBS broadcast by EDWARD HOWDEN, Director of the S. F. Council for Civic Unity. *Dateline Freedom*, a public service program jointly sponsored by CCU and Station KCBS, is heard each Saturday eve. at 10:30.

MARIN COUNTY—Two weeks ago a fiery cross, symbol of the KKK, was burned on a hill above Marin City. In reporting the incident, *Dateline Freedom* quoted the director of the Marin County Housing Authority as saying that he hoped the matter would not be treated lightly. It has not been.

The Marin County Council for Civic Unity, with the cooperation of the Marin County Sheriff's office and the authorities at the College of Marin, have uncovered the source of the cross-burning, and have taken steps to see that it will not be repeated. It seems that a social group on the campus of the College of Marin, the Xanthus Club, burned the cross as part of an initiation ceremony.

Disturbed by this deliberate use of an historical symbol of race hatred and violence, Sali Lieberman of the Marin Council for Civic Unity met with representatives of Marin County units of the YMCA, the Council of Churches, and the NAACP. Together they sat down with Ward Austin, president of the College of Marin, who shared their dismay. President Austin suspended the club, but beyond that arranged for a meeting of all the male students in the College, which took place this past week. Professor Fred Stripp of the University of California was guest speaker, and he stressed the dangers of bigotry, by deed or symbol, to our democratic processes. He was roundly applauded.

It would appear that now all College of Marin students recognize and reject the ugly implications of a burning cross. Another Marin County example of prompt, cooperative, and heartening community action.

A FOUR-YEAR CAMPAIGN to end discrimination in colleges and universities is beginning to bear fruit, according to a current report of the Anti-Defamation League of Bnai Brith. The Anti-Defamation League has found that of 518 institutions of higher learning which it has checked, more than 450 have taken some steps towards removing bars against admission of Negroes, Jews and persons of various national origin groups.

This report was made, incidentally, on the eve of the fortieth anniversary of the Anti-Defamation League, an arm of the Bnai Brith Lodges, which since 1913 has carried on an educational campaign to root out prejudice and discrimination from our national life. The climax of the ADL anniversary celebration came last week in Washington, D. C., when President Eisenhower addressed ADL delegates from all over the country, after receiving the 1953 American Democratic Legacy Award from Henry Schultz, national chairman of the league. Among those hearing the President's address were members of a San Francisco delegation led by Jefferson E. Peyser, former City Supervisor and a national vice-chairman of the Anti-Defamation League.

WASHINGTON, D. C.—THE FOURTEENTH AMENDMENT was intended to destroy all caste and color legislation in the United States, according to the brief which was filed in the U. S. Supreme Court this week by the NAACP in connection with the pending school segregation cases. These cases are scheduled to be re-argued before the Supreme Court on December 1. The five cases—involving segregation in the public school systems of South Carolina, Kansas, Virginia, Delaware and the District of Columbia—were first heard last summer by the Supreme Court, which later ordered the upcoming re-argument.

The basic point at issue, of course, is segregation per se. That is, the plaintiffs are arguing that even if segregated school facilities were equal in excellence, nevertheless the policy of segregation in and of itself is detrimental and unconstitutional. This is a new and sweeping approach to the problem.

The Supreme Court asked for a re-argument on the basis of five specific questions which it considers crucial and wants answered. The first two questions have to do with the intentions of those who enacted the 14th Amendment back in 1868. Did Congress, which submitted the 14th Amendment—and did the state legislatures and conventions which ratified it—intend that it would abolish segregation in the public schools? And, if they didn't intend immediate abolition of such segregation, did they anticipate that some future Congress or Court would take that step on the basis of the Amendment? These are the first two questions that the Supreme Court posed.

The NAACP attorneys argue that there is ample evidence that the people who framed, submitted and ratified the 14th Amendment understood that it would cover such matters as segregation in the public schools. They point to the clear-cut abolitionist philosophy of the men involved. They point to the fact that the 14th Amendment was ratified 18 years before the concept of "separate but equal" facilities came into being, so the Amendment's authors could hardly have had that evasive doctrine in mind.

Source:
Ed Howden
5/07

NOTES

EH from governing office

The California FEPC: Stepchild of the State Agencies

From Howden
ED 5/07

The 1959 California Fair Employment Practice Act¹ declares that it is "the public policy of this State . . . to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, or ancestry."² To effectuate that policy, a Division of Fair Employment Practices (FEPC)³ was created within the Department of Industrial Relations⁴ and empowered to prevent unlawful employment practices.⁵ This Note examines the effectiveness of the FEPC in carrying out California's fair employment policy.⁶ A description of the organization and functioning of the Agency is followed by an analysis of the need for increased resources and changes in Agency policy and the law. The Note concludes that the FEPC cannot fully implement fair employment without increased resources and broader powers.⁷

I. PERSONNEL AND FUNCTIONS OF THE FEPC⁸

A. Commissioners and Staff

The FEPC is headed by seven part-time commissioners who are appointed by

1. CAL. LABOR CODE §§ 1410-32.
2. CAL. LABOR CODE § 1411.
3. "FEPC" is used to refer to the Agency as a whole, including both commissioners and staff.
4. CAL. LABOR CODE §§ 50, 56.
5. CAL. LABOR CODE § 1421.
6. No attempt is made to evaluate the FEPC's role in the enforcement of antidiscrimination policy in the field of housing, a function also vested in the Agency. CAL. LABOR CODE § 1419.5. While technically still a responsibility of the FEPC, this function has been dramatically reduced by the passage of the Proposition 14 initiative in November 1964, which amended the California constitution to give owners of private housing absolute discretion as to whom they choose to rent or sell.
7. This study was made possible by a grant from the Justin Miller Endowment Fund. The primary source material is a series of thirty-nine interviews conducted from December 1964 through March 1965 with FEPC commissioners and staff, businessmen, management representatives, labor leaders, employment agency personnel, leaders of civil rights and minority groups, attorneys, legislators, and others familiar with the problems of fair employment. The writer gratefully acknowledges the time and assistance rendered by those interviewed. The sources of some interviews have been kept confidential at the request of interviewees. In other instances the writer has exercised discretion in keeping in confidence the sources of certain facts, statements, or opinions that might prove embarrassing to interviewees.
8. For an excellent description of the functioning of state FEPC's in general see Note, 74 HARV. L. REV. 526 (1961). Other less comprehensive descriptions are found in 2 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1451-83 (2d ed. 1958); NORGREN & HILL, TOWARD FAIR EMPLOYMENT 93-113 (1964); STAFF OF SUBCOMM. ON LABOR AND LABOR-MANAGEMENT RELATIONS OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 82D CONG., 2D SESS., STATE AND MUNICIPAL FAIR EMPLOYMENT LEGISLATION (Comm. Print 1952); Berger, *The New York State Law Against Discrimination: Operation and Administration*, 35 CORNELL L.Q. 747 (1950); Kovarsky, *A Review of State FEPC Laws*, 9 LAB. L.J. 478 (1958); Rosen, *The Law and Racial Discrimination in Employment*, 53

the Governor⁹ and are responsible for all major policy decisions of the Agency as well as for the disposition of individual cases.¹⁰ Individual commissioners conduct the necessary conciliation conferences in assigned cases, but final decisions are approved by the Commission as a whole. Commissioners devote seven to ten days a month to FEPC activity, about 60 per cent of which is devoted to handling individual complaint cases.¹¹

The present commissioners represent a fair cross section of the interested public. Three commissioners are from Northern California and four are from Southern California. The only Negro commissioner is also an official of the NAACP and of the Brotherhood of Sleeping Car Porters; a Spanish surname¹² commissioner is an attorney and an official of the Mexican-American Political Association; another commissioner is an official of the Urban League and vice-president of a major aircraft corporation. Other commissioners include a real estate executive, a small-businessman, a former county supervisor, and a woman who has been active in social work.

The fifty-member professional staff of the Agency is divided about evenly between the main office in San Francisco and the southern area office in Los Angeles, although additional one-man offices have been maintained in Fresno and San Diego since 1963. The staff is headed by three administrators appointed by the Governor—the Chief, Assistant Chief, and Special Representative. The remaining forty-seven staff positions are civil service jobs¹³ and include a two-man legal staff, five persons in educational work, a northern and a southern area supervisor, about twenty consultants who do the investigating and field work, and clerical employes.¹⁴

CALIF. L. REV. 729, 775-81 (1965); Tobriner, *California FEPC*, 16 HASTINGS L.J. 333 (1965); 68 HARV. L. REV. 685 (1955); 36 NOTRE DAME LAW. 189 (1961); 5 RACE REL. L. REP. 569, 582-92 (1960).

9. CAL. LABOR CODE § 1414. Commissioners are paid on a per diem basis, CAL. LABOR CODE § 1416, and meet at least once a month, CALIFORNIA FEPC, MANUAL OF POLICY § 600.1 (1964) [hereinafter cited as MANUAL].

10. CAL. LABOR CODE §§ 1418-19, 1421-26.

11. *Hearings Before California Senate Fact Finding Subcommittee on Race Relations and Urban Problems*, Jan. 20, 1965, at 12 (testimony of Clive Graham, Chairman, FEPC) [hereinafter cited as *Graham Testimony*].

12. Spanish surname is used to designate all white persons with Spanish surnames, as defined by the United States Bureau of the Census. White persons comprise 97.5% of all persons with Spanish surnames in California. CALIFORNIA FEPC, CALIFORNIANS OF SPANISH SURNAME 53 (1964).

13. When the FEPC was first created, staff positions were filled on a temporary appointment basis. The result was a series of political appointments of staff members who offended respondents by their overzealous approach. Interviews With Commissioners and Staff, FEPC, Dec. 1964 to March 1965. All hiring is now done through normal civil service channels; the present field staff has learned that it makes more progress without militance. Interview With Clive Graham, Chairman, FEPC, in Long Beach, March 19, 1965.

14. About 40% of the staff are minority group members. This has led critics of the FEPC to charge that its hiring policies discriminate against nonminorities, Interview With Hon. Jack Schrade, State Senator, in Sacramento, Feb. 3, 1965, a charge also made by some civil rights leaders who see the practice as a coverup for the lack of minorities in other state agencies, Interview With Harry Bremond, Vice-President, South San Mateo NAACP, in Palo Alto, Feb. 5, 1965. However, although the FEPC does exercise greater control over its personnel selection than other state agencies, it is more likely that the high percentage of minority staff is attributable to other circumstances: minority persons are typically well qualified for FEPC work because they are sensitive to discrimination that would escape other investigators; they are by and large exceptionally qualified to deal personally with minority complainants, showing understanding and instilling confidence; furthermore, such persons are attracted by the very nature of the Agency's work. In addition, 9.1% of California's population is of Spanish surname

B. Agency Functions

FEPC activities can be broadly categorized as educational activities and compliance activities. The former are designed to inform persons of the law and their rights and obligations under it. The latter are used to induce or, where necessary, compel compliance with the law.

1. Educational activities.

In a sense, every activity the FEPC undertakes is educational. For example, even when the Agency is negotiating with respondents in compliance procedures, it is attempting to educate them and influence others. However, the Agency also carries out a special program of dissemination of information about fair employment and the law. The 10 per cent of the present budget allocated for this educational program must pay the salaries of the five persons working on the program, as well as printing, postal, and other incidental expenses.¹⁵ Educational efforts are devoted mainly to producing pamphlets, folders, posters, and newsletters, many of which are designed to serve the FEPC's special publics. One publication, for example, explains the law to management, while another is aimed at motivating young minority persons to strive for higher attainment. At least one publication is printed in Spanish, *Usted tiene el derecho* ("You have the right").¹⁶ Another notable pamphlet is *Promoting Equal Job Opportunities*, which offers detailed suggestions to employers for making equal opportunity a reality in their work force. This pamphlet lists minority radio and television stations and newspapers, and encourages employers to take such affirmative steps as advertising in these media and making their job needs known to minority organizations, such as the NAACP, the Jewish Vocational Service, or the Council of Mexican-American Affairs. Publications are distributed to a comprehensive management mailing list obtained from the FEPC's parent Department of Industrial Relations.¹⁷

The FEPC also distributes filmstrips, exhibits, and special reports, and maintains a speaker service. Many staff members take a personal interest in this aspect of their work and go far beyond their job requirements in carrying the message of fair employment to the community. This is particularly true of the Spanish surname consultants, who carry an integrated caseload¹⁸ and often take on a heavy educational burden in the Spanish surname community as well.¹⁹

descent and 4-5% of the FEPC's individual complaints originate in the Spanish surname group. CALIFORNIA FEPC, CALIFORNIANS OF SPANISH SURNAME 5 (1964); Vega, FEPC and the Mexican-American Community, Nov. 12-15, 1964, at 1, on file with *Stanford Law Review*.

15. Interview With Mrs. Betty Miller, FEPC Staff, in San Francisco, Feb. 2, 1965.

16. More publications in Spanish are needed—in the idiom rather than simply translations of materials in English. See Vega, *op. cit. supra* note 14, at 6.

17. Interview With Lloyd Zimpel, Assistant Education Officer, FEPC, in San Francisco, Jan. 22, 1965.

18. An integrated caseload is one in which the consultant handles both Spanish language and non-Spanish language cases.

19. The effectiveness of the dedication of these Spanish surname consultants may be measured by the fact that the Spanish surname caseload, after remaining relatively constant for several years, nearly doubled (from 31 to 57) in 1963 after Consultant Vega had been added to the Los Angeles staff. Interview With Thomas Talavera, Deputy Labor Commissioner, California Department of Industrial Relations, in Los Angeles, March 18, 1965.

2. Compliance procedures.

The California FEPC follows compliance procedures closely analogous to those used by its counterparts in other states.²⁰ There are three types of compliance procedures—individual complaints, section 1421 investigations, and affirmative actions. The individual complaint is the usual compliance procedure. It is typically begun by an individual worker, although complaints may also be initiated by the Attorney General or an employer. The 1421 procedure is used in the absence of an individual complaint when the Agency makes an investigation prompted by a belief that discrimination exists. The affirmative action procedure may begin at the initiative of the Agency or of an employer, labor union, or employment agency. It differs from the 1421 investigation in that it does not presuppose the existence of discrimination and is used only with the consent and cooperation of the party to the action.

Individual complaints. Individual complaints account for approximately 90 per cent of the consultants' time and 60 per cent of the commissioners' time.²¹ About seventy-four complaints a month were received in 1963-1964.²² Complaints may be filed by any person claiming to be aggrieved, by the Attorney General, or by an employer whose employes refuse or threaten to refuse to abide by the law.²³ The power of the Attorney General to file a complaint has been used only twice.²⁴ This power enables the FEPC to acquire enforceable jurisdiction in the absence of an individual complaint; it may be used when the Attorney General or the FEPC believes discrimination exists but the respondent refuses to cooperate in a 1421 investigation or an affirmative action. The procedure puts the Attorney General in the position of a complainant rather than that of prosecutor, and the FEPC handles the case as if it were an individual complaint. There is no evidence in available FEPC statistics that an employer has ever filed a complaint.²⁵

When an individual files a complaint, he is interviewed by an FEPC consultant. The consultant's first job is to eliminate obviously ill-founded charges, and he is expected at this stage "to exercise reasonable discretion in determining whether or not a complaint should be accepted."²⁶ The facts are obtained and set down in writing—often the consultant has to articulate the problem for complainants with poor powers of expression. The complaint is then submitted to the

20. Twenty-two states, beginning with New York in 1945, have passed fair employment legislation having enforceable sanctions. The California law is patterned after the New York law, as are the laws of most of the twenty-two states. See NORGREN & HILL, *op. cit. supra* note 8, at 93-94; 36 NOTRE DAME LAW. 189, 193 (1961).

21. *Graham Testimony* 12.

22. *Id.* at 8.

23. CAL. LABOR CODE § 1422.

24. On one occasion this was at the initiative of the Attorney General's Los Angeles office against a municipality (case closed for insufficient evidence of discrimination), and on a second occasion at the request of the FEPC against a large San Francisco retail store (case pending). Letter From Charles E. Wilson, Senior Legal Counsel, FEPC, to Robert N. Baker, Deputy Attorney General, March 16, 1965, on file with *Stanford Law Review*.

25. See 1959-1960 CALIFORNIA FEPC REP. 16; 1961-1962 CALIFORNIA FEPC REP. 17; 1963-1964 CALIFORNIA FEPC REP. —.

26. MANUAL § 100.2. This policy was clarified by a bill passed in 1965 amending CAL. LABOR CODE § 1423 to read that a complaint must allege "facts sufficient to constitute a violation of any of the provisions of Section 1420 . . .," the section defining unlawful employment practices. Cal. Stat. 1965, ch. 1462, § 1.

complainant for his signature. It must be served upon the respondent at the time of initial contact or within forty-five days, whichever occurs first.²⁷

At this point, complaints are handled according to a set of priorities²⁸ made necessary because each consultant presently has an average pending caseload of almost thirty-six cases.²⁹ These priorities can be set out as follows: (1) Fresh cases are preferred because they are generally more successful than cases of discrimination that occur weeks or months before a complaint is filed. (2) Cases that promise to open up greater numbers of job opportunities tend to get assigned a higher priority. (3) Various other factors, such as an impending discharge of a complainant, may demand priority.³⁰

Each complaint is assigned to a commissioner and a consultant for investigation into whether there is probable cause to believe that discrimination has occurred.³¹ The consultant's function is primarily to gather the facts and present them to the commissioner, who is responsible for the decision on probable cause. The concept of probable cause is difficult to define precisely. One FEPC consultant describes it as "trying to find objective standards to apply to subjective circumstances."³² The difficulty arises because discrimination occurs in many elusive ways and legal proof of discrimination presents difficult problems, such as determining the weight to be given the fact that an employer, who hires a work force of several hundred out of a community that is 30 per cent Negro, employs only two Negroes.³³ Nevertheless, the vagueness of the probable cause concept makes it a flexible tool in the hands of a commissioner. By loosening the standard he can lower the high percentage of complaints dismissed for insufficient evidence of discrimination.³⁴ By tightening it he can cut the Agency's caseload, perhaps to allow the Agency to devote its resources to cases that may be expected to produce a higher return in terms of job opportunities, or perhaps only to disguise his own personal timidity. This flexibility is at the base of accusations by some civil rights leaders that commissioners for political reasons stifle staff work by not proceeding with certain cases. The Commission does, as one commissioner acknowledges, "exert a leavening influence" on the staff.³⁵ But whatever use—conscious or unconscious—a commissioner makes of the flexible probable cause stan-

27. Cal. Stat. 1965, ch. 1461, § 1.

28. Interview With Arthur Padilla, Consultant, FEPC, in San Francisco, Feb. 11, 1965.

29. These break down as follows: 28 individual complaints, 2.6 section 1421 investigations, 2 affirmative actions, and 3.2 housing complaints. *Graham Testimony* 11.

30. Housing cases, when the FEPC had greater responsibilities in that field, see note 6 *supra*, also received priority. Once a house is sold, it is too late for any sanction available to the FEPC to be effective since real estate is unique. An employer, however, is not only likely to have a number of jobs available, none of which have the uniqueness of real property, but he is also likely to have openings occurring frequently.

31. The probable cause concept is embodied in the language of CAL. LABOR CODE § 1421, authorizing the commissioner to proceed with the conciliation conference if "further action is warranted . . ." as a result of the investigation. A 1965 amendment to CAL. LABOR CODE § 1423 clarifies this somewhat by authorizing the investigation "where warranted by the evidence . . ." Cal Stat. 1965, ch. 1462, § 1.

32. Interview With Arthur Padilla, Consultant, FEPC, in San Francisco, Feb. 11, 1965.

33. See generally Note, 17 U. CHI. L. REV. 107 (1949).

34. Most recent statistics show that 60-70% of individual complaints filed are dismissed for insufficient evidence. See 1963-1964 CALIFORNIA FEPC REP. —.

35. Interview With Louis Garcia, Commissioner, FEPC, in San Francisco, Jan. 26, 1965.

dard, it undoubtedly varies significantly from case to case and commissioner to commissioner.

In each investigation a pattern check is sought as a matter of policy.³⁶ A pattern check is a survey of the percentage and distribution of minority employees made either visually or by examining respondents' records. While never conclusive, the pattern check is a highly relevant indicator of the extent of conscious or unconscious discrimination.³⁷ Investigators may also interview respondents' employees and take all reasonable steps required for proper investigation.³⁸ Among other things, investigators are directed to ask nongovernmental respondents if they hold contracts with the state or federal government.³⁹ This procedure partakes of the nature of a sanction. While the Agency disavows using government contracts as a lever to pressure respondents,⁴⁰ the reminder of the nondiscrimination clause in such contracts keeps the government contract holder conscious of the threat of losing what may be a major customer.⁴¹

If upon completion of the investigation the commissioner does not find probable cause, the complaint is dismissed and the complainant may appeal to the full Commission.⁴² Notice of dismissal at this or any other point in the proceedings must be communicated to the respondent.⁴³ In all cases in which probable cause for discrimination is found the Agency proceeds to a conciliation conference with the respondent.⁴⁴ This is normally conducted by the assigned commissioner, although he may delegate the authority to certain high-ranking staff members.⁴⁵ The object of the conference is to convince the respondent not only to redress the complainant's grievance but also to end any other questionable practices and engage in affirmative cooperation in the future. The approach of each commissioner and the results he obtains vary, but all commissioners aim at inducing a cooperative attitude on the part of the respondent. Since few are willing to admit they discriminate, most respondents are amenable to solutions suggested by the Agency. Thus in more than 99 per cent of cases the conciliation conference succeeds in producing an agreement between the Agency and the respondent.⁴⁶ The terms of this agreement are sent to the complainant;⁴⁷ if he is dissatisfied with the

36. MANUAL § 112.1.

37. For an excellent analysis of the problems involved in the use of such sociological evidence as legal proof of discrimination see Note, 17 U. CHI. L. REV. 107 (1949).

38. MANUAL § 104.1.

39. MANUAL § 104.5. Investigators also ask to examine pattern check forms used by firms participating in the "Plans for Progress" program with the federal government. MANUAL § 112.2.

40. Interview With Hugh Taylor, Consultant, FEPC, in San Francisco, Feb. 25, 1965.

41. The effectiveness of this sanction, however, may be tempered by the probable nonenforcement of government nondiscrimination clauses. No enforcement cases have come to the writer's attention and it seems unlikely that governments would ever withdraw contracts on grounds of discrimination, especially from such industries as defense and public utilities.

42. 8 CAL. ADMIN. CODE § 19003. Title 8 compiles the rules and regulations issued by the FEPC pursuant to its authority under CAL. LABOR CODE § 1427.

43. Cal. Stat. 1965, ch. 1464, § 1.

44. The commissioner must endeavor "to eliminate the unlawful employment practice complained of by conference, conciliation and persuasion." CAL. LABOR CODE § 1421. In 1965 the legislature added CAL. LABOR CODE § 1421.1, which directs the Agency to inform the respondent whether a particular discussion, or portion thereof, is part of the nondisclosable conciliation conference or of the investigative process. Cal. Stat. 1965, ch. 1463, § 1.

45. MANUAL § 105.1.

46. See *Graham Testimony* 5.

47. 8 CAL. ADMIN. CODE § 19003(d). MANUAL § 105.6 purports to give the commissioner discre-

results of the conciliation conference, he may appeal to the full Commission.⁴⁸

Should the conciliation conference fail to effect compliance by the respondent, the investigating commissioner can have an accusation issued in the name of the FEPC, thus bringing the case to public hearing.⁴⁹ Hearings are to be conducted in accordance with the Administrative Procedure Act.⁵⁰ The investigating commissioner may not participate in the hearing, except as a witness, or in the deliberations on the case, nor may he give his opinion on the merits of the case.⁵¹ The Commission makes findings of fact and either dismisses the case or issues a cease and desist order which may require the respondent to take various affirmative steps.⁵² Dismissals and orders are subject to judicial review,⁵³ but such review is not limited to whether the Commission's findings were supported by substantial evidence, as in most states. Instead, California allows the reviewing judge to examine the evidence and to determine whether in his opinion the decision accorded with the weight of the evidence.⁵⁴

To date, only three cases have been taken to hearing.⁵⁵ The Commission found discrimination in each case, but all three were reversed on appeal to the Superior Court.⁵⁶ Obviously the hearing process plays an insignificant part in the work of the Agency and seems useful primarily as a sanction to induce compliance at an earlier stage. This sanction could be made more powerful by limiting judicial review to a consideration of whether the record contained substantial supporting evidence. But even though a respondent under present law might anticipate having an adverse hearing decision reversed on appeal, he would quite likely wish to avoid the expense and publicity of a hearing. This in itself is a powerful incentive to earlier settlement. Moreover, experience in other states where review of FEPC decisions is more limited indicates that the hearing process is used no more than in California.⁵⁷

tion whether to furnish this information to complainant in writing or not, but the regulations calling for a written statement are apparently followed. Interview With C. L. Deilums, Commissioner, FEPC, in Oakland, Feb. 26, 1965.

48. 8 CAL. ADMIN. CODE § 19003(e). As an example of results that might be unsatisfactory to the complainant, the case may be considered adjusted by the Agency when complainant is not hired or upgraded but the respondent makes a significant improvement in his employment pattern or modifications of his application forms. See MANUAL § 110.5. Presumably this sort of adjustment would only be acceptable to the Agency in cases in which there was no provable case of discrimination against the complainant.

49. CAL. LABOR CODE § 1423; 8 CAL. ADMIN. CODE § 19004; MANUAL § 111.1 (issuance at discretion of assigned commissioner after consultation with Legal Counsel and Division Chief). See also 8 CAL. ADMIN. CODE §§ 19006(t) (withdrawal of accusation), 19010 (service of accusation).

50. CAL. LABOR CODE § 1424, as amended, Cal. Stat. 1965, ch. 967, § 1.

51. CAL. LABOR CODE § 1425, as amended, Cal. Stat. 1965, ch. 967, § 2.

52. CAL. LABOR CODE § 1426. Such steps might include hiring, reinstating, or upgrading the employe and making up back pay.

53. CAL. LABOR CODE § 1428.

54. *Atchison, T. & S.F. Ry. v. FEPC*, 7 RACE REL. L. REP. 164, 167 (Los Angeles Super. Ct. 1962), citing *Thomas v. California Employment Stabilization Comm'n*, 39 Cal. 2d 501, 247 P.2d 561 (1952), and *Dare v. Board of Medical Examiners*, 21 Cal. 2d 790, 136 P.2d 304 (1943).

55. *Matter of Guy F. Atkinson Co.*, 7 RACE REL. L. REP. 280 (1962); *Matter of T. H. Wilton Co.*, No. SF-1, FEP 60-A239, July 18, 1961; *Matter of Atchinson, T. & S.F. Ry.*, 6 RACE REL. L. REP. 332 (1961).

56. Interview With Elton Brombacher, Commissioner, FEPC, in San Francisco, Feb. 9, 1965. The opinion of the Los Angeles Superior Court in the *Atchison, T. & S.F. Ry.* case is reported in 7 RACE REL. L. REP. 164 (Los Angeles Super. Ct. 1962).

57. See 68 HARV. L. REV. 685, 686-87 (1955). The experience of the seven FEPC's on which that study was based indicated that only 8 of over 6,000 complaints filed in the various states had ever come to hearing.

The time required for handling complaints varies immensely from case to case, but presently averages about four months.⁵⁸ Complaints are occasionally lodged against employers who are already engaged in an affirmative program of cooperation with the FEPC in promoting equal employment. A phone call is usually enough to solve such problems. Here the company rather than the FEPC staff investigates; typically a misunderstanding on the part of lower line personnel is found, and the company redresses the complainant's grievance within hours. But in cases in which the Agency meets resistance in gathering information or where extensive investigation is needed to clarify other areas of apparent discrimination revealed by the investigation, field work may extend over many months. Frequently the Agency is forced to choose between a speedy settlement of an individual complaint and prolonged efforts to open up an entire firm instead of just a single job. The complaint is the Agency's opportunity to get its foot in the door; when a case is settled, the FEPC no longer has jurisdiction and its opportunity to settle larger problems within the firm is lost. Thus, extended cases may reflect greater long-run employment opportunities than quickly settled cases that leave the broader problem of respondents' overall policies untouched.

The 1421 investigation. The second type of FEPC compliance procedure is named for the section of the act that authorizes it. Section 1421 of the Labor Code empowers the FEPC to prevent unlawful employment practices by investigation and conciliation, even in the absence of a complaint, but provides no enforceable sanctions in such an action. The standard for undertaking such an investigation is variously stated as: "when it shall appear . . . that an unlawful employment practice may have been committed,"⁵⁹ upon "presentation of reasonable evidence by a credible source,"⁶⁰ or upon a "showing of substantial evidence indicating a probable violation."⁶¹ Similarly, the obligation to undertake the investigation once the applicable standard has been satisfied is not altogether clear. The statute appears to require an investigation, stating that once it appears that an unlawful employment practice may have been committed "the chairman . . . shall designate one of the commissioners to make . . . prompt investigation in connection therewith."⁶² However, the FEPC policy manual indicates that such an investigation *may* be initiated;⁶³ and that is apparently the basis upon which the Agency acts. Many 1421 investigations are not undertaken due to lack of manpower. The commissioners believe it is better not to open the investigation at all than to make an ineffective one.⁶⁴ While this may be a wise policy, it is questionable whether the law allows such discretion.

The investigation and conciliation procedures in a 1421 case are conducted like the individual complaint. However, 1421 cases are normally concerned with large numbers of jobs and thus take substantially longer to settle than the typical individual complaint case, the average time to date being eleven months.⁶⁵ While

58. *Graham Testimony* 11.

59. CAL. LABOR CODE § 1421.

60. MANUAL § 107.2.

61. *Graham Testimony* 6.

62. CAL. LABOR CODE § 1421. (Emphasis added.)

63. MANUAL § 107.2.

64. Interview With Clive Graham, Chairman, FEPC, in Long Beach, March 19, 1965.

65. *Graham Testimony* 11.

the FEPC has no enforcement power in a 1421 investigation, few respondents are recalcitrant and it is possible to refer cases to the Attorney General with a request that he file an enforceable complaint.⁶⁶ About half of the 103 section 1421 investigations initiated prior to December 1964 were still pending at that date.⁶⁷

Affirmative actions. The term "affirmative actions" can be used to describe all FEPC activities in which the Agency goes beyond the allegations of the particular complaint to encourage respondents to undertake positive programs, such as recruiting employes by advertising in minority news media. In this sense the affirmative action procedure overlaps certain aspects of the education program, as well as the individual complaint and section 1421 compliance procedures. Nonetheless, the term is also descriptive of the third and final type of compliance activity in which the FEPC engages.⁶⁸

Even though classified as a compliance activity, the affirmative action, unlike the other compliance activities, does not presuppose any violation of the law. An affirmative action program may begin on the initiative of an employer, perhaps when he is pressured by civil rights groups⁶⁹ or when, for reasons of social conscience or business judgment, he decides to embark on such a program. A program may also be initiated by the FEPC, but only with the employer's consent. Less commonly, affirmative actions involve labor unions or employment agencies, on either their own initiative or the FEPC's. Usually affirmative actions are initiated when some combination of three circumstances is present: (1) an employer controls a large number of jobs; (2) new opportunities for widespread employment arise, as in new plant openings or old plant expansions; and (3) a seriously deficient situation in terms of percentage and distribution of minority employes is discovered. Affirmative actions also encompass setting up local human rights commissions and working with other state agencies to eliminate discrimination.⁷⁰

One consultant in each of the major offices works exclusively in the field of affirmative actions. This type of activity has become a major undertaking only

66. See CAL. LABOR CODE § 1422; 8 CAL. ADMIN. CODE §§ 19001(c), 19002(a)(2). This procedure has been rarely used, however. See note 24 *supra* and accompanying text.

67. *Graham Testimony* 7.

68. The FEPC considers the authority to engage in affirmative compliance procedures to be implicit in the act. *Hearings on S. 773, S. 1210, S. 1211, and S. 1937 Before a Subcommittee of the Senate Committee on Labor and Public Welfare*, 88th Cong., 1st Sess. 258 (1963) (testimony of Edward Howden, Chief, California FEPC). Moreover, ample authority seems explicit in the act's mandate to "prevent unlawful employment practices." CAL. LABOR CODE § 1421.

69. The most widely publicized case of this nature occurred when the Bank of America, following criticism by the San Francisco Congress of Racial Equality, offered to turn over employment statistics to the FEPC. The bank and the FEPC worked out a landmark "Memorandum of Understanding" providing for detailed submission of personnel data and implementation of fair employment programs in many areas, including hiring, recruiting, training, and promotion, with a continuing critical review by the Agency. A comprehensive collection of information and documents covering the entire episode is available from the bank. Bank of America, Bank of America and the Congress of Racial Equality (1964). The first report by the FEPC on the bank's progress indicates a 37% increase in Negro personnel in the first three months. 1 CALIFORNIA FEPC, BANK OF AMERICA EMPLOYMENT PRACTICES REP. 5 (1964).

70. Interview With Hugh Taylor, Affirmative Actions Consultant, FEPC, in San Francisco, Feb. 25, 1965. CAL. LABOR CODE § 1419(h) specifically authorizes the FEPC to sponsor local advisory agencies and conciliation councils. To date, only two such bodies have been set up under FEPC auspices, in northern San Mateo County and in Palo Alto, the latter at the request of local citizens. Palo Alto Times, April 6, 1965, p. 1, cols. 5-8. Other such agencies have been established by local authorities independent of the FEPC. Interview With Sidney Worthington, Chairman, Advisory Council, San Francisco Human Rights Commission, in San Francisco, Feb. 19, 1965.

within the past two years⁷¹ and experience indicates that these cases take about as long to complete as section 1421 investigations.⁷² Thirty-nine such efforts have been undertaken, most of which were still in progress as of December 1964.⁷³ The opinion is apparently unanimous within the Agency and nearly so with interested outside observers that this type of activity is by far the most efficient and productive use of FEPC time and resources.

II. PROBLEMS AND POTENTIAL IMPROVEMENTS

Most of the problems and potential improvements of the California FEPC that can be discussed fall into four broad categories: the inadequacy of staff and budget; the need for new legislation; the need for changes in Agency policy; and general political considerations.⁷⁴

A. *The Inadequacy of Staff and Budget*

Starvation of an agency after its creation is an easy way to destroy its potency while appearing to support its goals. Although the 640,000 dollars currently available to the California FEPC compares favorably with allocations in other states,⁷⁵ the pressing need for more resources to devote to the antidiscrimination struggle is a subject on which all but the Agency's enemies can reach a rare unanimity. The Agency Chief considers present understaffing the greatest barrier to a more effective FEPC.⁷⁶ The commissioners agree.⁷⁷ Civil rights leaders' estimates of the FEPC's actual budget needs range from a four-⁷⁸ to a twenty-five-fold⁷⁹ increase in present resources. Although the Agency's officials and its literature all proclaim the backing of the state government,⁸⁰ budgetary requests are regularly

71. Interview With Louis Garcia, Commissioner, FEPC, in San Francisco, Jan. 26, 1965.

72. *Graham Testimony* 11.

73. *Id.* at 7.

74. For other criticisms and suggestions for improving FEPC's see KONVITZ & LESKES, A CENTURY OF CIVIL RIGHTS 215-18 (1961); Lucks, FEPC—Role & Philosophy, Nov. 1, 1964, at 5-7, on file with *Stanford Law Review*; Berger, *The New York State Law Against Discrimination: Operation and Administration*, 35 CORNELL L.Q. 747 (1950); Field, *Hindsight and Foresight About FEPC*, 14 BUFFALO L. REV. 16 (1964); Girard & Jaffe, *Some General Observations on Administration of State Fair Employment Practice Laws*, 14 BUFFALO L. REV. 114 (1964); Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis With Recommendations*, 14 BUFFALO L. REV. 22 (1964); Kovarsky, *A Review of State FEPC Laws*, 9 LAB. L.J. 478 (1958); Rabkin, *Enforcement of Laws Against Discrimination in Employment*, 14 BUFFALO L. REV. 100 (1964); 68 HARV. L. REV. 685 (1955); 17 U. PITT. L. REV. 438 (1956).

75. Apparently only New York, the original FEP state and the one FEP state of a size comparable to California, has devoted more money to fair employment than California. The New York Commission, however, also has jurisdiction over public accommodations. In 1963 the New York budget was about \$2 million, *Hearings, supra* note 68, at 272 (testimony of Henry Spitz, General Counsel, New York State Commission for Human Rights), as compared with about \$200,000 in Ohio, 5 OHIO CIVIL RIGHTS COMM'N ANN. REP. 34 (1964), \$48,000 in Missouri, *Hearings, supra* note 68, at 272 (testimony of Milton Litvak, Acting Chairman, Missouri Commission on Human Rights), and \$2,000 in New Mexico, 13 NEW MEXICO FEPC ANN. REP. 15 (1961).

76. Interview With Edward Howden, Chief, FEPC, in San Francisco, Dec. 14, 1964.

77. *Graham Testimony* 14. Commissioner Brombacher estimates the Agency could use at least double its present staff just in the urban areas where its main offices are located. Interview With Elton Brombacher, Commissioner, FEPC, in San Francisco, Feb. 9, 1965.

78. Interview With Dr. Thomas Burbridge, Former President, San Francisco NAACP, in San Francisco, Feb. 9, 1965.

79. Interview With Michael Myerson, Cochairman, Ad Hoc Committee to End Discrimination, in San Francisco, Feb. 26, 1965.

80. *Sec., e.g., California FEPC, Fair Employment Newsletter*, July-Aug. 1960.

trimmed from 25 to 75 per cent, which includes cuts by both the executive and the legislature.⁸¹ In the words of Dean Pollak of the Yale Law School, this is

an apt measure of our inability, as political communities, to elect legislators who will commit a meaningful amount of tax dollars to regulatory programs of this sort.

In short, if California has a staff of only 35 to 50 to administer its state anti-discrimination laws, that's because, collectively speaking, California doesn't really care very much about this kind of program.⁸²

1. *Part-time commissioners and staff responsibility.*

One advantage in having community leaders as part-time commissioners is that they command respect in the community apart from their FEPC work. Such stature is vital to an agency such as the FEPC, which must rely heavily on cooperation. It would seem even more advantageous to have full-time commissioners who could continuously bring their community prestige to bear. This advantage would result, of course, only if a commissioner's community status were such that it would not diminish once he left his non-FEPC position. Carry-over of prestige could be enhanced by limiting commissioners to a single four-year term,⁸³ although some difficulty might arise in finding community leaders willing to give up an established position in a business or profession to accept a full-time, nonrenewable FEPC appointment. A more important problem, however, is the practical reality of the present 640,000-dollar budget. To pay commissioners, for example, a salary of 20,000 dollars to serve full time would increase the Agency budget nearly 17 per cent.⁸⁴ A full-time salary at the present rate of fifty dollars per day would still involve an increase of at least 10 per cent. Other more pressing needs therefore rule out full-time commissioners under present budget allocations.

Working under part-time commissioners forces the staff to assume a high degree of responsibility.⁸⁵ Consequently the chief administrators attempt to upgrade the quality of the staff, but are limited by a budget that is too small to provide salaries to attract highly qualified people. As a further result of low salaries, the Agency has lost many of its best staff members.⁸⁶

2. *Access and community contact.*

The existence of the FEPC is a response to minority group pressures, although the Agency is intended to serve all the people and has processed some complaints

81. Interview With Edward Howden, Chief, FEPC, in San Francisco, Dec. 15, 1964. Budget cutting occurs in the Budget Bureau of the executive branch and in the Senate Finance Committee and the Assembly Ways and Means Committee.

82. Pollak, *Comment*, 14 *BUFFALO L. REV.* 70, 72-73 (1964).

83. Four years is the term provided by statute, but commissioners may be reappointed. CAL. LABOR CODE § 1414. Although the FEPC's six-year existence has not provided time for any significant turnover, four of the original five commissioners are still members of the Commission. The size of the Commission was increased from five to seven in 1963, but only one commissioner has left in six years.

84. Commissioners presently work seven to ten days a month, which accounts for a present salary of \$4,200 to \$6,000. An increase to \$20,000 would mean an increase of about \$15,000 for each of the seven commissioners, or a total increase of \$105,000.

85. Interview With C. L. Dellums, Commissioner, FEPC, in Oakland, Feb. 26, 1965.

86. Interview With Clive Graham, Chairman, FEPC, in Long Beach, March 19, 1965.

by nonminority Caucasians.⁸⁷ Nevertheless, the great bulk of complaints does come from minority persons, about 88 per cent of the total being from Negroes.⁸⁸ Therefore, some measure of the FEPC's accessibility may be seen by comparing the population distribution of these minority groups with the location of FEPC offices.

In 1960 people of Spanish surname comprised about 10 per cent of the population of California.⁸⁹ Fully 35 per cent of these people lived outside any metropolitan area served by an FEPC office. The definitions of "metropolitan area" are such that even those within such an area could easily live thirty miles or more from an FEPC office. The San Francisco-Oakland metropolitan area, for example, includes San Francisco, Alameda, Contra Costa, Marin, San Mateo, and Solano counties. This area has a total nonwhite and Spanish surname population of 523,933, of which only 187,515 live in San Francisco County.

The statistics are not quite so depressing for the Negro, who makes up 5.6 per cent of the state's population.⁹⁰ Only about 15 per cent of California's Negroes live outside the metropolitan areas served by the FEPC. These statistics, however, do not tell the whole story. Such population centers as San Bernardino and Santa Clara counties, whose nonwhite and Spanish surname populations are 81,573 and 98,445 respectively, do not have even the one-man office accorded Fresno County, with a comparable population of 88,983—and offices of that size are concededly too small to be very effective.⁹¹ Furthermore, such obscure FEPC offices as the one on the seventh floor of the State Building in San Francisco, even when physically near, are psychologically far removed from uneducated and unsophisticated minority persons who suffer discrimination. Many do not know that the FEPC exists, and others are for various reasons reluctant to take their problems to it.⁹²

A large part of the need for FEPC contact with those who have suffered discrimination could be filled by civil rights groups. The Palo Alto NAACP, for example, has referred thirty cases to the FEPC,⁹³ but this is apparently the only real channel to the Agency because other civil rights groups in the area refer complainants to the NAACP.⁹⁴ On the other hand, some civil rights leaders will not bother to make referrals. They view the FEPC as a last resort to be used only when their own methods fail and backup powers are needed.⁹⁵ Others apparently

87. *Ibid.*

88. 1961-1962 CALIFORNIA FEPC REP. 21.

89. Statistics concerning the Spanish surname population of California are taken from CALIFORNIA FEPC, CALIFORNIANS OF SPANISH SURNAME (1964) (compiled from the 1960 census by the Division of Labor Statistics and Research, California Department of Industrial Relations).

90. Statistics concerning the Negro population of California are taken from CALIFORNIA FEPC, NEGRO CALIFORNIANS (1963) (compiled from the 1960 census by the Division of Labor Statistics and Research, California Department of Industrial Relations).

91. Interview With Elton Brombacher, Commissioner, FEPC, in San Francisco, Feb. 9, 1965. See *Hearings Before California FEPC on Mexican-American Problems*, Nov. 10, 1964, at 8-9 (presentation of Mexican-American State Citizens' Committee).

92. See note 120 *infra* for a discussion of this problem.

93. Interview With Albert Barringer, Labor and Industry Chairman, Stanford-Palo Alto NAACP, in Palo Alto, Jan. 31, 1965.

94. This conclusion is based on the writer's visits to each civil rights or related organization in the Palo Alto area to inquire what advice he would be given if he were discriminated against and how to take advantage of the facilities of the FEPC. Only the NAACP was well-informed, and most other offices suggested he contact the NAACP.

95. Interview With Harry Bremond, Vice President, South San Mateo NAACP, in Palo Alto, Feb. 5, 1965.

are not concerned enough with the long-range possibilities of the FEPC to be bothered with referrals.⁹⁶ Although the major civil rights groups in the urban centers are typically well informed on the law and active in directing people to the FEPC, this is not universally true. The President of the Los Angeles NAACP not only was limited in his own knowledge of the FEPC to what he "read in the papers," but also was unable to recommend any more knowledgeable member of his chapter.⁹⁷

The Spanish surname worker is not served as well as the Negro by civil rights groups acting as channels to the FEPC. Although there are many Mexican-American community organizations, none of them are staffed to give the kind of service to their community that the NAACP offers the Negro. The FEPC has sought various ways of contacting the Spanish surname minority. Staff members have, for example, visited outlying areas, leaving literature at the office of the Labor Commissioner. However, the Agency has lacked the resources to make much progress in the metropolitan Spanish surname community, and it has been especially restricted in the rural areas, where much of the Spanish-speaking population is employed.⁹⁸

It would be desirable to establish local FEPC offices within minority communities to provide ready access and information for the people who suffer the greatest discrimination. Oakland in 1960, for example, had a Negro population of 83,618—over one-third of all Negroes in the San Francisco-Oakland metropolitan area.⁹⁹ Yet there is no FEPC office in Oakland, nor in any other center of minority population in the area. Some people within the Agency argue that there is an overriding virtue in the complainant's finding someone who cares in the State Building.¹⁰⁰ However, the number of persons who actually go to the FEPC and are satisfied is small enough to negate the symbolic value of the FEPC's being there. Of course the number deterred by the FEPC's remoteness is incalculable; and of those who do make the effort, it has been estimated that not more than 50 per cent are satisfied.¹⁰¹ Although the opening of offices in minority population centers would probably not change the percentage of dissatisfied complainants, it would make the Agency's services available to a much wider minority public and probably increase the number of complaints, and correspondingly the number of satisfied complainants. The FEPC has done all it can with its present budget to make its services known and available, but because of limited resources the Agency remains remote.

96. One official of a group which "endeavors to open up new employment opportunities to applicants" reported that she seldom advised using the FEPC because it was too slow in acting. Summing up her attitude, she said, "We're concerned with people, not policy."

97. Interview With President, Los Angeles NAACP, in Los Angeles, March 18, 1965.

98. See *Hearings, supra* note 91, at 8-10; Interview With Rafael Vega, Consultant, FEPC, in Los Angeles, March 18, 1965.

99. CALIFORNIA FEPC, OAKLAND SCHOOLS 5 (1964); CALIFORNIA FEPC, NEGRO CALIFORNIANS 12 (1963).

100. Interview With Hugh Taylor, Consultant, FEPC, in San Francisco, Feb. 25, 1965.

101. The writer asked each interviewee how many complainants he estimated were satisfied. Estimates ranged downward from 50%. This dissatisfaction is due to a number of factors, chief among which are the high number of dismissed complaints due to failure to find probable cause and the length of time taken to settle complaints.

3. *Carrying the work load.*

As previously noted, individual complaints average four months to settle and broader compliance actions average about eleven months.¹⁰² Consultants typically carry an average caseload of twenty-eight individual complaints and eight other types of actions.¹⁰³ Although this is more favorable than in the past, the Chairman estimates it is about a 400 per cent overload.¹⁰⁴

With regard only to the burden of individual complaints, which the Agency by law cannot refuse, providing a larger staff would result in three improvements. First, the time for case settlement could be reduced, ending a widely echoed complaint about the FEPC. If the individual complaint system is to work, the complainant must be guaranteed an expeditious treatment of his case. Frequently circumstances destroy the effectiveness of a delayed FEPC solution—the complainant may find another job, or move. Second, a larger staff would give the FEPC a greater ability to follow up orders and compliance agreements. The Agency Chief reports that at present follow-up is done irregularly, as time and staff availability allow.¹⁰⁵ The overwhelming burden of current complaints makes it clear that this allowance is small indeed.

The Agency should be able to revisit all respondents at regular intervals to insure that compliance agreements are performed and to guard against future violations. The Agency might review respondents' records and interview their officers, former complainants, and minority persons in respondents' employ. This would not only avoid the possibility that negotiated adjustments might be ignored, but it would also negate the danger of respondents' hiring complainants and then searching for a plausible pretext to fire them.¹⁰⁶

Chairman Graham argues that follow-up is of limited value in individual cases because the parties would inform the FEPC if trouble developed.¹⁰⁷ This view is questionable. For one thing, satisfactory adjustments may not include hiring of the individual complainant, either because of the nature of the solution reached¹⁰⁸ or because the complainant no longer wants the job. The agreement might include a promise by the respondent to cease all discriminatory practices, but, because the job in question had been filled, not provide relief for the complainant. Furthermore, adjustments often involve many steps beyond hiring or promoting the particular complainant, and he cannot be expected to police a broad agreement. In addition, complainants may fear further retaliatory action if they go back

102. See text accompanying notes 58, 65, 72 *supra*.

103. *Graham Testimony* 11. The other types of actions are section 1421 investigations, affirmative actions, and housing cases.

104. *Ibid.*

105. Interview With Edward Howden, Chief, FEPC, in San Francisco, Dec. 14, 1964.

106. An interesting problem, in this context, is whether an FEPC should allow a minority dismissal on a technically valid basis, even though a nonminority person would not have been treated so harshly. The California FEPC would not. Interview With C. L. Dellums, Commissioner, FEPC, in Oakland, Feb. 26, 1965. A study of the Massachusetts Commission Against Discrimination, however, indicated that that commission would not consider this to be discrimination. Kramer, *Enforcement of a Fair Employment Practice Law*, May 1, 1964, at 45-46 (unpublished paper on file at Stanford Law School).

107. Interview With Clive Graham, Chairman, FEPC, in Long Beach, March 19, 1965.

108. See *MANUAL* § 110.5. See also note 48 *supra*.

to the FEPC; or they may take further discrimination as evidence of the FEPC's impotence to help them and despair of aid from the government.

The third improvement resulting from a larger staff to handle individual complaints would be more complete solutions. At present some cases must be closed short of an agreement ending all discriminatory employment practices. In 20 per cent of the cases in which discrimination is found a fair employment policy is neither promulgated nor strengthened.¹⁰⁹ One respondent's lawyer cites such a case, in which the FEPC found probable cause and threatened to take the employer to hearing after failure of conciliation but failed to do anything about it. Perhaps such cases represent a policy decision to avoid public battles. Or they might indicate decisions that the employer has gone as far as he will and no sufficient basis for hearing exists. But sources within the Agency indicate that such cases may also be dropped simply for lack of time.

4. *Expanding the FEPC's more productive activities.*

Three FEPC activities promise more productivity than the present concentration on individual complaints: educational programs, section 1421 investigations, and affirmative actions. While concrete results of educational work are most difficult to assess, nevertheless the education program attacks discrimination in employment closer to its roots than any other Agency activity. Informing minority persons of the law not only encourages them to assert their rights, it also motivates them to strive for achievements they may have thought beyond their reach—and the demand for minority persons with skill and training far exceeds the supply.¹¹⁰ Furthermore, educational work informs the potential respondent of his obligations and encourages him to take affirmative steps to discharge them by going out of his way to recruit minority job applicants. Educational activity is also non-controversial, since it is approved by even those who do not approve of the FEPC as an investigatory agency.¹¹¹ Finally, more educational funds would enable the FEPC to hire a much needed research officer to compile statistics on the progress of fair employment, thus enabling the Agency to see in which direction it should be going and what changes in the law governing its powers, jurisdiction, and method of operation it should recommend to the legislature.

Opinion is nearly unanimous that the most productive FEPC compliance activities are section 1421 investigations and affirmative actions. By dealing with large employers and unions in cases that will result in wide-ranging plans for equal employment opportunity, the Agency can open up whole plants, firms, and industries. The number of jobs for minority workers that result from such programs can probably never be measured with any degree of precision; but no one doubts that they far exceed the number of jobs produced by the painstaking individual complaint process, in which respondents may control an insignificant

109. See 1963-1964 CALIFORNIA FEPC REP. —.

110. Interview With Walter Hooke, Urban League Skills Bank Director, in San Francisco, Jan. 30, 1965.

111. Interview With Hon. Clark Bradley, State Senator, in Sacramento, Feb. 3, 1965. Interview With William Smith, Executive-Secretary, Federated Employers of the Bay Area, in San Francisco, Feb. 11, 1965.

number of jobs. Yet the Agency's resources are so tied to individual complaint investigations that these more productive activities must be given a secondary role.¹¹²

B. *The Need for New Legislation*

Three important legislative innovations that could improve the California fair employment law would be to eliminate exceptions to the law, terminate the compulsory investigation of individual complaints, and extend the initiation power.¹¹³ The latter two suggestions are so intertwined that they will be discussed together.

1. *Elimination of exceptions.*

The present fair employment law does not cover as complainants members of employers' families or domestic servants. Nor does it cover as respondents those employing less than five persons; social and fraternal clubs; nonprofit charitable, educational, or religious associations or corporations; or employers with respect to their employment of agricultural workers residing on the land where they are employed.¹¹⁴ In addition, jobs requiring bona fide occupational qualifications¹¹⁵ are exempt from the law.¹¹⁶

The exceptions for employers of fewer than five persons and for family and domestic servants serve a dual function: they keep the Commission out of trivia in terms of job opportunities, and out of situations too personal for the law to effect a satisfactory solution. These exceptions should be retained. On the other hand, the private club exception is too broad and should be abandoned. Although it is said to protect ethnic and religious organizations, it excludes from the operation of the law a number of institutions, such as hospitals employing large numbers of workers and serving the public, which present no valid claim for exemption. The bona fide occupational qualification exemption should adequately protect any such organization deserving of protection, such as a restaurant maintaining an ethnic atmosphere or an ethnic fraternal group.¹¹⁷

112. See *Graham Testimony* 12; text accompanying note 21 *supra*.

113. Among other, less useful, suggestions for strengthening the law, the most frequently repeated is that "the law should have more teeth," *i.e.*, civil and criminal penalties beyond the present provision of CAL. LABOR CODE § 1430, which fixes a maximum \$500 fine or six months in jail or both for wilfully violating an order of the FEPC. Such additional penalties would probably be undesirable. Better results are accomplished in an atmosphere of cooperation than in an atmosphere of forced employment. In fact, more than 99% of the cases are presently settled before the point where penalties would be imposed, which makes the expected gains from the imposition of stiffer penalties seem illusory. Furthermore, guilt is not easily placed in cases of discrimination—most civil rights leaders agree that inertia or force of habit account for a large amount of discrimination and that there is a minimum of pathological prejudice. Finally, stiffer penalties might induce stiffer resistance by respondents to the FEPC's efforts, and such penalties might arouse an adverse public reaction.

114. A 1965 act of the legislature amends CAL. LABOR CODE § 1413 to end the agricultural workers exception for persons whose employment begins after Sept. 18, 1965. Cal. Stat. 1965, ch. 1185, § 1.

115. "Bona fide occupational qualifications" refers to the racial or ethnic background essential for particular jobs; for example, portraying a historical or well-known personality on stage, screen, or television when a close likeness is required.

116. The various exceptions to the law are listed at CAL. LABOR CODE §§ 1413, 1420.

117. A bona fide occupational qualification was recognized for a restaurant designed to be a replica of a Tokyo dining place, but was applied only to employes who were visible to the public. California FEPC, Fair Employment Newsletter, Jan.-Feb. 1962. The Commission's policy is to require requests for such exemptions in writing and to judge them strictly. MANUAL § 400.

2. *Curtailment of the compulsory investigation of individual complaints and extension of the initiation power.*

Ideally, the FEPC should be provided with more resources and with more efficient methods of operation. However, given a legislative unwillingness to provide significant increases in funds, two changes in the law, taken together, would allow the Agency to allocate present resources more productively. The FEPC should be allowed discretion in the investigation of individual complaints and should be given the power to initiate without a complaint enforceable actions against uncooperative employers.

Given the limitations of the existing framework of resources and powers, it is hard to disagree with one commissioner who declares, "The present method of operation is the optimum in methodology."¹¹⁸ The Agency must by present law investigate *all* valid individual complaints, and it is so backlogged in such cases that no significant shifting of resources is possible. Moreover, these individual cases burden the Agency beyond its capacity to deal quickly and efficiently with such complaints and cause it to turn away from opportunities promising more fruitful action. This is made more serious by the fact that the individual complaint system fails to reflect accurately the incidence of discrimination.¹¹⁹ For one thing, many individuals who suffer discrimination fail to file a complaint;¹²⁰ for another, firms and whole industries reputed to discriminate will not, because of this reputation, receive applications from minorities, and no opportunity for a complaint arises.

Nevertheless, abandonment of the complaint system is not advocated here; rather, a simpler solution lies in granting the FEPC discretion as to which individual complaints should be investigated. In many cases the Agency might proceed as it presently does. But in others it would not be forced to miss an opportunity to pursue a large-scale employer through a 1421 action in order to investi-

118. Interview With Elton Brombacher, Commissioner, FEPC, in San Francisco, Feb. 9, 1965.

119. Edward Howden, Chief, FEPC, stated: "There is, I believe, a broad consensus among the state and local FEPC's and students of their work to the effect that limitation of such an agency to a compliance program stemming only from the receipt of miscellaneous individual complaints is to hold it to a haphazard, piecemeal, and wholly inadequate method of operation." *Hearings, supra* note 68, at 231. See also Girard & Jaffe, *supra* note 74, at 115; Hill, *supra* note 74, at 24.

120. Some of the reasons complaints are not filed, even when discrimination clearly occurs, are lack of information, lack of courage to go to a state agency, length of time needed to settle complaints, psychological accommodation to discrimination, pessimism and cynicism, reluctance to get involved, and language and cultural barriers. Interview With Edward Howden, Chief, FEPC, and Charles Wilson, Senior Legal Counsel, FEPC, in San Francisco, Dec. 14, 1964. It is often difficult to get minority persons even to approach an agency such as the State Department of Employment, and it is accordingly more difficult to bring them to approach an enforcement agency such as the FEPC. Interview With Mrs. Carol Green, Bayshore Employment Service, in East Palo Alto, Jan. 22, 1965.

The Spanish surname worker who suffers discrimination may fail to complain for reasons not mentioned above: dislike of being classified in a minority and hope of being considered an Anglo-American; a fatalistic, all-suffering attitude carried over from his status in other countries; and a wish to avoid places where he is not welcome. Discrimination against the Spanish surname worker is also frequently of a special nature. He is typically not rejected at the hiring gate, but is hired because he can be discriminated against on the job. Fear of losing his job and fear of deportation may keep him from complaining in this situation. Interview With Rafael Vega, Consultant, FEPC, in Los Angeles, March 18, 1965. In fact, only about 4-5% of the individual complaints come from the Spanish surname community, although 9.1% of California's population is of Spanish surname descent. CALIFORNIA FEPC, CALIFORNIANS OF SPANISH SURNAME 5 (1964); Vega, FEPC and the Mexican-American Community, Nov. 12-15, 1964, at 1, on file with *Stanford Law Review*.

gate an employer with only a few positions available. Those who would oppose such a change give both philosophical and practical reasons for maintaining the present complaint system. It is said the system emphasizes the importance of the individual, giving him an outlet for his grievance and letting him know someone cares. However, the same people who make this argument testify, in the next breath, that the number of satisfied complainants is few and that two-thirds of the complaints are dismissed for inadequate evidence of discrimination.¹²¹ In addition, complaint processing with present resources averages four months, and the final adjustment, when made, may even then fail to give the complainant a job.¹²² Thus the number of individuals who find satisfaction is small enough to weaken the individualism argument for retention of the complaint system. Furthermore, if the Agency could devote larger percentages of resources to 1421 investigations and affirmative actions, the number of individual complaints would diminish in the long run.

Supporters of the individual complaint system also stress, however, its practical importance in revealing wider areas of discrimination and suggesting fields for 1421 investigations and affirmative actions. But, as pointed out above, individual complaints still would have their place in the system, and under a discretionary system they could be used selectively to seek out discrimination beyond the individual case. Nor is there any reason to expect that civil rights groups which have been active in referring cases of discrimination to the Agency would not continue to do so; rather, referrals would undoubtedly increase as wider results were obtained.

An important additional device which should be granted to the Agency under the suggested selective enforcement system is the ability to initiate enforceable actions. While the experience of the California FEPC in 1421 investigations to date has been one of meeting a generally cooperative attitude on the part of employers, it is vital that the power of the FEPC to deal with the recalcitrant employer, now available only through individual complaints, be expanded. Otherwise, the FEPC might divert its resources into more productive types of actions only to find itself frustrated when the targets of the action refused to cooperate.

Theoretically, the Agency can obtain enforcement jurisdiction over any respondent through the power of the Attorney General to act as complainant.¹²³ This device might be used more extensively than it presently is,¹²⁴ but the Attorney General is apparently reluctant to act unless his own investigation indicates a case of discrimination.¹²⁵ This procedure duplicates the FEPC's efforts; and, in fact, the Attorney General does not have a civil rights division staffed to handle this work. The result is a bottleneck that could be eliminated simply by enabling

121. This figure is 80% among complaints from the Spanish surname community. *Vega, op. cit. supra* note 120, at 2.

122. Of the total number of cases closed by satisfactory adjustment through 1964, only 47% resulted in an offer of immediate hire, reinstatement, or promotion. Some other agreements were less immediately, but nevertheless ultimately, helpful to the complainant. For example, 64% of the agreements included a commitment to hire or promote at the first opportunity and 88% included a commitment to consider hiring or promoting at the first opportunity. 1963-1964 CALIFORNIA FEPC REP. —.

123. CAL. LABOR CODE § 1422.

124. See note 24 *supra* and accompanying text.

125. Interview With C. L. Dellums, Commissioner, FEPC, in Oakland, Feb. 26, 1965.

the FEPC to initiate enforceable actions on its own—that is, by adding sanctions to section 1421 investigations.¹²⁶

C. Agency Policy

The general attitude of the FEPC is reflected in various policies the Agency pursues. While they are nowhere spelled out, the policies of the Agency concerning public disclosure of its activities and its relations with the business community and the labor unions are particularly revealing.

1. Public disclosure of FEPC activities.

Section 1421 forbids the Commission and its staff to disclose what transpired in the course of the conciliation conference, on penalty of being found guilty of a misdemeanor and subjected to discipline under the state Civil Service Act. Nothing else is required by law to be kept secret, and Commission policy specifically allows disclosure of information obtained through investigation and mutually accepted final terms of conciliation.¹²⁷ Public reports on progress in affirmative actions are periodically issued when a case is already in the public arena.¹²⁸ Furthermore, the assigned commissioner and the Division Chief have general authority to issue any publicity they feel ought to be issued.¹²⁹ These apparently liberal publicity policies conceal a practice of secrecy that makes it almost impossible for an independent observer to uncover information about specific cases. Although the FEPC freely discusses unidentified fact situations in its publications and in personal interviews, the Agency is apprehensive about revealing details of individual complaint cases,¹³⁰ such as names of complainants and respondents,¹³¹ investigation records, and settlement terms.

This policy is a controversial one, both within and without the Agency.¹³² It meets a mixed reaction with the Agency's staff. It finds support from such diverse sources as the President of the San Francisco Congress of Racial Equality¹³³ and

126. A majority of FEPC's already possess this power. KONVITZ & LESKES, *A CENTURY OF CIVIL RIGHTS* 217 (1961). Another possibility for expanding the initiation power would be to extend it generally to private groups. The Ohio and Rhode Island statutes expressly provide for this, OHIO REV. CODE ANN. §§ 4112.01(A), 4112.05(B) (1965), R.I. GEN. LAWS ANN. § 28-5-17 (1956), and New York has reached the same result by judicial decision, *American Jewish Congress v. Carter*, 19 Misc. 2d 205, 206, 190 N.Y.S.2d 218, 220 (Sup. Ct. 1959). The California law is phrased in terms of a "person claiming to be aggrieved," CAL. LABOR CODE § 1422, but there is no apparent reason why this should not be interpreted to include private groups. Section 1413(a) defines "person" to include associations or corporations, and the only issue would be whether such groups were "aggrieved." Such an interpretation should be possible in light of the provision in § 1431 suggesting liberal construction of the act. However, little use has been made of the group complaint privilege where it is available. 68 HARV. L. REV. 685, 692 (1955).

127. MANUAL § 500.3. CAL. LABOR CODE § 1421.1, added in 1965, requires the Commission to inform respondents as to whether a particular discussion, or portion thereof, is part of the nondisclosable conciliation conference, or of the investigation, which is disclosable. Cal. Stat. 1965, ch. 1463, § 1.

128. MANUAL § 502.1.

129. MANUAL § 501.2.

130. This secrecy, however, does not extend to 1421 investigations or affirmative actions.

131. In the past this information was not even subject to discretionary disclosure. California FEPC, Fair Employment Newsletter, Aug.-Sept. 1961.

132. See Rabkin, *Enforcement of Laws Against Discrimination in Employment*, 14 BUFFALO L. REV. 100, 111-13 (1964), for a brief but illuminating discussion of this problem.

133. Interview With William Bradley, President, San Francisco CORE, in San Francisco, Feb. 25, 1965.

attorneys who have represented respondents in negotiations with the FEPC. And it is reflected in the policies of civil rights groups, many of which are remarkably reluctant to disclose names of persons they have referred to the FEPC.¹³⁴

The reasons given for secrecy are varied. FEPC personnel support the policy because of a belief that the success of the Agency is dependent on the quiet method by which it deals with respondents,¹³⁵ because of fears aroused by years of opposition,¹³⁶ and because of the fear of being accused of trial by headline.¹³⁷ Others suggest that more publicity should be avoided as notoriety would give ammunition to the opponents of the FEPC and aid them in repealing the law.¹³⁸ A fear of embarrassing the complainant is also present in the thoughts of those who favor secrecy.

These reasons merit consideration. Although it is not clear from whom a complainant would have anything to fear except his employer or potential employer—who must know about the complaint anyway—complainants apparently often do have a nebulous but compelling fear of some sort of retaliation;¹³⁹ and consultants frequently tell of persons who refuse to sign complaints they themselves initiated. Furthermore, publicity could endanger the FEPC's relations with respondents by turning situations of possible cooperation into adversary ones. Respondents who might have complied in fear of a public hearing could well decide to resist instead if complaints were made public. Furthermore, respondents who did cooperate would nevertheless suffer from publicity along with the recalcitrant.

There are, however, strong arguments for publicity. Some civil rights leaders contend that public opinion is behind fair employment and that aggressive use of publicity would bring public pressure to bear on violators.¹⁴⁰ Publicity might also promote minority group confidence in the FEPC and encourage bringing more grievances to the Agency; for although the number of complaints is more than can be efficiently handled at present, few observers suppose that it is anywhere near the number of cases of discrimination that occur. Still another advantage would be that publicity might induce compliance in employers who had not been respondents—just as spot income tax checkups and scattershot antitrust prosecutions serve to deter violations.

134. Interview With Miss Elsa Alsberg, Executive Director, Palo Alto Fair Play Council, in Palo Alto, Jan. 21, 1965; Interview With Albert Barringer, Labor and Industry Chairman, Stanford-Palo Alto NAACP, in Palo Alto, Jan. 31, 1965.

135. Interview With Elton Brombacher, Commissioner, FEPC, in San Francisco, Feb. 9, 1965.

136. Interview With C. L. Dellums, Commissioner, FEPC, in Oakland, Feb. 26, 1965. Mr. Dellums was a part of the movement for an FEPC from the earliest days. In 1946 a proposal to establish an FEPC was put on the ballot in the form of an initiative proposition and soundly defeated. See *San Francisco Chronicle*, Nov. 8, 1946, p. 3, cols. 5-6. For a brief history of the attempts to institute an FEPC in California prior to the establishment of the present Agency in 1959 see Tobriner, *California FEPC*, 16 *HASTINGS L.J.* 333-34 (1965).

137. Interview With Arthur Padilla, Consultant, FEPC, in San Francisco, Feb. 11, 1965. This justification may be quite sound in relation to the law-protected conciliation conferences. The FEPC describes it thus: "[I]n the event of public hearings or court actions [respondents] are protected against implications of guilt which might be found in a recital of their settlement offers made during conciliation efforts." *California FEPC, Fair Employment Newsletter*, Aug.-Sept. 1961.

138. Interview With William Bradley, President, San Francisco CORE, in San Francisco, Feb. 26, 1965; Interview With Hon. W. Byron Rumford, Assemblyman, in Sacramento, Feb. 4, 1965.

139. Perhaps there is some fear of potential future employers who would be unaware of the complainant's action in the absence of publicity.

140. Interview With Don Smith, President, Los Angeles CORE, in Los Angeles, March 18, 1965.

Resolving these conflicting arguments is difficult. But present FEPC policy not only restricts information that might embarrass complainants and cooperative respondents, it also impedes helpful publicity and legitimate investigation into the progress the FEPC is making. Secrecy gives as much ammunition to the FEPC's critics as would a completely open disclosure policy. Furthermore, with the Agency receiving an average of around 800 individual complaints a year, and engaging in section 1421 investigations and affirmative actions in significant numbers, no respondent is likely to be subjected to any significant amount of annoying or harmful publicity; although the number of cases may not be large compared with the amount of discrimination that occurs, it is sufficient to make any given case reasonably anonymous. If each case were given routine publicity, any specific case would become a highly unnewsworthy event.¹⁴¹ Finally, experience in other states indicates that completely open disclosure procedures apparently have no deleterious effect on the persuasion process. The Washington State Board Against Discrimination, for example, not only invites the public to all meetings but distributes lists of cases to be discussed and provides mimeographed copies of the reports and recommendations of investigators without impeding the success of its compliance activities.¹⁴² It is therefore recommended that the FEPC abandon all secrecy except with regard to what transpires in conciliation conferences, which is all that the law strictly requires.

2. *The FEPC's relations with business and labor.*

The two respondent communities with which the FEPC primarily deals are business and organized labor. The attitudes that have grown out of these relationships understandably differ, but each exercises a degree of constraint on the activities of the FEPC.

The FEPC is less responsive to the business community than to labor unions or the political world. The Agency owes nothing to business because the FEPC was created over its almost unanimous opposition. Indeed, a large part of the Agency's function is to police that community; and the FEPC is, in a sense, a free lawyer for those who feel that they have suffered at the hands of business. Although the Agency makes every effort to be neutral, the law itself presupposes a bias for fair employment which necessarily restricts business discretion in hiring; the members and staff of the FEPC are and must be selected to reflect that bias. In spite of the FEPC's regulatory stance, an era of good feeling appears to be emerging between the FEPC and, at least, big business. This is partly due to increasing pressure on business from civil rights groups, which makes the FEPC appear to be a neutral agency in comparison; it is also a reflection of pressure for fair employment from the federal government and a growing social conscience in large corporations. But this appearance of good feeling is deceptive, for it masks opposition that has gone underground in the belief that open resistance is no longer useful or out of fear that the FEPC or the state or federal government will

141. A previous attempt at monthly press releases on nonconfidential information was ended because nobody used them except a few minority group weeklies. Interview With C. L. Dellums, Commissioner, FEPC, in Oakland, Feb. 26, 1965.

142. See Note, 74 HARV. L. REV. 526, 546-47 (1961).

somehow retaliate.¹⁴³ The Agency does, however, endeavor to develop a cooperative relationship with the business community. This policy is not necessitated by the political power of business opponents; instead, cooperation is sought simply because it is the most efficient path to fair employment. However, since the FEPC must consider the impact of various actions on its business relations due to the greater number of jobs that can be opened through cooperation, a more vigorous program is to some extent held back by fear of business opposition.

On the other hand, although strongly denied by some FEPC officials,¹⁴⁴ the impression is widespread that the FEPC is soft on union discrimination. The FEPC cannot, of course, control the incidence of individual complaints that come to it; but it has control over its section 1421 and affirmative action dockets, and it is here that its lack of vigor in pursuing union discrimination appears. Only eight of the more than 100 section 1421 investigations and only a single affirmative action have dealt with unions.¹⁴⁵ This mildness is not, apparently, due to any direct pressure from the labor movement. Indeed, labor has been one of fair employment's best friends, at least officially. Organized labor was instrumental in financing the drive to establish the FEPC,¹⁴⁶ and the AFL-CIO hierarchy maintains a vigorous stand in favor of fair employment. However, there is much autonomy in union structure, and the attitude of statewide leaders is not necessarily that of local leaders or the rank and file.

There are both practical and political reasons for the FEPC's failure to push a union antidiscrimination campaign. Extending the antidiscrimination campaign against unions would be practically less productive than against business because of the difference in nature and structure of a union and a business. Unless the FEPC has an enforceable complaint, few sanctions are available that will affect the union. First of all, unions are not dependent on profit and public image and are therefore more immune from demonstrations and boycotts by civil rights groups or from the pressure of publicity. Thus it is unlikely that a recalcitrant union would be overly concerned with the publicity of a 1421 investigation or would cooperate in an affirmative action. Union leaders are dependent on and responsive to the wishes of their voting and dues-paying members. Moreover, a union's governing structure is composed of boards, councils, and committees that proceed by meetings and majority votes in such a way that union leaders cannot make policy decisions with the same freedom as management.

The FEPC's inattentiveness to union discrimination is also explained by what might be called a camaraderie of liberal politics. A political attitude which appears

143. Members of the California Senate Subcommittee on Race Relations and Urban Problems, which met all over the state to hear testimony in 1964 and early 1965, reportedly were approached privately by businessmen who feared the FEPC and felt it was abusive, but who were unwilling to be identified as opposing it for fear of recriminations. Off-the-Record Interview With Member of State Senate Subcommittee on Race Relations and Urban Problems, in Sacramento, Feb. 3, 1965.

144. *E.g.*, Interview With C. L. Dellums, Commissioner, FEPC, in Oakland, Feb. 26, 1965.

145. Interview With Mrs. Betty Miller, Staff, FEPC, April 7, 1965. Civil rights leaders indicate that their organizations, too, have failed to attack union discrimination as aggressively as they have business discrimination. Interview With Dr. Thomas Burbridge, Former President, San Francisco NAACP, in San Francisco, Feb. 9, 1965; Interview With William Bradley, President, San Francisco CORE, in San Francisco, Feb. 25, 1965.

146. Interview With C. L. Dellums, Commissioner, FEPC, in Oakland, Feb. 26, 1965. The other major sources of finance were the NAACP and individual contributors.

dominant in the FEPC was expressed by one civil rights leader who, after discussing the practical reasons why so little attention had been paid to unions and indicating that his organization was about to move into this area, added, "Still, civil rights groups need their alliances with friendly unions."¹⁴⁷ Similarly, union financing of FEPC drives and support of top union leadership have created a tie to labor that often prevents the proponents of fair employment from seeing the evils in unions.

Unions, however, can and do discriminate through their hiring halls or through agreements with management. And apparent FEPC bias toward unions damages the Agency's public image and undoubtedly lessens cooperation by business. The answer to this problem is a series of vigorous 1421 investigations against some of the more offensive unions and an attempt to engage unions in the kind of affirmative actions that have been entered into with management.¹⁴⁸ Furthermore, recalcitrant unions could be met with an enforceable action entered through the Attorney General's office or, if the law were changed as suggested above, through an action brought directly by the FEPC. Only by such an all-out attack on discriminatory practices can the FEPC fully carry out its mandate and erase the impression of union favoritism.¹⁴⁹

D. General Political Considerations

The FEPC has often been accused of an excess of timidity in exercising its powers. One interviewee within the Agency sums up the problem bitterly:

The potential of the FEPC is not realized due to political appointees. Action on certain cases shows a hesitancy to go ahead due to the political implications. The Agency is afraid both of the people and of special pressures. It has a tendency to caution because of the controversial nature of the area. It neglects its responsibilities. . . . It is afraid of reaction against political incumbents.

One civil rights leader reports that "the Commission avoids politically dangerous projects. There are political appointments at the top. The commissioners slow things down. Nothing is done about unions . . . a militant doesn't fit within the structure. You need to have a wishy-washy approach to operate there."¹⁵⁰ But even such critics as these admit that it is difficult to distinguish political expediency from the practical reasons for the FEPC's timidity. The present legal powers and budget of the Commission, if not its very existence, are on shaky political ground. Every job within the Agency and every nickel of expenditure must meet the approval of the state legislature each year. While this may not differ from the situation in other state agencies, nevertheless it ties the FEPC so closely to the legislature that no matter how broad the policy of the fair employment law, the Agency

147. Interview With William Bradley, President, San Francisco CORE, in San Francisco, Feb. 25, 1965.

148. The FEPC is not unaware of the problem. It is presently engaged in exploring methods of coping with union discrimination, particularly to determine how the Agency can wield an effective sanction in the absence of an enforceable complaint.

149. For a brief discussion of this problem with suggested solutions see NORGREN & HILL, *TOWARD FAIR EMPLOYMENT* 272-75 (1964).

150. Interview With Harry Bremond, Vice President, South San Mateo NAACP, in Palo Alto, Feb. 5, 1965.

cannot go beyond what the legislature and the Governor want. Thus, whatever discrepancy exists between the vigorous language of the act and the timid attitude of the FEPC can ultimately and more justly be traced to a lack of complete support of the FEPC by the legislative and executive branches of the state government.

The law creating the Commission seems to require an all-out attack on discrimination. It states that the denial of equal employment opportunities substantially and adversely affects the interests of employees, employers, and the public in general,¹⁵¹ and declares the opportunity to be employed without discrimination a civil right.¹⁵² The Agency is formally empowered to prevent all unlawful employment practices,¹⁵³ and the provisions of the act are to be liberally construed to accomplish the announced objectives.¹⁵⁴ In spite of this, the Agency has been reluctant to suggest that it be given wider powers on the theory that this might boomerang into a reexamination of the whole act that would result in lessening the Agency's power.¹⁵⁵ This is a practical policy which reflects the known attitude of the legislature. Many of the defects and exceptions in the original act were the result of political compromises.¹⁵⁶ And the continuing timidity of the Agency seems justified by the fate of attempts to effect substantive amendments to the law. For example, in 1963 a bill to give the Commission the initiation power possessed by most other FEPC's was killed in the Assembly Judiciary Committee.¹⁵⁷ Commissioner Garcia states that requests for a significant increase in funds would receive a flat rejection.¹⁵⁸ Conversations with legislators confirmed this view. While there are some legislators who have always been opposed to the existence of the FEPC,¹⁵⁹ the real danger to the Agency's effectiveness lies in the political fears of the FEPC's friends. "There is no need to strengthen the Commission now," reports one assemblyman. "This is not the time for the initiation power. It is important for the Agency just to survive for a few more years."¹⁶⁰

Another problem is that the concept held by many legislators of what the FEPC should be doing and the demands of the situation are entirely different. These legislators view the proper role of the FEPC as passive. They contend that people should come to the Agency and that it should not search for cases.¹⁶¹ Some even object to the FEPC giving notice of its existence,¹⁶² as it does to management and minority groups through its educational programs. They fear an overzealous FEPC and think that giving it too much power might make the Agency

151. CAL. LABOR CODE § 1411.

152. CAL. LABOR CODE § 1412.

153. CAL. LABOR CODE § 1421.

154. CAL. LABOR CODE § 1431.

155. Interview With Edward Howden, Chief, FEPC, in San Francisco, Dec. 14, 1964.

156. Interview With Hon. W. Byron Rumford, Assemblyman, in Sacramento, Feb. 4, 1965.

157. Interview With Edward Howden, Chief, FEPC, in San Francisco, Dec. 14, 1964.

158. Interview With Louis Garcia, Commissioner, FEPC, in San Francisco, Jan. 26, 1965.

159. Interview With Hon. Clark Bradley and Hon. Jack Schrade, State Senators, in Sacramento, Feb. 3, 1965.

160. Interview With Hon. Lester McMillan, Assemblyman, in Sacramento, Feb. 3, 1965.

161. Interview With Hon. John Holmdahl, State Senator, in Sacramento, Feb. 3, 1965.

162. Interview With Hon. W. Byron Rumford, Assemblyman, in Sacramento, Feb. 4, 1965. Assemblyman Rumford reports the existence of these views among legislators, but he does not share their view.

too ambitious.¹⁶³ In spite of the mandate of the law that empowers the FEPC to prevent unlawful employment practices, and the apparently obligatory duty to investigate whenever "it shall appear . . . that an unlawful employment practice *may have been committed . . .*,"¹⁶⁴ the California legislature and executive have debilitated the law, both by a failure to provide the funds and powers to carry out the policy of the law and by a negative attitude toward the FEPC, which attitude prompts the Agency's timidity.

A discussion of political considerations would not be complete without recognizing that legislators reflect the attitudes of their constituents. Thus, the ultimate source of restraint on a vigorous prosecution of California's fair employment policy may be the attitude of the people of California. Recent popular reaction to fair housing laws indicates that public acceptance of the principle of fair employment cannot be assumed.¹⁶⁵

III. CONCLUSION

Statistics to measure the precise effect the FEPC has had on fair employment are unavailable, and opinions of knowledgeable observers vary widely. The consensus, however, seems to be that the FEPC has been effective and useful to some extent, but not in proportion to the magnitude of the problem. Few contend that the Agency does not have its heart in the struggle for equal employment opportunities. It is staffed by high-caliber people dedicated to their cause; however, some useful changes could be made within the Agency. Among these are the abandonment of the veil of secrecy that surrounds so much of the FEPC's functioning and the launching of a vigorous program designed to bring labor unions into line with the law. But most defects stem from a lack of resources and powers. There is no reason why the most populous state in the Union cannot spend as much as New York, which would provide an approximate quadrupling of present resources.¹⁶⁶ Staff should be increased and upgraded, offices geographically dispersed and located in areas of minority concentration, commissioners designated to serve on a full-time basis, and adequate funds made available for massive increases in the affirmative action program and for expediting the processing of individual complaints. Research funds should be made available to enable the Agency to determine where and why problems exist. The education program should be expanded. The private club exception should be eliminated. If, however, resources adequate to maintain a large-scale program of section 1421 investigations and affirmative actions and to expedite individual complaint handling are still to be denied the Agency, the legislature should make it possible for existing resources to be used more efficiently through broader actions by eliminating the burden of compulsory investigation of individual complaints and by authorizing

163. *Ibid.*

164. CAL. LABOR CODE § 1421. (Emphasis added.)

165. See note 6 *supra*.

166. California is presently spending over \$90 million on the mentally retarded, as opposed to the \$640,000 allocated to combat employment discrimination. CALIFORNIA STUDY COMM'N ON MENTAL RETARDATION, *THE UNDEVELOPED RESOURCE: A PLAN FOR THE MENTALLY RETARDED IN CALIFORNIA* 36 (1965).

the Agency to initiate enforceable actions. Ideally, both increased resources and more flexible powers should be provided. Finally, the hostile attitude in Sacramento toward a vigorous pursuit of the goals set by the legislature itself should be replaced by full support for the FEPC. Only when it is clear that California really means to back up words with action will its minorities have faith in the ultimate attainment of equal employment opportunities through the law.

Richard B. Couser

from Ed Howden
5/07

TESTIMONY OF MR. CLIVE GRAHAM, CHAIRMAN, CALIFORNIA FAIR EMPLOYMENT PRACTICE COMMISSION, BEFORE STATE SENATE FACT FINDING SUBCOMMITTEE ON RACE RELATIONS AND URBAN PROBLEMS -- Final hearing, Room 2040 State Capitol, 20 January 1965

Howden
says he
wrote
this
speech

Mr. Chairman and members of the committee:

The California Fair Employment Practice Commission appreciates this opportunity once again to offer testimony and to discuss with you certain aspects of the complex and urgent problems of race relations in the Nation's largest State. You will recall that over the past 14 months members of our Commission and staff have come before your committee in Sacramento, San Francisco, Oakland, and Los Angeles on questions such as the personnel policies and practices of public agencies and private employers; the operations of FEPC in administering both the FEP Act and the Rumford Fair Housing Act; prevailing forms of discrimination in the housing industry; the implications of Proposition 14 for our communities and the State as a whole; some sources of intergroup fear and prejudice; ways in which anti-minority feelings or attitudes are actually engendered or perpetuated by institutionalized habits of discrimination in sectors of industry or of the community; and the roles of law and of government in helping overcome these anachronistic habits and practices.

For today's final hearing Senator Holmdahl has invited any additional or supplementary testimony we may wish to present, and has asked specifically that I touch on each of the following topics relating to the authority and functions of the FEP Commission: our present activity in relation to housing discrimination; historical review of our work in the employment field; outline of the Commission's role in the Bank of America-CORE dispute; problems of case backlog and time required to process cases; proportions of Commissioners' and staff time devoted to individual complaints and other activities; recommendations as to budget and staff needs; and recommendations relating to increased FEPC authority or jurisdiction, or for changes in methods of operation.

1. FEPC and housing discrimination. Proposition 14, amending Article 1, Section 26 of the State Constitution to give the owner of housing accommodations "absolute discretion" in his decisions as to whom to sell or rent such property, took effect December 7. On January 6, upon the carefully considered advice both of our own staff counsel and the Office of the Attorney General, the Commission adopted the following statement:

STATEMENT BY CALIFORNIA FAIR EMPLOYMENT PRACTICE COMMISSION
WITH RESPECT TO ITS RESPONSIBILITIES UNDER THE RUMFORD ACT
AS MODIFIED BY PROPOSITION 14

The results of the November 3rd balloting on Proposition 14 became effective 7 December 1964 as Article 1, Section 26 of the California Constitution. Many uncertainties remain as to the precise legal consequences of this amendment; these will be resolved in due course by our courts of law. Pending such judicial determinations, the Fair Employment Practice Commission must continue to discharge its duties and conduct its program on the basis of the best available legal advice. This statement seeks to answer, insofar as possible, main questions which are being asked as to the impact of Proposition 14 on FEPC's work in the field of housing discrimination. The following points appear to be free of serious doubt:

Proposition 14 does not repeal the Rumford Act. Nowhere in the text of the new Article 1, Section 26 is there reference to that law or to any other statute. While the new amendment refers to owners of residential property with respect to their decisions on rentals or sales, it does not change the coverage by existing law of individuals, associations, or corporate entities engaged in dealings in homes or rental units of which they are not the owners. Thus real estate brokerage offices, as business establishments, and lenders or financial institutions which service the housing market are still clearly covered by the law. Complaints of unlawful discrimination by such offices, persons, or institutions which are filed by any aggrieved person with FEPC will be investigated and, if the facts warrant, will become the subject of the same conciliation or enforcement processes as existed prior to the adoption of Proposition 14.

Apart from the foregoing enforcement jurisdiction which remains unchanged by the new amendment, the Commission is still authorized to engage in a broad range of educational, advisory, research, conciliatory and affirmative activities in service of the objective of equal housing opportunity. No conflict with the new constitutional section arises, for example, if the Commission (a) investigates complaints of housing discrimination and seeks conciliated adjustment of valid grievances, where the owner is willing to cooperate; (b) puts forth an intensified educational program to eliminate or reduce misunderstandings, fears, and other sources of prejudicial restrictions in housing; (c) creates advisory agencies or conciliation councils to study problems in this field, to foster good will and cooperation, and to make recommendations to the Commission concerning its work; (d) conducts or brings about needed research relating to achievement of an open housing market; and (e) initiates or assists in various types of affirmative action with the housing industry toward the above objective. With regard to such approaches to the acknowledged problem of discrimination in housing, the Commission's legal authority under the Rumford Act stands unchanged by the adoption of Proposition 14.

This interpretation of the effects of Article 1, Section 26 of the State Constitution is based upon the advice of the Commission's staff counsel and that of the Office of the Attorney General, which also serves as counsel to FEPC. This analysis is in basic accord with that of the Legislative Counsel of the State of California. It is consistent also with statements frequently made during the recent campaign by leading proponents of Proposition 14 and spokesmen for the real estate industry.

Admittedly, grave questions of constitutional authority and statutory interpretation remain to be answered. No decisive answers to these questions can be secured at this point, nor can they be considered in the abstract. They may be determined preliminarily and in part by the Commission -- as they will be decided ultimately in the courts -- on the basis of concrete complaints and factual problems which are brought to the Commission's attention.

It must be recognized, however, that even in those areas where the authority of the Commission remains clear, the task of fulfilling the public policy against discrimination in housing, inherently difficult and complex prior to last November 3rd, assumed far weightier dimensions with the adoption of Proposition 14. The Commission is left with important statutory responsibilities which it must endeavor to carry out in the face of the new declaration of absolute right, enshrined in our State Constitution, which sanctions and thus inevitably tends to encourage those acts of racial and religious discrimination decried by both proponents and opponents of Proposition 14. It is impossible to predict whether the Commission and other forces will be able, in the face of this forbidding handicap, to bring about significant progress against pervasive and stubborn patterns of housing discrimination.

The Commission will, in any event, vigorously and wholeheartedly endeavor to fulfill its educational and affirmative responsibilities in support of equal opportunity in housing.

You will note that the second paragraph of this statement refers to FEPC's remaining enforcement jurisdiction under the Rumford Act, and that in the third paragraph we have outlined main kinds of educational, conciliatory, advisory, and affirmative responsibilities which stand unimpaired by the passage of Proposition 14. I might add that not only do these responsibilities remain: their full, vigorous, and effective discharge has now assumed the greatest importance and urgency.

Let us be quite clear. Approval of the new constitutional amendment did not reverse our well established State public policy against the evil of discrimination in housing on grounds of race, religion, or ancestry. It did not strip the State of the obligation and the power to do many things to encourage and promote equality of opportunity in the housing market -- an

objective frequently and articulately embraced by the principal sponsors of Proposition 14 throughout and since the recent campaign over that measure. We all recall that it was "forced" nondiscrimination -- and only that -- against which the realtors' fight was waged. The evil of racism in housing was publicly acknowledged by virtually all parties to last year's massive ballot battle over this issue, and the desire to eradicate it by educational and affirmative means was almost universally proclaimed.

This, then, was the setting within which a majority of voters were persuaded to approve the realtor-sponsored amendment. Under all the circumstances, it seems to me that only a determined bigot would now contend that the November vote was a mandate to the State to renounce altogether its continuing responsibility to do everything possible, through persuasion, conciliation, research, and education, to foster nondiscrimination in housing. It would be the height of folly and bad faith for the State now to shirk or reject its plain duty along these lines -- a duty not only to her millions of minority group citizens but to all who seek to achieve and bequeath to their children good, decent, and tranquil communities throughout California.

FEPC is now proceeding in the light of the foregoing understanding of the responsibilities resting still upon State government in this matter. We have, for example, participated in beginning discussions with housing industry representatives and with concerned local community groups and human relations commissions, among others, concerning affirmative and cooperative programs on behalf of equal housing opportunity. We are preparing new educational programs. We are considering the continuing establishment of advisory or conciliation councils, especially in areas lacking adequate citizen or official human relations resources. We hope to be able to stimulate and assist in essential research. And as complaints come to us we shall continue to seek, where warranted, quiet, conciliated correction of inequities. With regard to owners now at liberty to discriminate, this conciliation process will, of course, depend upon their willingness to talk with us; we anticipate that many will voluntarily cooperate. With regard to realty brokerage offices, lending institutions, and State or local units of government involved in housing, the Rumford Act's full jurisdiction, from investigation through conciliation to court enforcement if necessary, remains in effect.

Despite our Commission's serious reservations, expressed above, as to the adequacy of such approaches to this admittedly large and grievous problem,

there is hope that some meaningful progress will result. Together, we must now nurture, not destroy, that hope. To do otherwise would be to aggravate despair and court rising desperation.

2. Brief historical review of Commission's work regarding employment discrimination. Our basic work under the Fair Employment Practice Act may be described under two main headings: compliance and education. There is no sharp line of demarcation between these two; every compliance action carries educational value, and the ultimate objective of educational programs is willing compliance with the spirit, as well as letter, of the law.

Compliance activities are perhaps most often thought of in terms of the aggrieved individual bringing his complaint to FEPC for investigation, and, where warranted, adjustment through conciliation or enforcement. This form of compliance activity has in fact comprised the greater part of the Commission's workload over the slightly more than five years of its history to date. The FEP Act took effect on the 18th of September, 1959. As of the end of 1964, just under 3,800 (3,794) individual complaints had been filed with the Commission, of which 3,230 had been processed and closed, and 563 were pending. About one-third of the closed complaint cases resulted directly in corrective action to eliminate discriminatory practices, the remainder being dismissed for insufficient or no evidence of unlawful discrimination. Of the 919 individual cases in which the assigned commissioner determined that discrimination had occurred, all but three were adjusted through conciliation endeavors. The remaining three were the only ones which reached the stage of public hearing before the Commission as a whole (not including the commissioner assigned to the particular case). No public hearing in an employment case has been held since January 1962.

Although the results have rarely been subject to close measurement, it is extremely important to recognize that the constructive consequences of FEPC's handling of an individual complaint typically go well beyond its specific disposition. The employer, union, or employment agency against whom the complaint has been brought is often moved to examine for himself, in consultation with the FEPC representative, the hiring, upgrading, or assignment practices of his organization as these affect minority applicants or workers. Not infrequently he finds substantial inequities or differences of treatment based on race, religion, or ancestry, whether stemming from a definite intent to discriminate on the part of some of his personnel, or from less conscious habit, custom, or inertia, or from factors operating outside his organization, e.g. restrictive recruitment

channels. In any event, this affirmative review and appraisal of the situation often leads to most salutary results for all concerned, including the removal of unseen barriers to utilization of available manpower at their highest skills without regard to race or other arbitrary criteria.

I want to emphasize that this beneficial, affirmative action often takes place whether or not grounds are found to uphold the individual complaint which took us in the first place to the door of the business or union organization. We suspect that something of this sort occurs sometimes after we have concluded a case, even where the respondent employer has not manifested to us any real interest in holding up the mirror to his personnel practices. In any event, it is clear that the individual complaint case carries an indirect significance and effect well beyond its particular merits and specific disposition. The so-called policing function of our agency is minimal in comparison to the creative and cooperative compliance with the law's central spirit which we are often able to awaken and encourage. This is one of the main ways in which Governor Brown, Assemblyman Rumford, and other far-sighted authors and supporters of this legislation hoped and anticipated that it would work.

A second main type of direct compliance case consists of an investigation initiated by the Commission pursuant to Section 1421 of the Act. Such investigations may be undertaken when it appears to the Commission that a violation has occurred, even though no individual complainant has come forward. The Commission is empowered to seek correction of such a violation only through endeavors at conciliation, not, if conciliation should fail, through hearing and enforcement as with the individual complaint. It is possible, however, that the Attorney General would choose to file a complaint with the Commission concerning a violation not otherwise resolvable.

These general investigations are usually far more extensive and time-consuming than an individual complaint, but the effect may be correspondingly greater in terms of broadened job opportunities. Typically, such investigations have covered large firms, or the firms and unions controlling a given occupation in an important area, or major employers within a certain industry. The Commission has exercised this power only upon a showing of substantial evidence indicating a probable violation, and rarely on its own initiative; almost always this has come to the Commission as a request from an organization, agency, or individual.

Mainly because of their magnitude relative to the Commission's staff capability, only 103 such investigations had been undertaken by the end of 1964. Of these, 52 had been completed and 51 were pending at that time. Some of those pending were well along, but others, to the Commission's sharp regret, were obliged to await availability of staff. The Commission regards this kind of investigation as one of its most meaningful instruments for encouraging more thoroughgoing compliance. Here again, as with the individual complaint, the emphasis is not upon seeking to establish guilt with a view to punishment, but to achieve a meeting of the minds and to effectuate lasting improvements in employment practices with reference to those traditionally subject to discrimination.

A third major form of FEPC compliance undertaking is designated as an "affirmative action." In essence, this is a variation on the Section 1421 investigation, differing on two main points: (a) the effort does not stem from an allegation or supposition that an actual violation of the FEP law has occurred, and (as follows) (b) it is entirely a voluntary matter on the part of the employer or other organization concerned as to whether he wishes to enter into conference and consultation with the FEPC representative for the purpose of generally reviewing and strengthening, if indicated, his utilization of minority manpower. Either the employer is willing or no working relationship comes into being.

The affirmative action approach to major employers, industries, and unions has been recognized over the past several years by principal state fair employment agencies and by the President's Committee on Equal Employment Opportunity as a highly productive means of widening job opportunities. Over the past 18 months our FEP Commission has launched some 39 such efforts, of which 37 were in progress as of December 31. Voluntarily participating in these efforts are large industrial employers (some meeting with us in groups), utilities, banks, firms in trade and commerce, major educational institutions, government agencies, and labor organizations. There has been no reason to publicize these endeavors, but one which is of very large scale -- with the Bank of America -- may be referred to since it was initiated by the bank itself through an open letter to FEPC. The resulting memorandum of understanding between FEPC and the bank has received widespread and complimentary attention as a landmark agreement in this field. The committee has already seen our rather extensive first report on the bank's progress under this agreement; the second report is now nearing

completion; others will follow at four-month intervals. We continue meanwhile, to review the bank's equal employment program and to consult and assist in its implementation throughout this firm's far-flung organization. The relationship is not merely amicable, but creative and productive in terms of the shared goal of doing everything possible, consistent with maintaining customary standards of operating efficiency, to enlarge the job opportunities of minority group Californians and to induce upcoming youth from such groups to stay with their schooling and to aspire and prepare to enter the mainstream of our job market.

Another vital feature of the affirmative action approach is that the Commission can address itself, on a planned basis, to main problem areas and to employment situations likely to yield good results -- rather than to rely solely on the haphazard incidence of individual complaints. If we mean seriously to expedite the pace of inclusion of minority group Californians in our economy's normal employment processes, we cannot leave to chance the selection of the principal sources of employment with which we should be dealing. The choice is between an accidental, piecemeal process and a rational, broad-gauged program. Note, too, that if we are successful over the long run with well-conceived affirmative actions and Section 1421 investigations, it is reasonable to anticipate a gradual decline in the number or complexity of individual complaint cases. The complaint comes, in its nature, after the fact of alleged discrimination; the affirmative action builds employment situations which become less and less likely to give rise to such allegations. The old system of curing is now complemented by promising means of prevention.

This is not to suggest that we can now dispense with the techniques essential to curing. The moral and legal duties do -- and should -- remain to investigate and seek adjustment of the individual complaint. Redress, where justified, is indispensable. But a modern fair employment agency must have the capacity to work at the problem in both ways at once.

So our Commission's normal handling of complaints continues apace and requires the great bulk of staff and commissioner time. An overview of the individual complaint statistical trends will give some view of the dimensions of this phase of our work. During FEPC's first 16 months (1959-60) the average number of individual complaints received per month was about 35. In the next two calendar years (1961-62) this rose to a monthly average of about 63. During the last two years (1963-64) the average rose to around 74 per month.

According to our best information, throughout the California FEPC's history to date, our employment caseload has been heavier than that of any other state's fair employment agency.

Education and information comprise the other main part of the Commission's program. This aspect of our work is many-faceted, as there are many publics to which it is necessary to interpret the meaning of the law, e.g. private and governmental employers, placement agencies, unions, communications media, various minority groups, teachers, counselors, and the "general public." In addition, we endeavor to contribute our share to the tremendously important, ongoing task of motivating minority group young people to aspire to working careers commensurate with their potentialities and inclinations. On earlier occasions your committee has reviewed some of our publications directed toward this latter end, such as Success Story and Si--Se Puede. We have produced useful materials also in the form of exhibits, film strips, newsletters, and special reports. We have been extremely active in our speaker service and in all manner of informal and formal conferences with industry, union, and community groups.

Underlying the various specific missions within our educational program is the general charge which the statute places upon our Commission to promote good will and understanding among all segments of the State's population and to do all in our power to "minimize or eliminate discrimination" because of race, religion, or ancestry.

During most of our years to date we had but a single staff member in the capacity of education officer. Although all members of the Commission and professional staff bear a share of the speaker service and conference load, the Commission's educational programming has been inexorably limited by the lack of a larger staff devoted entirely to this part of the work. Following passage of the Rumford Fair Housing Act in 1963, an assistant education officer was authorized, and our activity along these lines was stepped up accordingly. We still fall considerably short of a minimum desirable level of educational program, however, in my view.

I am aware that this "brief" review of our work on employment discrimination has become too long, so I shall close it without going into certain additional elements of program which otherwise you might find most interesting.

3. FEPC and the Bank of America-CORE dispute. Since our executive officer, Mr. Edward Howden, went into this subject with you at your San Francisco hearing last month, and since you have already seen our rather full First Report on this affirmative action, perhaps I can give it the barest summary in a few lines, and the committee may pursue the subject in more detail if desired.

FEPC entered this situation when we responded to the announcement by the Bank of America that it would commence submitting personnel statistics to our agency, classified according to racial or ethnic identity, rather than to accede to a CORE demand for such statistics. Since this would probably place the Commission in the position of evaluating the bank employment practices, our response, while indicating that we would be pleased to receive the proffered figures, pointed out that we would need information in sufficient depth to permit meaningful review. We said also that we would like to confer with bank officials.

After a period during which the bank and CORE met several times, FEPC and the bank commenced discussions to ascertain whether a mutually satisfactory cooperative working relationship could be reached. The eventual "Memorandum of Understanding" resulted from a number of very thorough conferences.

The three crucial elements in the FEPC-bank understanding provided for (a) the bank's personnel statistics to be submitted periodically to FEPC; (b) a continuing joint consultative relationship to deal with any activities of the bank relevant to its newly emphasized equal employment policy; and (c) periodic independent public reporting by FEPC concerning the bank's progress in implementing this policy.

FEPC's role was not that of mediator between the bank and CORE (although for a time two officers of the agency were, as individuals, part of a mediation team designated by the Governor). The bank and CORE remained at impasse for a considerable period after the bank-FEPC agreement was reached. Finally, after, CORE spokesmen had appeared on two occasions before the full Commission, and after there had been clarification of certain features of the agreement, the CORE picketing came to an end.

The affirmative action understanding between FEPC and the bank was probably seen by most people knowledgeable in these matters as a substantial and meaningful agreement. CORE has not indicated whether it shares that view. Public comment in editorials and otherwise was generally commendatory.

4. Case backlog and average time required to process cases. At the end of December, 1962, 433 cases were pending; the comparable year-end figures for 1963 and 1964, respectively, were 763 and 614. The last figure included 51 general investigations under Section 1421. Also pending at the end of 1964 were 63 housing cases.

These most recent figures indicate that as of last December 31 the average pending caseload of each of our field consultants was 28 individual employment complaints, about 2.6 general investigations, almost 2 affirmative actions, and 3.2 housing complaints. If we were to assume that not more than about 10 individual employment complaints at any given time would constitute a maximum "normal" workload -- or, perhaps, 5 such complaints and 2 general investigations -- it is evident that our field staff is currently about 400 percent overloaded or backlogged. And just now we happen to be in better condition than usual in this regard!

The case backlog piled up on each of our seven commissioners is approximately comparable to that of field staff, even after the norm for non-backlogged cases in process is adjusted upward to take into account the part-time, review role of the commissioner versus the heavy investigative duties of the consultant staff.

Following are the approximate average times, for the several different kinds of cases, which elapse from the date of filing until closure by the assigned commissioner. Please keep in mind that in some cases the commissioner's closure is not "final action" -- an appeal may ensue, the case may be reopened, or other steps may be taken.

(a) Individual employment complaints: about 4 months at present. In earlier years the average elapsed time was 5 months or higher.

(b) Section 1421 investigations: about 11 months, based on our entire experience to date.

(c) Housing complaints: about 2 months.

Not enough affirmative actions have yet been completed to provide a basis for a valid average lapsed time. The time demands of these undertakings appear, however, to be comparable to those of Section 1421 investigations.

It will be recognized that lapsed time between formal opening and formal closure of a case is by no means equivalent to the actual man-days expended on

the case. One of the reasons, for example, that lapsed time on an employment complaint case is 4 months rather than 2 or 3 is that the staff consultant or commissioner is obliged to spread his attention, energies, and time over a number of cases during the same period.

5. Proportions of Commissioner and staff time spent on individual complaint cases. Since commissioners have policy-making functions which field staff does not have, a smaller proportion of their overall time is devoted to case matters. The commissioners, it will be recalled, serve on a part-time basis; individual members usually devote between 7 and 10 days per month to FEPC work. We estimate that 30 to 40 percent of this time is occupied in commission meetings, related policy and review responsibilities, and information-education activities. Of the remaining 60 to 70 percent of their time, the great preponderance is devoted to their duties in connection with individual complaint cases. Overall, therefore, we estimate that perhaps 60 percent of a commissioner's time is occupied with individual complaint cases, and about 10 percent with general Section 1421 investigations and affirmative actions.

As for field staff and their supervisors, approximately 90 percent of their time overall is occupied in processing individual complaint cases, the remainder being divided among general investigations, affirmative actions, information-education work, training, and miscellaneous administrative matters.

6. Recommendations as to increased FEPC authority or jurisdiction. Generally, we find that our needs for budget and staff augmentation (the point to follow) are more urgent than for increased powers or jurisdiction. There are, of course, various points on which almost any statute could be refined and improved. One such recommendation which our Commission is making is for a narrowing of the exemptions from the FEP Act of certain classes of employers as set forth in the second paragraph of Section 1413(d). The point here is that at present the Act does not cover a sweeping range of nonprofit institutions and organizations, and that there is no necessary or rational basis for this exemption except in certain position categories in religious institutions.

Your committee might wish also to consider whether the FEP Act should be amended so that complaints of violation of the State's existing law against age discrimination in employment could be received and processed by our agency. Similarly, employment discrimination on the basis of sex could become the subject of an amendment to the FEP Act. It appears that a number of states with fair employment legislation will be considering such an amendment in their current

legislative sessions, since the new Federal fair employment law contains such a provision and since consistency between Federal and State statutes in this matter is highly desirable.

In a number of major states, the official fair employment agency has among its responsibilities the handling of complaints of discrimination in hotels, restaurants, and other places of public accommodation. Under present California law, the aggrieved person in such a situation may seek redress only through litigation. It would perhaps be desirable also to provide the option of seeking administrative and conciliatory assistance in resolving such problems.

7. Recommendations regarding budgetary and staff matters. Our Commission believes that its effectiveness would be greatly strengthened if there were a substantial increase in budgetary provision, first for increased field consultant staff, and secondly, for specialist staff in the areas of information-education, community relations, and research. Augmented field staff (with appropriate provision for supervision) would enable us to function far more significantly in the realm of affirmative action. As indicated earlier in this testimony, it is now well established that the affirmative action approach, in addition to the necessary handling of individual complaints, is not only effective but a most efficient, economical allocation of a fair employment budget and staff. Finally, there is an urgent parallel need to strengthen our capacity for educational work, both in employment and housing. At least minimal community relations and research services are essential -- and long overdue in this aspect of our work.

Again, we appreciate the opportunities your committee has afforded for representatives of our Commission to contribute to the extremely important study in which you are engaged.

FEPC

FAIR PRACTICES NEWS

For equal opportunity in employment and housing



FAIR EMPLOYMENT PRACTICE COMMISSION

P.O. Box 603, San Francisco 94101

322 West First Street, Los Angeles 90012

No. 18

May-June 1964

from Ed Howard

Bank Agreement--Jobs For Minorities

On June 1 the California FEPC and the Bank of America, one of the State's largest employers, signed an agreement for a "dynamic, comprehensive program of affirmative opportunity" aimed at increasing the number of minority individuals at all levels of the Bank's work force.

The program announced by FEPC Chairman Carmen H. Warschaw and the Bank's board chairman, Jesse W. Tapp, has received wide attention and favorable comment from public officials, business and community leaders, and news media throughout the state. It involves submission of personnel data to be evaluated by FEPC, continuing review by FEPC of the Bank's equal employment policy and practices, joint consultation as to means of improving the program, and periodic public reporting by FEPC.

(Text of the Memorandum of Understanding is reprinted in this newsletter.)

The Bank of America opened correspondence with FEPC in mid-March when it rejected demands by the Congress of Racial Equality for such an agreement. Following a series of meetings with CORE, the Bank offered to provide FEPC--rather than CORE--with statistical information about its personnel. Mrs. Warschaw replied that FEPC would accept the responsibility upon agreement as to what data would be meaningful in evaluating the Bank's practices.

A series of intensive FEPC-Bank discussions followed, resulting in the June 1 pact. The Bank's first ethnic survey of its more than 28,000 employees will be made as of July 31, and FEPC's public report will be issued several weeks thereafter. It is the Commission's policy not to publish unevaluated personnel statistics, but the report will contain whatever data is

necessary to support its conclusions.

Later surveys of Bank employment will be made at four-month intervals. Meanwhile, FEPC staff has been assigned to conduct spot checks of the Bank's administrative departments and more than 850 branches and to consult with William R. Layfield, human relations coordinator, and other Bank officials concerning all phases of implementation of the affirmative opportunity program.

Mrs. Warschaw, in Los Angeles, and Commissioner Louis Garcia, in San Francisco, are in charge of this FEPC "affirmative action" with the Bank.



THIS NEW FEPC photo-mural exhibit, "Equal Opportunity--Employment and Housing," has been seen by thousands of Californians since it first went on display earlier this year.

FEPC Urges Recruiting For San Diego City Jobs

A positive policy of recruiting, hiring and upgrading Negro, Mexican American and other minority employees in the City of San Diego's civil service system was urged by FEP Commissioner Dwight R. Zook in a report to the City Council on June 23.

San Diego's civil service procedures were studied by FEPC at the city's request. Although they were found to be not inherently discriminatory, Commissioner Zook said the City had failed to project a strong image of equal opportunity in the minority community, resulting in a small number of applicants and an uneven distribution of minority employees in various departments.

Negroes and Mexican Americans hold City jobs in approximate proportion to their numbers in the total population, Mr. Zook found. But most of them at the time of the survey were in menial, unskilled and service positions.

Only 2.2 percent of the Negroes employed by the City were in clerical positions; 0.7 percent held professional or technical jobs; 69.1 percent worked in labor or trades and 6.8 percent in custodial or guarding positions.

Of Mexican American employees, 4.7 percent were in clerical positions; 0.8 percent held professional or technical jobs; 58.3 percent worked in labor or trades and 1.6 percent did custodial or guarding work.

In discussion with members of the City Council, Commissioner Zook said that many qualified Negroes and Mexican Americans fail to apply for upper-level civil service jobs "because they don't think they have a chance.

"It is not enough for you to say you have done all you can to eliminate discrimination by keeping your doors open," he continued. "You must go out into the community and promote recruitment to overcome years of deprivation of minorities."

The investigation, under Section 1421 of the FEP Act, was the first to be requested by a California city. A limited number of copies of the report, "City of San Diego Employment," are available on request to FEPC, Box 603, San Francisco 1.

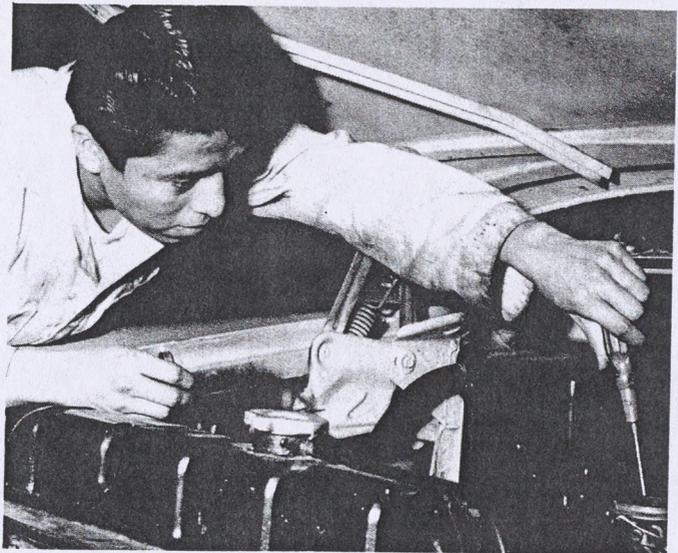


Photo by O.C.C., Laney Campus

Harold Bagody, American Indian student in the auto mechanics class at Laney Campus, Oakland City College.

Proposition 14 Questioned By State Supreme Court

Ultimate constitutionality of the California Real Estate Association's initiative constitutional amendment, to appear on California's November ballot as Proposition 14, was questioned in a decision of the State Supreme Court on June 3.

In denying a petition to block the amendment, which would nullify existing fair housing law and prohibit future passage of such measures, the Court said:

"Although there are grave questions whether the proposed amendment to the California Constitution is valid under the Fourteenth Amendment to the United States Constitution, we are of the view that it would be more appropriate to pass on those questions after the election, should the proposed amendment be adopted, than to interfere with the power of the people to propose laws and amendments to the Constitution, and to adopt or reject the same at the polls."

NOW AVAILABLE: "Fair Housing--What the Law Does," a new flyer covering essential provisions of the Rumford Fair Housing Law, plus detailed questions and answers; "Opening the Door," a folder describing nine case histories from FEPC housing files. Write FEPC, Box 603, San Francisco 1, Calif.

Oakland School Attitudes Criticized

The Oakland Unified School District has hired Negro teachers principally to fill vacancies in predominantly Negro schools; few teachers of Spanish surname are employed; promotion is slower for Negro teachers than for others; and predominantly Negro schools seem to provide less opportunity for learning and career preparation than do schools which are racially mixed.

These and other findings were presented by FEP Commissioner C. L. Dellums to members of the school district board at a conference in Oakland on June 16. The comprehensive report, with seven main recommendations, was the first to be published by FEPC.

Main emphases of the long investigation, during which staff consultant Hugh Taylor observed conditions and conferred with faculty at every one of Oakland's 88 public schools, were on the district's role as an employer and on its attitude toward minority group students and their preparation for employment careers.

In commenting on placement policies of the school, the report said "Negro teachers have heretofore been assigned to schools with a large number of Negroes in the student body and were not considered on an equal basis for schools without a significant number of Negroes in the student body. An inescapable conclusion, it seems, would be that Negro teachers are hired principally to fill vacancies in Negro schools."

Survey of Teachers

Of the 1,158 teachers in Oakland elementary schools during 1962-63, 164 were Negro, 10 had Spanish surnames, and 54 were Oriental. At that level, 78.1 percent of the Negro teachers were at predominantly Negro schools, 1.2 percent were at predominantly Caucasian schools, and 20.7 percent were at racially mixed schools.

In the junior high schools, with 643 teachers, 105 were Negro, 17 had Spanish surnames, and 12 were Oriental. Sixty percent of the Negro teachers were at predominantly Negro schools, 2.8 percent at Caucasian schools, 37 percent at mixed schools.

Senior high schools had 524 teachers, of whom 44 were Negro, eight had Spanish

surnames, and 11 were Oriental. Forty-one percent of the Negro high school teachers were at predominantly Negro schools, 22.7 percent were at Caucasian schools, and 36.4 percent were at racially mixed schools.

Attitudes of school personnel toward Negro students varied with the composition of the student body. In predominantly Negro schools, concern for the children and their educational achievement was often subordinated to an emphasis on discipline. In some schools, administrators and counselors had prejudged the potential abilities of minority individuals, and failed to encourage students to seek higher education.

Principal Recommendations

Commissioner Dellums's principal recommendations to the Oakland school board, pending further discussions and review, were:

1. Dismissal, if necessary, of any principal, administrative head, counselor or teacher whose educational approach to minority-group students is limited by prejudice as to their possible achievement;
2. An intensive program for all certificated personnel of inservice training in human relations;
3. Hiring of teachers on merit, without regard to their race, creed, or ancestry; and assignment of minority-group teachers to all schools, avoiding any concentration in particular areas;
4. Equal promotional opportunities for all teachers, without regard to race, creed, or ancestry;
5. Use of the list of substitute teachers as a recruitment source;
6. A conscientious effort to employ Spanish-surname teachers or others with a knowledge of conversational Spanish;
7. Closer surveillance by the Board of hiring practices with respect to classified personnel.

A limited number of copies of the "Report on Oakland Schools" are available on request to FEPC, P. O. Box 603, San Francisco 1.

Fair Housing Cases Show No Move-Outs By Whites

When Negroes have moved into a new neighborhood as the result of FEPC conciliation efforts, white residents have not moved out, an analysis of housing cases through June has shown.

The FEPC received 135 complaints of alleged discrimination in housing between September 20, 1963, when the Rumford Act became effective, and June 30. Ninety-two of these were decided, and 43 were still under investigation or conciliation at the end of June. Of all completed cases, 61.4 resulted in corrective action after conference and conciliation.

The majority of all cases involved refusal to show property or to rent or sell to Negroes. In closed cases, FEPC conciliation resulted in 42 complainants being permitted to inspect the dwellings they were initially refused. Fourteen of the 42 moved in, while the remainder found that they preferred to take other accommodations.

None of the complaints were filed against the owners of single-family, owner-occupied homes that were privately financed. The majority involved complaints against firms or individuals in the business of housing, such as managers, agents or real estate brokers, and most concerned apartments or other multiple dwellings.

CALIFORNIANS AGAINST PROPOSITION 14 is the new name of Californians for Fair Housing, the campaign group opposing the realtor's initiative amendment to the State Constitution. Northern California headquarters has moved to 48 Second St., San Francisco.

Advisory Groups Meet

Carrying forward plans made in an organizational meeting with Governor Edmund G. Brown last April, the new Women's Advisory Council to FEPC met in two regional meetings during June. Mrs. Ruth W. Avakian, Northern California Co-chairman, and Mrs. Jonas Salk, Southern California Co-chairman, presided at the meetings, held in Berkeley and Los Angeles, respectively.

Formation of the first FEP local advisory group was also completed when Commissioner Elton Brombacher announced appointment of Horace Marshall of San Mateo as chairman of the 16-member San Mateo Area Advisory Committee.

Employment Cases

Since passage of the FEP Act in 1959 through June 1964, the received number of complaints alleging discrimination in employment numbered 3534. Of these, 2712 have reached final disposition, and of this number about one-third have resulted in corrective action. Additionally, the Commission has undertaken 101 investigations under its Section 1421 authority, and initiated 26 affirmative action programs.

FAIR EMPLOYMENT PRACTICE COMMISSION

State of California, Edmund G. Brown, Governor
Department of Industrial Relations, Ernest B. Webb, Director

Carmen H. Warsaw, *Chairman*

Elton Brombacher, C. L. Dellums, John Anson Ford,
Louis Garcia, Clive Graham, Dwight R. Zook, *Commissioners*
Edward Howden, *Division Chief*

FEPC

FAIR PRACTICES NEWS

DIVISION OF FAIR EMPLOYMENT PRACTICES
455 Golden Gate Ave.
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Memo of Understanding

Full Text of Agreement Between California State Fair Employment Practice Commission and Bank of America National Trust and Savings Association, June 1, 1964

The Bank of America recognizes that a sincere and dedicated attempt to improve the economic opportunities of minority groups should continue to be part of its civic responsibility, and that there is legitimate reason for the public to be informed as to the Bank's progress in discharging this responsibility. In order to maximize its contribution to overcome the cancerous moral evil of inequities based on race, religion, or ancestry, the Bank believes that more than passive compliance with the letter of the fair employment law is essential--that a dynamic, comprehensive program of affirmative opportunity must be sustained on a high-priority basis. The Bank is deeply committed to such a program.

To these ends the Bank has expressed its willingness to confer with minority group organizations as to progress being made and to entertain their suggestions for improved practices, has accepted a number of such suggestions, has sought the counsel of the State Fair Employment Practice Commission (FEPC), and has offered to submit periodically to FEPC vital information reflecting the status and accomplishment of the Bank's affirmative opportunity program.

Recent discussions between the Bank and the Fair Employment Practice Commission have led to this Understanding, embracing three principal dimensions of the cooperative working relationship agreed to: (1) submission of significant personnel data to FEPC,

(2) continuing review by FEPC of the Bank's affirmative policy implementation and joint consultation concerning its effectiveness, and (3) periodic public reporting by FEPC on pertinent aspects of the personnel data and management action in service of the foregoing objectives.

1. Personnel Data To Be Submitted To FEPC Every Four Months

a. In addition to total employment figures, racial or ethnic groups according to which reports of work force components will be submitted are: Negro, Oriental, other nonwhite, and Spanish surname.

b. By job classes.

Class I. Normal in-hire or entrance positions generally designated as clerical. Typical positions are proof machine operator, credit checker, typist, PBX operator, statement clerk, safe deposit attendant, and teller. The teller position will be separately analyzed as a subgroup within the total. Approximately 50 percent of all Bank personnel fall within Class I.

Class II. Included here are positions immediately senior to those in Class I, e.g. first-line supervisor, senior clerical, and note teller. This class comprises about 29 percent of all personnel. In addition to the total, two sub-groups will be distinguished according to levels of responsibility.

Class III. The next higher 15 percent. Typical positions include branch operations officer, lending officer, small branch manager, administration specialist, department head.

Class IV. The highest group, comprising about 6 percent. Positions included are managers of intermediate to large branches, operations officers of major branches, heads of large administrative departments, administration specialists, supervisors of groups of branches, and senior management.

c. By location. State totals, plus each of 10 geographic areas exclusive of administration staff, and administration staff according to each of the three major locations in the San Francisco and Los Angeles areas, respectively. ERMA centers and district trust offices, although part of administration staff, will be reported for the areas in which they are situated, since their entrance staff is employed in the local market. In addition, the Bank will provide information relating to racial and ethnic distribution of personnel within the two major metropolitan areas.

d. By job opportunities.

(1) For the first reporting period, the percentages of total hires represented by each of the component minority groups as follows: San Francisco and Los Angeles central hiring offices, Sacramento, and San Diego. It is understood that virtually all hires take place in Class I, except those which occur through the several training programs. The desirability of continuing this report with respect to Sacramento and San Diego will be reappraised by the Bank and FEPC after evaluation by FEPC of the first report.

(2) For occasional, selected reporting periods:

Comment By Major Newspapers

In editorial comment on the FEPC-Bank of America agreement the San Francisco Chronicle said, "other banks and probably other industries will use this as a guide...for opening up minority group employment." The Los Angeles Times said, "the precedent set by the Bank of America could conceivably influence the state's entire business community." The Los Angeles Herald-Examiner said the agreement should have "a favorable and far-reaching influence in the solution of similar problems." The San Francisco News-Call Bulletin cited the agreement as "major recognition that extraordinary measures are required in today's civil rights climate."

numbers of applicants and of hires, by racial and ethnic breakdowns, for selected cities or other areas.

(3) For the formal training programs: numbers of entrants employed for these programs and successful completions, by racial and ethnic breakdowns.

e. Applicant tallies. Tallies of applicants at the point of first interview, by racial and ethnic breakdowns will be carried out from time to time, as requested by FEPC, for limited periods, e.g. one week. Initially this will be done only at the central hiring offices in San Francisco and Los Angeles, later perhaps in other locations. It is expressly understood that no such studies will entail any form of specification or designation of individual applicants by race or ancestry.

f. If further data or additional means of spot-checking or otherwise verifying certain types of information later appear to FEPC to be necessary or desirable, the Bank will cooperate in facilitating detailed examination of such data or augmenting its reporting.

g. Apart from such statistical information, the Bank will keep FEPC advised as to any significant activities or developments relating to recruiting, training, upgrading, or other personnel processes which might have bearing on the general subject of this Understanding.

2. Policy Implementation: Continuing Review And Consultation

While the personnel data to be reported as described above are essential to the advancement of equal employment opportunity, such data alone will not provide an adequate basis for appraisal and strengthening of the Bank's overall employment practices. There will also be thoroughgoing study of all the policies and processes bearing upon recruitment, selection, training, and promotion of personnel, from which may emerge, in joint consultation, ideas and recommendations for increasingly effective practices. FEPC's examination of the Bank's practices affecting personnel will be as comprehensive as deemed necessary.

The spirit in which this work proceeds will be that of a cooperative, affirmative endeavor, seeking full realization of the basic purpose of the Bank's policy on equal employment opportunity and of the intent of President Peterson's strong declarations on this subject.

In general, the main features of an affirmative program of this nature are set forth in the FEPC brochure, Promoting Equal Job Opportunity: A Guide for Employers. Features which, it is anticipated, will be applicable and useful in the Bank's program--to be supplemented by others resulting from experience, from consultation with FEPC, or from suggestions by concerned minority group organizations--are the following:

Policy. The Bank will continue to make every effort to ensure that its statement of equal employment policy as it affects hiring, promotions, training, and assignment carries the full force and effect of a major policy promulgated by the highest authority in senior management, and is carried out at all levels.

Recruiting. The Bank utilizes the services of the minority specialists in the various California State Employment Service offices throughout the State.

The Bank will expand its efforts to make its policies and personnel needs known to churches, school principals, teachers, counselors, and to other organizations, agencies and individuals which may provide communication or access to prospective minority applicants. Minority employees will be encouraged to refer qualified friends and relatives.

The Bank will participate with school districts in distributive education programs potentially leading to Bank employment and will provide speakers or other assistance to "Career Day" and similar activities.

Hiring. The FEPC employment poster is displayed at all Bank installations. Personnel, medical, and security procedures will be continuously reviewed to eliminate any possible discrimination, actual, inadvertent, or apparent.

Tests and standards have

been and will be reviewed to make sure that they are valid for the positions, uniformly applied, and free of inadvertent bias. Special efforts will be made to ensure that personnel involved in hiring will be thoroughly aware of the problems of minority applicants.

Training. Special efforts will be made to recruit minority persons for training programs which lead to higher-skilled, supervisory, and executive responsibilities. Minority employees will be encouraged, along with others, to participate in American Institute of Banking courses, and will be counseled regarding methods of personal and career advancement.

Transfer and promotion. Promotional channels and decision-making will be continuously reviewed to make certain that minority employees have equal opportunity and are fully aware that advancement will take place on merit alone.

Advertising. Advertising of employment vacancies will be carried in minority news media among others and will emphasize the Bank's equal opportunity policy. Minority group persons will be among those portrayed in the Bank's general advertising in mass media.

3. Public Reporting

FEPC has the right and responsibility to determine what information should be released in the public interest and will accordingly prepare and issue occasional public reports summarizing and critically appraising main features of the Bank's equal opportunity policies and practices. Normally included, it is anticipated, will be discussion of areas of strength or weakness in the Bank's practices, with illustrative instances of progress or problems; appraisal of activities such as recruiting for entrance positions and for training programs; appropriate statistics and other supporting data and suggestions or recommendations which FEPC may wish to offer. It is FEPC policy not to disclose unevaluated personnel pattern information. Any views which the Bank may have as to the validity of FEPC's observations in a given report will receive serious consideration prior to its release.

6/26/07

He will get me Phila
850-page employment
report 1958 } call him
off

Questions for Edward Howden

What does he see as the importance of the CCU? How did it relate to NAACP?

What was his involvement with the struggle for FEP Law? Who drafted the final version? Where did they get the 1421 idea? What things didn't get in?

When/how first met CL?

When/how did he become FEPC director (title?)

How did he regard the mission of the FEPC?

What was the daily work like

Worked with CL directly?

What was it like to work with CL? What was their relationship?

What was CL's work style?

How would he describe CL's personality?

How would he describe/assess CL's leadership?

How would he describe CL's politics?

What were major accomplishments/significance of FEPC? Major weakness/problems?

How would he assess CL's achievements/significance?

Fondest memories of CL? Anecdotes?

John more, John more

934-2693
925-552255

Note: Testimony of Mrs. Clara
Graham, was written by Howard