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U.S. DEPARTMENT OF LABOR EMPLOYMENT AND TRAINING ADMINISTRATION Bureau of Apprenticeship and Training Washington, D.C. 20210	Distribution: BAT-1 BAT-6 BAT-9	Subject: Code: 650 Dual Lists, 29 CFR 30
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PURPOSE: To convey a recent SOL opinion on certain special circumstances wherein dual lists and selections therefrom /sic/ are permissible

STATEMENT OF OPINION: by Associate Solicitor James D. Henry

"As we understand it, the question of the use of dual lists arises in the following way. When a sponsor announces that apprenticeship opportunities are available, a large number of applications are received. But, according to some sponsors, even where vigorous affirmative action efforts have been made to recruit women, because of the attractiveness of the skilled trades as an occupation the number of applications from men far exceeds that from women. In addition, many sponsors say that women do not score well on written tests and other selection criteria, and as a practical matter, it is very difficult for sponsors to meet the goal for women established by 29 CFR 30.4(f). These sponsors have inquired whether it is permissible to establish separate or "dual" eligibility lists for women and men and to select apprentices from each list in a ratio which would assure that the goal for women is achieved. Another technique would be to "skip over" more highly ranked men on a unitary list to reach women for purposes of meeting the goal.

Our opinion is that these methods of meeting the goal for women are permissible in the circumstances described below. Title VII of the Civil Rights Act of 1964 makes it unlawful employment practice for an apprenticeship program to discriminate against any individual because of race, color, religion, sex or national origin in admission to an apprenticeship program. (Civil Rights Act of 1964 as amended, Section 703(d), 42 U.S.C. 2000-e2 (d).) In addition, the commitments contained in the affirmative action program of any person or organization operating an apprenticeship program shall not be used to discriminate against any qualified applicant or apprentice on the basis of race, color, religion, national origin, or sex. (29 CFR 30.18.) The maintenance of "dual eligibility lists" is permissible, in our opinion, where they are used to remedy the present effects of past discrimination, or to remedy the adverse impact of unvalidated

selection procedures. Griggs v. Duke Power and Electric Co., 401 U.S. 424 (1971). Barnett v. International Harvester 11, EPD ¶10,846 (W.D. Tenn. 1976). In the Barnet case, the court found that evidence of past discrimination in apprenticeship at the International Harvester plant justified the use of dual lists. In the preamble to the 1978 amendments to 29 CFR Part 30, the Department of Labor found that there has been widespread discrimination against women in the construction industry. Hiring and promotion on the basis of numerical ratios instituted to remedy the effects of past discrimination have consistently been sanctioned by the courts. (Castro v. Beecher, 459 F. 2d 725 (1st Cir. 1972). Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974).

In addition, separate hiring, promotion or referral pools are permissible where unvalidated tests which have an adverse impact on protected groups are being used. Thus, for example, the United States Employment Service has instituted a policy, in TESPL 2764, requiring that where an employment agency is using tests which have not been validated, applicants must be referred in the same ratio as their membership in the pool of applicants at each local office. This procedure protects against any adverse impact of the unvalidated tests.

Finally, the use of dual lists would be permissible where a sponsor is taking action pursuant to the Equal Employment Opportunity Commission's Guidelines of affirmative action (29 CFR Par 1608). The Guidelines provide that an employer may take action which recognizes the race, sex or national origin of applicants or employees where a reasonable self analysis shows that employment practices are having an adverse impact on a particular group's employment opportunities, leave uncorrected the effects of prior discrimination, or result in disparate treatment (29 CFR 1608.4).

ACTION

The opinion given above covers specific and special circumstances in addition to those instances wherein separate lists and/or non-sequential selections are prescribed by a Court of Law, by consent agreement, or by an administrative authority having the force of law. The operative phrases for the specific and special circumstances upon which the SOL opinion rests should be carefully noted.