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Ethridge v. Rhodes
(S.D. Ohio, May 17, 1967)

Owen Fiss referred to you the attached opinion and order in Ethridge v. Rhodes, decided May 17, 1967, and suggested that we consider participation should an appeal be taken. Although time for appeal has expired and no appeal has been taken, the decision and certain subsequent actions by the Legislature and Governor of Ohio merit comment.

A. Ethridge v. Rhodes - This was a class action brought in the District Court for the Southern District of Ohio by two Negro tradesmen in Columbus, Ohio against the Governor of Ohio, the Director of the Ohio Department of Public Works, and the Treasurer of Ohio. The complaint alleged 1) that plaintiffs are qualified journeymen in the electrical and heavy equipment operation trades respectively; 2) that, because of race, they have been denied membership in and job referral by Local 683, IBEW 1/ and Local 18 IUOE, respectively; 3) that they have been unable to obtain or retain commercial employment in their respective trades inasmuch as the relevant construction contractors in the area have entered into exclusive hiring and union security arrangements with those unions; and 4) that defendants are about to enter into contracts for the construction of the Medical Basic Sciences Building on the campus of Ohio State University, at Columbus. The prayer of the complaint was for an injunction against entering into such contracts on the ground that such contracts

1/ On April 14, 1967, we brought suit against Local 683, IBEW in the Southern District of Ohio under section 707 of Title VII.

cc: Records
Chrono
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would deprive them and members of their class of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

Following an evidentiary hearing the court found 1) that defendants are aware that qualified Negroes will not be able to get jobs in a majority of the crafts which will work on the public construction project in question because the unions which must be used as labor sources for contractors in these crafts engage in a pattern of racial discrimination as to admission and referral; 2) that bids from contractors were received by the State of Ohio for the project in question, and after review, contracts were sent to at least four contractors for their signatures. While these contracts have been signed and returned by the contractors and have not been signed by state officials, a declaration of intention to sign them has been made by state officials; 3) that at least one of the contractors who signed such a contract refused to submit a non-discrimination assurance from its hiring source in compliance with defendant Governor's executive order dated June 15, 1966, as amended December 30, 1966. This is an assurance by the union that a) admission to its full referral facilities, both as to apprentices and journeymen, is open on equal terms to all qualified persons without discrimination based on race. . . , and b) it "will have in its apprentice group and refer for employment without discrimination both whites and non-whites (including Negroes) or in the alternative [it] shall be deemed to have waived any right to be a recruitment source with respect to every twentieth employee" hired for work under the construction contract; 4) and that upon discovering that no assurances were submitted in the category of heating, ventilating and air conditioning, defendants agreed to waive the assurances requirement for the contract involving this category.

On the basis of these facts, the court held that by entering into the contracts defendants would engage in state action in violation of the equal protection clause. The court, citing Barton v. Wilmington Parking Authority, 365 U.S. 715 (1961), and Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 959 (C.A. 4, 1963), stated (slip op. pp. 7-8):

The officials of the State of Ohio. . . have displayed a shocking lack of concern over the realities of this whole situation and the inevitable discrimination that will result from entering into and performing under the proposed contracts with the proposed contractors. . . . Defendants' failure to assure qualified minority workers equal access to job opportunities on public construction projects by acquiescing in the discriminatory practices of contractors and craft unions clearly falls within the proscription of the Fourteenth Amendment. . . . In a venture such as this one, where the state as a governmental entity becomes a joint participant with private persons, the restrictions of the Fourteenth Amendment apply not only to the actions of the state but also to the acts of its private partners--the contractors--and the state is bound to affirmatively insure compliance with the constitutional provisions.

The court summarily rejected defendants' argument that it would be sufficient for them to invoke the sanctions of the performance bond if and when discrimination under the contract occurred 2/, stating (p. 7) "[T]his solution is totally inadequate for the elimination of the pattern of discrimination that has been allowed to exist."

2/ This was apparently a reference to the provisions of sections 153.60 of the Ohio Revised Code. Section 153.59 provides that in every state construction contract, the contractor shall agree that in the hiring of employees for work under the contract, no contractor, subcontractor, or any person acting on his behalf shall discriminate on the basis of race. Section 153.60 then provides that the contract shall provide, for breach of this nondiscrimination clause, a forfeiture of \$25 for each person discriminated against, and cancellation of the contract for a subsequent violation of this clause.

The court entered a permanent injunction which enjoined defendants from 1) entering into the specific contracts submitted and signed by the contractors; 2) entering into contracts for the construction project in question with any person who is bound by any agreement or otherwise a) to secure his labor force exclusively or primarily from any union which refers employees in a racially discriminatory manner, or b) which requires, as a condition of employment, that employees hired by such person become members of the union and membership in such union is on a racially discriminatory basis; and 3) entering into contracts for the construction of the project in question with any person who does not obligate himself or is not legally eligible and actually prepared to secure employees from sources that will reasonably insure equal job opportunities on a non-racial basis.

B. Legislation of May 31, 1967 - Subsequent to the decision in Ethridge v. Rhodes and on May 31, 1967, the Ohio State Legislature enacted an "emergency measure" made necessary because "efforts to eliminate discrimination have proved inadequate [and] execution of major public works contracts is being delayed." This legislation (sections 153.581, .591) which is attached, declares void and unenforceable any exclusive hiring hall contract insofar as employment under any public works contract is concerned, unless the union has in effect procedures for referring employees on a non-racial basis and unless the union "includes in its apprentice and journeyman membership or otherwise has available for job referral without discrimination, qualified employees, both whites and non-whites (including Negroes)."

This legislation, therefore, frees contractors in performance of public work contracts from any obligation to hire employees exclusively through the hiring hall of a union that cannot refer, without discrimination, both white and non-white employees.

C. Executive Order of June 5, 1967 - Close upon the heels of the court decision and the legislative enactment and on June 5, 1967, Governor Rhodes issued an executive order to insure that "performance of state contracts for construction. . . of public . . . works continue to completion without interruption. . . arising from misunderstandings or disputes relating to racial makeup of work forces." This order (attached), which rescinded the executive order referred to above, relieved all contractors from public works contracts executed pursuant to that prior order upon an agreement to perform the commitments set forth in the new order. These commitments, which the order requires of all public works contractors without exception are, inter alia, that he and his subcontractors will 1) act effectively to insure that qualified applicants for employment are selected on a non-racial basis; 2) in requesting workers from a hiring source, ask for qualified workers, white and non-white; 3) use as hiring sources only entities in which access to referral facilities is on a non-racial basis; 4) in conformity with law, will exercise the employer's right to be the sole judge of the qualifications of persons employed; 5) acknowledge the new legislation as governing any hiring hall contract used to man any work under the contract sought by the bidder's bid and where appropriate will avail themselves of its provisions.

D. Conclusion - Besides the obvious significance of the legislation and executive order in providing construction contractors in Ohio generally with a realistic opportunity to hire qualified Negro tradesmen, for public construction projects, the specific contractors and state officials affected by the injunction in Ethridge v. Rhodes case, as a result of these developments, can now enter into new contracts and proceed with the performance of the public works project there involved in full compliance with the order entered and constitutional requirements set forth in that case.

STATE OF OHIO
Executive Department

OFFICE OF THE GOVERNOR

Columbus

EXECUTIVE ORDER OF JUNE 5, 1967

WHEREAS, by enactment of Section 4112.02 and related sections of the Ohio Revised Code, the Ohio General Assembly has made it an unlawful discriminatory practice for any employer, labor organization, or joint labor-management committee controlling apprentice-training programs to discriminate with respect to equal employment opportunity because of race, color, religion, national origin or ancestry; and

WHEREAS, Section 153.59 of the Ohio Revised Code provides that in every state contract for the construction, alteration, or repair of any public building or public work, the contractor shall agree that in the hiring of employees for performance of work under said contract or any subcontract he will not, by reason of race, creed or color, discriminate against an applicant for employment or employee hired for performance of work under said contract; and

WHEREAS, Section 153.591 of the Ohio Revised Code frees contractors in performance of public works contracts from any obligation to hire employees exclusively through the hiring hall of any labor organization that cannot refer without discrimination qualified employees both white and non-white (including Negroes); and

WHEREAS, the above-mentioned laws, together with the forfeiture and cancellation penalties prescribed in Section 153.60 of the Ohio Revised Code, demonstrate a legislative purpose that public contracts shall be performed only by contractors who comply with Ohio laws prohibiting discrimination and guaranteeing equal opportunity in hiring and employment; and

WHEREAS, federal law providing grants-in-aid for construction within the State of Ohio prohibits discrimination in hiring and employment under contracts related to such grants and provides penalties for discrimination, which can include forfeiture; and

WHEREAS, the public health, safety and welfare require that performance of state contracts for construction, alteration or repair of public buildings and public works continue to completion without interruption or work stoppages arising from misunderstandings or disputes relating to racial makeup of work forces,

NOW, THEREFORE, I, JAMES A. RHODES, Governor of Ohio, hereby administratively determine that effective implementation of the mandate of the Ohio General Assembly requires that the State of Ohio, in contracts for construction, repair, or alteration of any public building or public work, shall consider only bids from bidders who affirmatively demonstrate preparation for and readiness to comply with Sections 153.59, 153.591, 4112.02, and related sections of the Ohio Revised Code;

AND I DO HEREBY ORDER that in receiving and analyzing bids, all contracting authorities under my jurisdiction concerned with construction, repair, or alteration of any public building or public work shall deem not responsive the bid of any bidder who does not file with his bid pledges and

commitments as follows (in the language set forth in Appendix A appended hereto) relating to his performance of the contract sought by his bid:

- (1) He and his subcontractors will act effectively to insure that qualified applicants are selected for employment, and that employees are accorded equal treatment during employment, without regard to race, color, religion, national origin or ancestry.
- (2) He and his subcontractors will post conspicuously such announcements with respect to nondiscriminatory hiring as are required by Section 4112.07 of the Ohio Revised Code and by federal law and regulations.
- (3) In requesting workers from a hiring source, he and his subcontractors will ask for qualified workers, white and non-white (including Negroes).
- (4) He and his subcontractors will use as hiring sources only entities, including labor unions, in which access to referral facilities, whether as apprentices or journeymen, is open on equal terms to all qualified persons without discrimination based on race, color, religion, national origin or ancestry.
- (5) He and his subcontractors, in conformity with law, will exercise the employer's right to be the sole judge of the qualifications of persons employed.
- (6) He and his subcontractors acknowledge Section 153.591 of the Ohio Revised Code as governing any hiring hall contract used to man any work under the contract sought by the bidder's bid and where appropriate will avail themselves of its provisions.
- (7) He and his subcontractors, before hiring outside a hiring hall contract under the circumstances contemplated by Section 153.591 of the Ohio Revised Code, will first notify the labor organization involved that such hiring is deemed necessary unless, within thirty days after such notice, the labor organization makes such referral or referrals as in the judgment of the employer eliminates the need for hiring outside the contract.
- (8) He and his subcontractors will accept such compliance reviews by the Ohio Civil Rights Commission as are requested by the Governor, or by the Department Director having responsibility for administration in behalf of the State of Ohio of the contract derived from the bidder's bid, and will forward to the Commission all information requested;

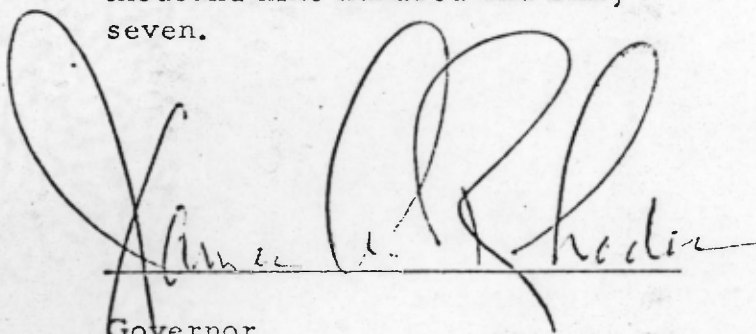
AND I DO FURTHER ORDER that contracting authorities under my jurisdiction as aforesaid, upon finding breach of any pledges or commitments listed in this Executive Order as prerequisite to a responsive bid, shall, after giving thirty days' notice of the intention so to do, suspend in whole or in part, as may be appropriate, any contract entered into as aforesaid, for not to exceed thirty days during which the contractor may cure his breach, failing in which the contracting authority shall declare the contract canceled, unless the Governor for good cause shown shall order an additional suspension for a stated period;

AND I DO FURTHER ORDER that any contractor bound by a public works contract executed pursuant to my Executive Order of June 15, 1966, or to said Order as amended December 30, 1966, upon execution of an addendum to his contract in the form set forth in Appendix B, shall be relieved of his obligation to perform according to the pledges and commitments set forth in said Executive Order dated June 15, 1966, or in said Executive Order as amended December 30, 1966, in consideration of his obligating himself and his subcontractors to accept and to perform the pledges and commitments contained in this Executive Order.

AND I DO FURTHER ORDER that effective 12:00 p.m. June 4, 1967, my Executive Order of June 15, 1966, as amended December 30, 1966, is rescinded.



IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed, at Columbus, this 5th day of June, in the year of our Lord, one thousand nine hundred and sixty-seven.


Governor

ATTEST



Secretary of State

APPENDIX A

The bidder, with knowledge of the provisions of the June 5, 1967, Executive Order of the Governor of Ohio relating to equal employment opportunity, by executing this proposal makes the pledges and commitments enumerated in said order as pre-requisites to a responsive bid.

APPENDIX B

The undersigned Contractor, for himself and his Subcontractors, in consideration of the release of Contractor, by the State of Ohio, from Contractor's obligation to perform certain pledges and commitments required by the Executive Order of the Governor dated June 15, 1966, or by said Executive Order as amended December 30, 1966, relating to the contract identified below, hereby accepts and promises to perform the pledges and commitments set forth in the Executive Order of the Governor of Ohio issued June 5, 1967.

Re Contract
Identified as: _____

(Contractor's Name)

By: _____

STATE OF OHIO

Date of Addendum: _____

By: _____

AN ACT

To declare void as against public policy any hiring hall contract with a labor organization that is unable thereunder to make job referrals for public works contracts free of racial discrimination and for such purpose to enact sections 153.581 and 153.591 of the Revised Code, and to declare an emergency.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 153.581 and 153.591 of the Revised Code be enacted to read as follows:

Sec. 153.581. As used in sections 153.581 and 153.591 of the Revised Code:

(A) "Public works contract" means any contract awarded by a contracting authority for the construction, engineering, alteration, or repair of any public building, public highway, or other public work.

(B) "Contracting authority" means the state, any township, county, municipal corporation, school board, or other governmental entity empowered to award a public works contract.

(C) "Contractor" means any person, partnership, corporation, or association that has been awarded a public works contract.

Sec. 153.591. Any provision of a hiring hall contract or agreement which obligates a contractor to hire, if available, only such employees as are referred to him by a labor organization shall be void as against public policy and unenforceable with respect to employment under any public works contract unless at the date of execution of such hiring hall contract or agreement, or within thirty days thereafter, such labor organization has in effect procedures for referring qualified employees for hire without regard to race, color, religion, national origin, or ancestry and unless such labor organization includes in its apprentice and journeymen membership, or otherwise has available for job referral without discrimination, qualified employees, both whites and non-whites (including Negroes).

SECTION 2. This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety. The reason for this necessity is that it is the policy of the state to maximize equal employment opportunities in the performance of public works contracts; efforts to eliminate discrimination have proved inadequate, execution of major public works contracts is being delayed, and hiring hall contracts affecting some building crafts contrary to the policy stated in proposed section 153.591 of the Revised Code are currently in negotiation

for renewal and others of like nature will be in negotiation during May, 1967. Therefore, this act shall go into immediate effect.

Charles K. Keene
Speaker of the House of Representatives.

Robert B. Brown
President of the Senate.

Passed May 31, 1967

Approved _____, 1967

James A. R. [unclear]
Governor.