

Committee on Staff Planning Report to the Faculty on Affirmative Action Policy

Background

What is the Taxman case? What is its relevance to the development of a viable affirmative action policy?

Beginning in 1975, the Board of Education of Piscataway, NJ developed an affirmative action policy applicable to all employment decisions. Its stated purposes were to ensure equal employment opportunity to all prospective employees regardless of race, gender or national origin and to prevent discrimination in employment on the basis of the same factors. It was intended to function as a tie breaker: When candidates for hiring, promotion or retention were equal in qualification, any candidate belonging to a protected class would be advantaged.

In early 1989, the Board set out to reduce by one the teaching staff of the Business Department of Piscataway High School. This was interpreted as requiring the layoff of either Sharon Taxman or Debra Williams, the latter being the only minority member of the relevant department. Since these individuals seemed equal in all other respects, the Board invoked the affirmative action policy, retaining Williams as a way of maintaining the cultural diversity of the teaching staff.

This action prompted a charge of employment discrimination by Taxman, eventually resulting in a suit by Taxman against the Board that was argued before the United States Court of Appeals, Third Circuit, in late 1995 and early 1996. It was decided on August 8, 1996 in favor of Taxman. A planned appeal to the United States Supreme Court was canceled by a recent, widely reported, out-of-court settlement. Hence, the decision in the Taxman case seems to represent an important statement on legally acceptable and unacceptable approaches to affirmative action policy, perhaps especially to institutions such as Bucknell, that are within the jurisdiction of the Third Circuit court.

The answers to subsequent questions posed in this report should clarify some of the reasoning and many of the requirements advanced in the Taxman opinion. To begin, it may be worth noting that the framers of the Taxman verdict relied primarily upon three earlier sources. The first is Title VII of the Civil Rights Act of 1964, which seeks to (a) end discrimination based on race, color, religion, sex or national origin, and (b) remedy the segregation and under-representation that past discrimination has caused. The second is a case decided by the Supreme Court in 1979 (*United Steelworkers v. Weber*), in which a nonminority worker disputed a plan that reserved half of the openings in an industrial training program for blacks until the representation of black craft-workers at the plant became comparable to that in the local work force. This case appears to have played a critical role in the Taxman verdict by defining 2 criteria that, in the circuit court's opinion, must be met by any viable affirmative action plan. The first of these requires that any action under such a plan be justified by a "manifest imbalance" reflecting the underrepresentation of members of some protected class in "traditionally segregated job categories." The second requires that these actions not "unnecessarily trammel" the rights of nonminority candidates or employees. The third of the sources that are liberally quoted in the Taxman opinion is a case decided by the Supreme Court in 1987 (*Johnson v. Transportation Agency, Santa Clara County*) that affirmed the legality of an affirmative action plan developed by the Santa Clara County Transit District Board of Supervisors.

Among the factors that seem to have entered into this decision are: (a) the fact that the plan aimed at the attainment, not maintenance, of a balanced work force; (b) clear evidence for a manifest imbalance between the proportion of minorities at different levels within the agency and in the relevant pool of prospective workers; and, (c) the fact that the plan authorized the consideration of affirmative action concerns without unnecessarily trammeling the rights of nonminority candidates or employees. In connection with the last point, the Taxman opinion notes with approval the use of gender (the relevant factor in the Johnson case) as a "plus" factor, a criterion that advantaged the affirmative action candidate while being only one of several variables considered in the employment decision.

General questions on affirmative action

Is affirmative action policy the only policy that affects diversity?

By definition, an affirmative action policy advantages the members of a protected (under-represented) class. Accordingly, such a policy increases diversity, even though an increase in diversity cannot be its goal. Rather, a viable affirmative action policy must seek to eliminate the effects of past or present discrimination on the members of a protected class. As noted above, however, an affirmative action policy achieves these goals through a form of discrimination. Presumably, it is precisely this tension that has led courts to limit affirmative action policies with respect to their methods, goals, and the circumstances under which may be applied. On the last of these, the Taxman opinion is very clear in prohibiting the use of affirmative action policies to increase diversity, in the absence of evidence of present or past discrimination.

Does this prohibition prevent Bucknell from setting and seeking diversity goals? Here, it is important to realize that diversity in hiring also is promoted by efforts to (a) bring positions to the attention of the broadest possible audience and (b) ensure that searches are conducted without discrimination against the members of protected classes. As pursued at Bucknell, such attempts to ensure equal employment opportunity (EEO) include at least three specific elements. First, the Affirmative Action Officer (AAO) requires that positions be advertised in publications likely to be consulted by all prospective candidates. In addition, search committees are encouraged, though not required, to send letters inviting applications from (i) advanced students in leading graduate programs in the field, (ii) graduating students at historically black colleges and universities, and (iii) individual female or minority graduate students listed in directories available from the AAO. Second, search committees, in consultation with the AAO, are required to provide national data describing the proportions of women and members of other protected classes among recent PhD recipients in the relevant field. In addition, committees are expected to provide similar data describing the pool of candidates applying for the advertised position. These breakdowns are examined by both the AAO and relevant Dean. When corresponding figures differ substantially (e.g., the proportion of women in the local pool is far lower than that in the national pool), either the AAO or Dean may delay the search while an explanation is sought. In an extreme case (in which the disparity is thought to reflect some aspect of the advertisement or its distribution), a search can be suspended or terminated until appropriate corrective action is taken. Third, the AAO or Dean also can suspend or terminate a search if it appears that discrimination has occurred at any stage in the evaluation of candidates.

Under what circumstances is an affirmative action policy legal?

As indicated by the decision in the Johnson case and the discussion of this verdict in the Taxman opinion, it seems clear that affirmative action plans can be justified. However, there are several criteria that, based on the Taxman opinion, must be satisfied for their justification. First, a viable plan must be justified by evidence for a manifest imbalance, itself reflecting the underrepresentation of members of a protected class in one or more traditionally segregated job category. Second, it must have a remedial purpose, aimed at the eradication of the consequences of earlier employment decisions that are themselves consistent with a pattern of present or past discrimination by the employer in question. Third, it must be a temporary measure, directed at the attainment, not maintenance, of a balanced work force. Fourth, it cannot unnecessarily trammel the rights of nonaffirmative action employees or candidates. For instance, a viable plan cannot create an "absolute bar to the advancement" of such individuals. Fifth, an acceptable plan must incorporate clear objectives, as well as criteria that can be used to assess progress, guide specific employment decisions, and assure the consistency of any preferences granted with the plan's goals. Finally, consistent with the fourth of these points, the Taxman opinion implies that an affirmative action plan could not be used to justify an employment decision leading to the dismissal of an existing nonminority employee. Beyond this, however, there seems to be little or no connection between these criteria and the nature of the relevant employment decision (to hire, promote or layoff). In particular, there is no suggestion that these requirements apply only to decisions with the potential to terminate employment.

Are there other characteristics that might be shared by any viable affirmative action policy?

We believe that the appropriate unit in the analysis and implementation of affirmative action procedures is the department (e.g., not a larger unit such as the division, faculty or university). This focus seems justified on the basis of (a) significant differences in the composition of the applicant pools potentially available in different disciplines, and (b) the fact that most of the critical decisions in faculty hiring are made at the departmental level. While there may be an argument for considering a unit smaller than a department (a subdiscipline), we view this as an impractical strategy that often would deny the national data required to judge the adequacy of an applicant pool and the appropriateness of affirmative action procedures.

We also believe that any distinction between affirmative action and nonaffirmative action searches (or situations in which affirmative action procedures are and are not justified) ultimately will hinge on statistical evidence for the existence of a substantial imbalance in the compositions of a department and pool. This seems consistent, first, with the successful use of such evidence to justify earlier affirmative action plans (Johnson and Weber cases). Second, there is the simple fact that the data required for such judgments are readily and consistently available. Third, there may be an important advantage in the use of data that can reveal trends consistent with possible discrimination without either alleging or proving intentional discrimination. At the same time, one can imagine other statistical or nonstatistical evidence that could be advanced to support or refute a pattern of past discrimination by a program or department. Such evidence can be considered.

Current affirmative action policy at Bucknell

What are the critical elements in the affirmative action policy recently adopted by the university?

The current policy begins by distinguishing between nonaffirmative action and affirmative action searches- Within the latter category, it also distinguishes between searches that are affirmative action with respect to gender as opposed to ethnicity (relevant protected class includes citizens and permanent residents in the following groups: African Americans, Asian Americans, Native Americans, Spanish Americans, Pacific Islanders). To make these distinctions, the proportions of women and ethnic minorities in the hiring department or program are compared with those in each of the relevant national pool (of recent recipients of the relevant terminal degree) and local pool (of applicants for the position). Only if the proportion of protected class members in the department is substantially lower than those in both pools will an affirmative action search (with respect to gender, ethnicity or both) be declared.

An affirmative action search differs from a nonaffirmative action search in two major respects. First, search committees conducting affirmative action searches are permitted, though not required, to confer small advantages ("plus factors" in the Taxman opinion) upon candidates from the relevant protected class(es). Second, the procedures used in an affirmative action search are reviewed by the Committee on Equal Employment Opportunity (EEOC) before an offer is issued, regardless of the affirmative action status of the favored candidate.

How does this policy differ from its predecessor?

In the recent past, all searches were treated as we now treat affirmative action searches, though procedural reviews by the EEOC were reserved for those resulting in recommendations to hire nonaffirmative action candidates. Past policy also collapsed women and ethnic minorities into a single category of affirmative action candidate. Because of its separate consideration of data on the two protected classes, the current policy makes it possible to conduct an affirmative action search with respect to one protected category even if the data would not permit such a search with respect to the other.

Could this policy be improved? If so, how?

The brief description provided above probably does not do justice to the current policy. Nevertheless, it is clear that considerable confusion surrounds several aspects of this policy, suggesting a need for greater clarity in its description and justification. In addition, we believe that the current policy can be improved by several changes. First, we think that the comparisons most relevant to the identification of affirmative action searches are those involving the compositions of the department and national pool: we do not think that such searches require justification by the pair of comparisons incorporated in the current procedures. Second, we think that the criteria that trigger affirmative action searches can be defined much more clearly and consistently than in the past with reference to simple concepts in statistics or probability theory. Third, we think that much greater clarity and consistency can be achieved on the issue of when, and how often, a "plus factor" is to be applied during an affirmative action search. While there may be limits on the extent of clarity or consistency that can be achieved in the definition of the plus factor, we also think that it is possible to achieve some reduction in the confusion attending this issue. Each of these areas of possible improvement is explored at greater length below.

One or two triggers

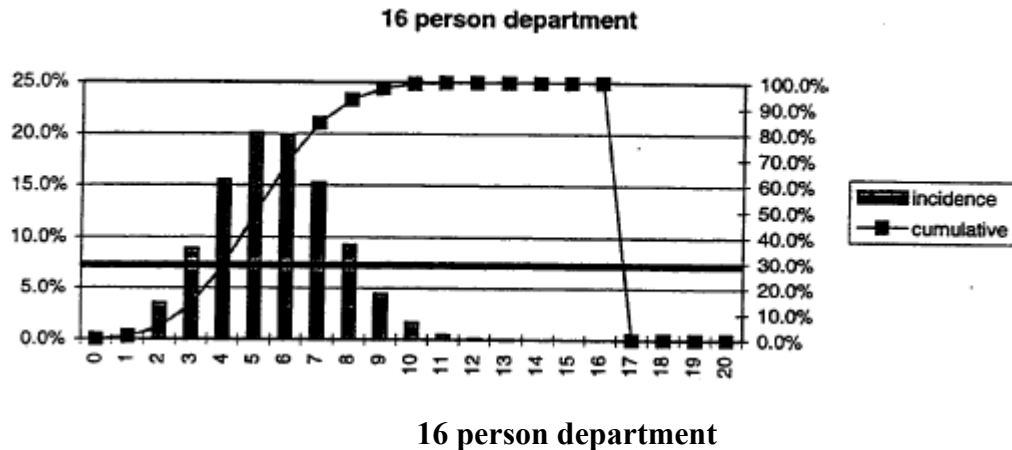
The current process incorporates a two-stage test, beginning with a comparison of the incidences of protected class members in the department and national pool, and then turning to the comparison of their incidences in the department and actual pool. In reviewing the general issue of such comparisons as ways of recognizing employment imbalances, we have come to think that this two-stage test is illogical. The first stage (including national statistics, perhaps even adjusted to reflect the pool of degree recipients seeking academic employment) seems logical, in that it provides a reasonable way of judging whether a given departmental composition is likely or unlikely as the result of an unbiased series of appointments. However, we believe that the composition of the applicant pool is not as relevant to this question and should not excuse a department from the use of affirmative action procedures in an effort to bring departmental composition more in line with the national statistics. Therefore, it seems reasonable to drop the second stage: we should identify a search as an affirmative action search on the basis of national statistics alone, and should authorize the application of a plus factor to members of the relevant protected class(es) in instances where there are protected class candidates in the applicant pool, whether or not they represent a significant percentage of that pool.

Toward a statistical definition of "manifest imbalance"

It seems highly likely that our affirmative action policy will continue to distinguish between affirmative action and nonaffirmative action searches. As indicated above, the test that we suggest for the identification of departments with a history of possible discrimination involves determining whether there is a significant discrepancy between the current composition of a hiring department and the national availability of female or minority PhDs in the discipline. How can we use these two pieces of statistical information to determine whether a given instance (i.e., a specific difference in representation between department and discipline) constitutes a significant discrepancy?

We propose a specification of this criterion that follows logically from analysis of the likelihood that a given department composition results from an "unbiased" series of draws from a population of a certain composition. In a world in which 50% of PhDs are female, how likely is it that a department of 10 will have 4 women? In a population in which 30% of PhDs are ethnic minorities, how likely is it that a department of 8 will have 2 minority faculty members? These are questions that have simple answers within probability theory. It seems reasonable, then, to adopt the following specification: A department's current composition displays a history of possible discrimination if there is a probability of less than 30% that a series of "unbiased" draws from the relevant background population would yield a department with a proportion of members of the relevant protected class that is no higher than the current level.

To illustrate, the following graph represents the calculated distribution of department compositions for a department of 16 and a background frequency of protected class candidates of 35%. The graph shows that 50% of the departments have a composition of 5/16 or less (<31%); 70% have a composition of 6/16 or less (<38%); 14% have a composition of 3/16 or less (<19%); and so forth. In this model the "threshold composition" would be 3 protected class members: if the department composition was 3/16 or less, then the search would be declared an affirmative action search.



One of the advantages of this approach is its flexibility. For instance, it can be modified by pushing upward or downward the likelihood criterion that constitutes the zone of "moderately unlikely" outcomes. We have chosen 30% as the salient point in the belief that this reflects a reasonable compromise between more stringent standards of scientific proof and more liberal standards that might fall short of documenting the "manifest imbalance" emphasized in the relevant legal cases. Second, this approach can be embodied in a simple spreadsheet model, which generates a threshold proportion on the basis of department size, department composition, and discipline composition. The table below summarizes the required computations for a range of department sizes and discipline frequencies.

This approach seems appropriate for several reasons. First, it establishes an objective way of specifying the relationship between the statistics of the current situation and the possibility of prior discrimination: if a given outcome is unlikely to have resulted from a series of unbiased choices, this amounts to the conclusion that it is possible that the current composition derives from some form of discrimination. Bias and discrimination are thus logically related in this approach. Second, the criterion is simple to apply and requires no subjective judgment about how large a discrepancy between current composition and background frequency is needed to trigger the affirmative action criterion. In fact, the approach shows that there is no fixed relationship between the two percentages; rather, department size affects the threshold value.

In connection with the last point, it should be noted that that this approach entails that for small departments and rare protected classes, even a zero-presence composition is not sufficient to trigger an affirmative action search. This is because, in these circumstances, the zero-presence composition is more than 30% likely to emerge through an unbiased selection process. These are the cells containing "n/a" in the table (e.g., for a department of 6 and a protected class frequency of 15%, 37% of departments will have no protected class member.)

Threshold # of protected class triggering AA search based on 30.0% likelihood									
size	10%	15%	20%	25%	30%	35%	40%	45%	50%
5	n/a	n/a	n/a	0	0	0	0	1	1
6	n/a	n/a	0	0	0	0	1	1	1
7	n/a	n/a	0	0	0	1	1	1	2
8	n/a	0	0	0	1	1	1	2	2
9	n/a	0	0	0	1	1	2	2	3
10	n/a	0	0	1	1	2	2	3	3
11	n/a	0	0	1	1	2	3	3	4
12	0	0	1	1	2	2	3	3	4
13	0	0	1	1	2	3	3	4	5
14	0	0	1	2	2	3	4	4	5
15	0	0	1	2	3	3	4	5	5
16	0	1	1	2	3	4	4	5	6
17	0	1	1	2	3	4	5	6	6
18	0	1	2	2	3	4	5	6	7
19	0	1	2	3	4	5	5	6	7
20	0	1	2	3	4	5	6	7	8

Defining the plus factor

We envision the plus factor as affecting just two stages in the hiring process. First, it should be applied in the determination of an interview list. At this point, the plus factor might move affirmative action candidates up within or across clusters of otherwise similarly qualified applicants. While it is impossible to set a definite limit on the extent of such adjustments, we envision them as small, comparable in magnitude to the margin of error that most would recognize as intrinsic to the necessarily subjective process of comparing candidates. We do not view plus factors as having the power to eliminate the requirement for qualifications consistent with those specified in the relevant job description. Second, the plus factor also might be applied near the end of a search, as the University decides how to direct an offer of employment. At this point, it would serve as a tie breaker, tipping the balance toward one of two (or more) otherwise very similarly qualified candidates. Even here, it should be understood that the plus factor cannot operate in isolation, but acts as one of several variables considered in the employment decision, as required in the Taxman opinion.

Would such a policy meet the requirements and implications of the Taxman case?

An earlier section detailed many of the characteristics that, based on the Taxman opinion, should be exhibited by a viable affirmative action policy. Briefly, such plans must be temporary measures, aimed at the remediation of possible past discrimination that is supported by evidence for the existence of a manifest imbalance in the current work force. They must be appropriate in structure, with criteria and methods that are clear and consistent with their goals. They also must be appropriate in scope, conferring advantages that reduce discrimination and its effects, while not unnecessarily trammeling the rights of nonaffirmative action individuals.

We believe that the affirmative action policy that we propose would meet these requirements. First, the designation of an affirmative action search would be based on statistical evidence for the underrepresentation of a protected category of applicant (women or ethnic minority) in the relevant job category at Bucknell. The policy would remain in effect as long as such disparities continued to exist. Second, the proposed policy incorporates guidelines for the identification of affirmative action searches and to determine when affirmative action candidates should be advantaged within such a search. We also have tried to clarify the magnitude of the advantage (plus factor) that a minority candidate should receive at each of the relevant points in an affirmative action search. In the process, we have tried to balance the needs for clarity and flexibility. Like many of the decisions made in the hiring process, plus factors inevitably will vary across searches using different methods for the comparison of candidates. Third, the rights

of nonaffirmative action candidates are protected by (a) the restriction of plus factors to affirmative action searches, and (b) the fact that these factors are small and constitute just a fraction of the information considered in an employment decision.

Could it be implemented consistently?

We believe that the policy that we propose could be applied with reasonable consistency across departments and time. Consistency of application should be substantially enhanced by the changes noted above, which increase the clarity and objectivity of the criteria that would trigger and guide affirmative action searches.

How would it affect faculty diversity?

Recent legal opinions suggest that affirmative action policies cannot pursue diversity as a goal. The only acceptable justification for an affirmative action search is evidence consistent with present or past discrimination. Given such evidence, an affirmative action policy will advantage the members of protected classes and thereby increase diversity. On the other hand, the impact of an affirmative action policy would be expected to depend on the frequency of its application: a policy that is applied selectively, as seems to be required by current law, will have less of an impact than one that is applied to every search.

Beyond these obvious points, we find it difficult to predict the impact of the policy we propose on future levels of faculty diversity at Bucknell. An affirmative action policy cannot guarantee that a position will be filled by a member of a protected group, since this would constitute an illegal bar to the advancement of nonminority candidates. Accordingly, even affirmative action searches will not always end in the hiring of an affirmative action candidate. Conversely, nonaffirmative action searches may end in the hiring of such a candidate. For these and other reasons, we believe that the issue raised here is too complex to be answered now, and should be deferred for at least the year required to apply the proposed policy to a sufficient number of faculty searches.

Finally, we must reemphasize the dependence of faculty diversity on EEO policies and procedures quite separate from those advanced in the name of affirmative action. With faculty support, the AAO could revise recruitment and other EEO procedures with the potential to increase faculty diversity. Even without such revisions, departments and search committees can increase diversity by advertising positions as broadly as possible, by inviting applications from affirmative action candidates, and by taking appropriate measures to address any special concerns of such candidates during interviews or at other stages in the process of recruitment and hiring.