



Issue Date: 11 August 2004

In the Matter of

Department of Labor, Office of Federal
Contract Compliance Programs,

Plaintiff

v.

Bank of America,

Defendant

Case No.: 1997-OFC-00016

**RECOMMENDED DECISION AND ORDER ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT**¹

On November 6, 2003, the Plaintiff, Office of Federal Contract Compliance Programs, U.S. Department of Labor (hereinafter "OFCCP"), filed Plaintiff's Motion for Partial Summary Judgment pursuant to 41 C.F.R. §60-30.23. By filing this motion, the Plaintiff requests the Court to conclude as a matter of law that OFCCP did not violate the Fourth Amendment to the U.S. Constitution during the compliance review investigation of the Defendant, Bank of America (hereinafter "BOA"), giving rise to the original litigation.² In response, Defendant filed its cross Motion for Summary Decision and Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment on June 18, 2004. On July 23, 2004, Plaintiff filed its Reply Brief in Support of its Motion for Partial Summary Judgment and Response to Defendant's Motion for Summary Decision. In response, Defendant filed a Reply Brief on August 3, 2004.³ For the reasons set forth below, I have concluded that Plaintiff's Motion for Partial Summary Judgment must be granted.

STATEMENT OF THE CASE

On November 24, 1993, the Regional Director of the OFCCP in Atlanta notified the President and Chief Executive Officer of NationsBank in Charlotte, North Carolina that its Charlotte facility had been selected for compliance review under Executive Order No. 11246 (30

¹ Citations to the record of this proceeding will be abbreviated as follows: "PX" refers to Plaintiff's Exhibits; "DX" refers to Defendant's Exhibits.

² At the time of the original Administrative Complaint, filed July 18, 1997, Bank of America was known as NationsBank.

³ Although in my March 31, 2004 Status Order, I directed that no further briefing would be permitted after the Plaintiff submitted its Reply Brief, I am granting the Defendant's Motion for Leave to File a Reply Brief.

Fed. Reg. 12319), as amended by Executive Order No. 11375 (32 Fed. Reg. 14303), and Executive Order No. 12086 (43 Fed. Reg. 46501 (hereinafter “Executive Order 11246”), Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §793 (2002), and Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended, 38 U.S.C. §§4211-4212 (2000). Together, these statutes and regulations require that government contractors and subcontractors (1) treat their employees without discrimination based on their color, religion, sex, national origin, age, disability, status as a veteran of the Vietnam Era, or status as a disabled veteran; and (2) take “affirmative action” to employ, advance in employment, and otherwise treat qualified applicants and employees without discrimination based on their color, religion, sex, national origin, age, disability, status as a veteran of the Vietnam Era, or status as a disabled veteran. The OFCCP conducts compliance reviews periodically to determine whether covered government contractors are in compliance with the affirmative action and nondiscrimination requirements of those laws and their implementing regulations. *See* 41 C.F.R. §60.

Initially, the Regional Director requested that the Defendant submit its Affirmative Action Program, along with other documentation. Without objection, NationsBank submitted the requested information, and OFCCP subsequently conducted an on-site review in April 1994. The OFCCP found that NationsBank had violated Executive Order 11246 by discriminating against minority applicants for entry level positions. On October 19, 1994, the OFCCP notified NationsBank of its finding.

Shortly thereafter, the OFCCP initiated additional compliance reviews at NationsBank’s offices in Tampa, Florida and Columbia, South Carolina. NationsBank objected and refused to comply with the review of those facilities. In March 1995, NationsBank filed an action in the U.S. District Court for the Western District of North Carolina, seeking injunctive relief, alleging that the OFCCP’s selection of the Tampa and Columbia Facilities violated the Fourth Amendment’s protection against unreasonable searches. In February of 1997, NationsBank amended its complaint, adding an allegation that OFCCP’s selection of the Charlotte facility also violated the Fourth Amendment. The District Court granted NationsBank’s request for a preliminary injunction, thereby precluding OFCCP from bringing an enforcement action against NationsBank. The U.S. Court of Appeals for the Fourth Circuit subsequently granted summary judgment to OFCCP, thereby vacating the District Court’s preliminary injunction, stating that NationsBank had to first exhaust its administrative remedies.

The Plaintiff then filed an Administrative Complaint demanding that NationsBank comply with Executive Order 11246 or risk debarment. Newly-named Bank of America moved for summary decision, contending that OFCCP violated the Fourth Amendment when it selected and searched its Charlotte facility for compliance review. On August 25, 2000, Administrative Law Judge Richard Huddleston issued a Recommended Decision granting BOA’s motion for summary decision. Judge Huddleston concluded that OFCCP’s selection of the Charlotte facility was not based on an administrative plan containing neutral criteria, and was arbitrary and unconstitutional.

The OFCCP filed exceptions to the Recommended Decision with the Administrative Review Board (hereinafter “Board”). On March 31, 2003, the Board reversed Judge Huddleston’s decision and remanded to the Office of Administrative Law Judges for further

proceedings, concluding that the record presents genuine issues of material fact. *OFCCP, Department of Labor v. Bank of America*, No. 00-079 (Mar. 31, 2003). The case was subsequently assigned to me. On November 6, 2003, OFCCP filed its Motion for Partial Summary Judgment. Bank of America filed its response and Motion for Summary Decision on June 18, 2004. Plaintiff filed its final reply brief on July 23, 2004. Finally, Defendant filed a Reply Brief on August 3, 2004. I have considered each of the parties' filings in making my determination in this matter.⁴

STATEMENT OF UNCONTESTED FACTS

Defendant, Bank of America, is a government contractor under the terms of Executive Order 11246 and the implementing regulations.⁵ As a result, BOA is subject to periodic compliance reviews conducted by OFCCP. Since the late 1980's, the Department of Labor has implemented and developed a program of "corporate management reviews" to ensure compliance with Executive Order 11246. The OFCCP's Regional Directors are responsible for the administration of compliance reviews in accordance with OFCCP policies.

On November 19, 1993, the Director of OFCCP's Policy, Planning and Program Development Division, Annie Blackwell, compiled a list of government contractors covered by Executive Order 11246 that have at least 5,000 employees. Individual contractors were to then be selected for corporate management reviews from that list by using the OFCCP's Equal Employment Data System (hereinafter "EEDS") Manual.⁶ The list of contractors was distributed to OFCCP's Regional Offices.

On December 1, 1993, OFCCP issued its Revised Operational Plan for fiscal year 1994 (hereinafter "Revised FY '94 Operational Plan"), which was designed to "assure that OFCCP efficiently and effectively accomplishes [its] mission" to ensure full compliance by Federal contractors with Executive Order 11246 and the implementing regulations. (DX 8, at 2). The Revised FY '94 Operational Plan, which specifically established objectives based on the average completion time for compliance reviews, was designed to be used in conjunction with the guidelines set forth in the EEDS Manual.⁷ *Id.*, at 3. Specifically, the Revised FY '94 Operational Plan directed the Regional Directors to select contractors for corporate management reviews from within a particular market area that were either a Fortune 1000 company, or had at least 4,000 workers. *Id.*, at 4.

⁴ The Defendant has requested oral argument on the cross-motions for summary judgment. The parties' briefs have thoroughly addressed the issues; in this connection, there are no issues of fact to be determined, or determinations of credibility to be made. I find that no useful purpose would be served by oral argument, and the Defendant's request is thus denied.

⁵ Bank of America is a depository of government funds and an issuing and paying agent of U.S. Savings Bonds.

⁶ On April 6, 1995, Deputy Assistant Secretary of the OFCCP, Shirley Wilcher issued a "Policy Alert" confirming the agency's policy, "that the criteria and procedures described in the [EEDS Manual] are to be used to select contractors for service and supply compliance reviews." (DX 13). According to Ms. Wilcher, "using EEDS assures that the contractor selections are based on a neutral system." *Id.*

⁷ The EEDS Manual was designed to assure that the contractor selections are based on a neutral system. (DX 13).

Before the distribution of Ms. Blackwell's list and the issuance of the Revised FY '94 Operational Plan, officials at OFCCP's Atlanta Regional Office met on October 25, 1993 for a management and training conference. (DX 10, at 7). OFCCP's Atlanta Regional Director, Carol Gaudin, testified that it was during that meeting when BOA's Charlotte facility was selected for compliance review. *Id.* Initially, OFCCP's national office had directed Ms. Gaudin to select six (6) facilities in the Atlanta region for compliance review during the 1994 fiscal year beginning October 1, 1993. The facilities chosen were to have 5,000 employees, be a Fortune 500 or 1000 company, and be a multi-facility establishment with corporate headquarters within the region. (DX 14, at 29-31). Ms. Gaudin then directed, but without specific instruction, OFCCP's Charlotte District Director, Jerome Geathers, to provide two possible candidates for review from his district. The Assistant District Director, Paul Deavers, reviewed the list of potential contractors, and reduced it by eliminating from consideration those companies that had been reviewed within the preceding three (3) years. He gave the resulting list, which included Bank of America, to Mr. Geathers. (PX 3, at 31-32). Mr. Geathers further limited the range of possible candidates geographically—to the immediate Charlotte area—in order to reduce travel expenses (DX 14, at 104-106). Ultimately, Mr. Geathers presented Duke Power and BOA to Ms. Gaudin at the October 25, 1993 meeting as the two candidates for compliance review. The record contains no evidence explaining how specific candidates—namely, Duke Power and BOA—were chosen from among the list of contractors satisfying the criteria set forth by the District Director and Assistant District Director. Indeed, Mr. Geathers testified that he did not select BOA pursuant to the EEDS Manual; nor did he recall Ms. Gaudin utilizing the EEDS to make her selection. (DX 4, at 53-54).

Once presented with the two candidates, Ms. Gaudin selected Bank of America despite Mr. Geathers' recommendation that Duke Power should be selected. Ms. Gaudin testified that she made her selection based on yet another set of criteria: BOA was a top-five corporation in terms of size; because BOA was growing, there were "a lot of opportunities for affirmative action"; and she wanted geographic diversity and diversity of industries among those selected for the total review in 1993. (DX 10, at 10-11). Ms. Gaudin testified that her selection criteria were not part of any administrative plan in effect at that time. (DX 10, at 11-12). In fact, Ms. Gaudin admitted that the criteria she used to select BOA over Duke Power were not applied to all contractors selected in 1993.⁸ *Id.* Moreover, OFCCP's national office did not supply any guidance for selecting one over the other. *Id.*, at 12.

On November 18, 1993, Ms. Gaudin sent an e-mail to the national office containing the list of six (6) selected contractors, including Bank of America. (DX 21). On November 18, 1993, Ms. Gaudin sent another e-mail listing those contractors that had been approved by the national office, and urging scheduling letters to be distributed as soon as possible. (DX 12). Among those approved for review was Defendant Bank of America's Charlotte facility. One week later, on November 24, 1993, OFCCP issued a Notice of Compliance Review (hereinafter "scheduling letter") to Mr. Hugh McColl, President and CEO of BOA, notifying him that the

⁸Shortly after receiving notification that OFCCP selected BOA's Tampa and Columbia facilities, BOA's personnel officer Charles Cooley challenged those selections in writing. Subsequently, Ms. Gaudin telephoned Mr. Cooley on December 12, 1994 to discuss the selection of the facilities. According to Mr. Cooley's sworn affidavit, Ms. Gaudin explained that banks are "notorious" for having the "worst record of affirmative action." (PX 8, at 2). Ms. Gaudin did not recall making the statement.

Charlotte facility had been selected for compliance review under Executive Order 11246 and the applicable regulations. (DX 1; PX 9).⁹

The scheduling letter outlines the phases of the compliance review, and includes a request that BOA submit its Affirmative Action Program in order to begin the initial desk audit. *Id.*; see 41 C.F.R. §§60-1.40, 60-2.1-60-2.15, 60-741, 60-250. As the scheduling letter explains, the desk audit is designed to prepare for the onsite review. (DX 1; PX 9). Accordingly, the scheduling letter provides a list of documents OFCCP planned to examine during the onsite review. In response to the scheduling letter, BOA submitted the material requested by OFCCP without objection in late March, 1994. The record contains multiple correspondences addressed to Mr. Geathers from BOA Vice President Leslie Wrenn and Executive Vice President Lawrence McCray, in which BOA provided additional, requested material in April, 1994. Accompanying each submission is a statement by BOA that the documentation is subject to a claim of confidentiality in order to prevent any potential competitive harm. (PX 6). No other objection or statement challenging the selection or upcoming onsite review of the Charlotte facility is contained in those correspondences.

In April, 1994, OFCCP conducted the onsite review of BOA's Charlotte facility. OFCCP submitted sworn affidavits from Mr. Geathers and Mr. Deavers in support of its Motion for Partial Summary Judgment, in which they stated that at no time prior to, or during the onsite review did anyone from BOA question, challenge, or otherwise object to OFCCP's ability or authority to conduct the compliance review. (PX 4, 5). Bank of America has not provided any evidence, or made any assertion to the contrary.¹⁰ Indeed, BOA stipulated to the fact that it provided OFCCP with complete access to its documents and Charlotte facility during the onsite review.¹¹

By letter dated December 8, 1994, BOA's personnel officer Charles Cooley challenged the selection of its Tampa, Florida and Columbia, South Carolina facilities. (PX 8). More than three years later, on February 26, 1997, BOA amended its complaint challenging OFCCP's selection of the Tampa and Columbia facilities on Fourth Amendment grounds, to include the Charlotte facility.

⁹BOA's Memorandum, submitted along with its Motion for Summary Decision, addresses the factual circumstances up to the point in time when BOA's Charlotte facility was chosen, including the selection process. However, BOA has failed to specifically address the factual circumstances surrounding the actual compliance review—i.e., its decision to provide the requested documentation to OFCCP, and its compliance with the onsite review of its Charlotte headquarters. Def.'s Memo. in Support of Motion for Summary Judgment, at 1-16 (June 18, 2004). Accordingly, I can reasonably assume that Defendant, BOA does not challenge Plaintiff OFCCP's presentation of the facts relevant to the issue of consent, and that no dispute of fact exists concerning that issue.

¹⁰ In one correspondence from BOA to Mr. Geathers dated October 14, 1994—6 months after the onsite review—Executive VP McCray expressed disappointment in OFCCP's findings, but admitted “[BOA] has made every effort to cooperate with you and your staff during this audit.” And, “[w]e have made these efforts without question or hesitation.” (PX 6).

¹¹ Additionally, the record contains six (6) letters from BOA to OFCCP between BOA's submission of the desk audit material and OFCCP's Notice of Violations dated October 19, 1994, none of which contain a single objection to the selection process or the onsite review of the Charlotte facility. (PX 6). The record contains numerous additional correspondences after BOA had been notified of the alleged violations addressed to OFCCP; not a single one of those letters contains an objection to the selection and review of the Charlotte facility. (PX 6, 8).

THE ADMINISTRATIVE REVIEW BOARD'S DECISION

The Board began its decision by confirming two well-established Fourth Amendment principles arising in the context of this case. First, citing *See v. City of Seattle*, 387 U.S. 541, 543 (1967) and *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311-3312 (1978), the Board noted that the protection against unreasonable searches contained in the Fourth Amendment applies to official entries of businesses as well as private residences. Second, the Fourth Amendment's requirements apply to searches of businesses conducted by administrative agencies. *Barlow*, 436 U.S., at 320 (where a provision of the Occupational Safety and Health Act giving OSHA the authority to inspect establishments without a warrant held "unconstitutional insofar as it purports to authorize inspections without or warrant or its equivalent.").

Those "firmly rooted" principles, as the Board further noted, have specifically been applied to investigations under Executive Order 11246. *United States v. Mississippi Power & Light Co.*, 638 F.2d 899 (5th Cir. 1981) ("MP&L" or "NOPSIS I").¹² Upon examining the Fourth Amendment concerns raised by the two defendants in these cases, the Fifth Circuit determined that "a formal judicial warrant is not required in all administrative searches if the enforcement procedures contained in the relevant statutes and regulations provide, in both design and practice, safeguards roughly equivalent to those contained in traditional warrants." *NOPSIS II*, 638 F.2d at 907. Moreover, the search must still be measured against "the broad Fourth Amendment test of 'reasonableness.'" *Id.* The Board then described the elements of a reasonable search applicable to an administrative agency:

One element of the question is whether the proposed search is authorized by statute, and a second is whether it is properly limited in scope. . . . A third element should be an examination of how the agency chose to initiate this particular search. The search will be reasonable if based either on (1) specific evidence of an existing violation, (2) a showing that the reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular (establishment) . . . or (3) a showing that the search is pursuant to an administrative plan containing specific neutral criteria. It is important that the decision to enter and inspect . . . not be the product of the unreviewed discretion of the enforcement officer in the field.

OFCCP, Department of Labor v. Bank of America, No. 00-079, at 12 (Mar. 31, 2003) (quoting *NOPSIS II*, 638 F.2d at 907-908, quoting *See v. Seattle*, 387 U.S. at 545).

The Board's focus then shifted to the issue of consent as a "specifically established exception" to the requirements of both a warrant and probable cause under the Fourth

¹² *United States v. Mississippi Power & Light Co.*, 638 F.2d 899 (5th Cir. 1981) involved the consolidation of two cases; the other being *United States v. New Orleans Public Service, Inc.*, 638 F.2d 899 (*NOPSIS II*). Both involved proposed searches of companies doing business with the federal government. In addition to the shorthand "MP&L", the case is also known as, and is referred to throughout this decision as "*NOPSIS II*."

Amendment. *Bank of America*, No. 00-079, at 13 (Mar. 31, 2003) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)). Consent, as the Board described, renders lawful a warrantless search so long as the consent is “voluntarily given, and not the result of duress or coercion, express or implied.” *Bank of America*, No. 00-079, at 13 (Mar. 31, 2003) (quoting *Bustamonte*, 412 U.S. at 248-49). More specifically, the Board stated that consent can be established by proof of contemporaneous consent at the time of the actual search. *Id.* Citing to a laundry list of federal decisions, the Board made it quite clear that in the absence of a warrant, a target contractor has the ability to limit or stop an administrative inspector from proceeding with a search at the inception of that search, or any time during the search. *Id.*, at 13-14. And, a failure to object or limit the search can demonstrate contemporaneous consent. *See id.*

In its decision to remand, the Board noted that ALJ Huddleston erred by not recognizing that contemporaneous consent would remove the search from the requirements of the Fourth Amendment. *Bank of America*, No. 00-079, at 18 (Mar. 31, 2003). According to the Board, the issue of contemporaneous consent is critical here because even if the Board were to adopt BOA’s contention that the selection of the Charlotte facility was not made pursuant to a plan with neutral criteria, that alone would not entitle BOA to dismissal of the case. *Id.* Put another way, the determination of whether BOA gave contemporaneous consent is a completely separate inquiry from the reasonableness of OFCCP’s selection of the Charlotte facility under *NOPSI II*.

Although not raised by OFCCP, the Board next addressed the issue of whether consent can also be implied simply by virtue of the government contract. The Board explained that some courts have held that consent given as a condition of receiving government contracts or benefits precludes an objection to a search on Fourth Amendment grounds. *Id.*, at 15 (citing *United States v. Brown*, 763 F.2d 984 (8th Cir. 1985) and *Zap v. United States*, 328 U.S. 624 (1946) (where government contract required access to contractor’s records, Navy contractor had no Fourth Amendment claim to privacy in these mandatory records). On the other hand, several other courts have held that the process for selecting the target of a search must be reasonable, even when the subject gave prior consent by contract to be searched. The Board adopted this second line of cases as applicable to the present case. *See infra*, *First Alabama Bank of Montgomery v. Donovan*, 692 F.2d 714 (11th Cir. 1982); *United States v. Harris Methodist Fort Worth*, 970 F.2d 94 (5th Cir. 1992); *Beverly Enterprises, Inc. v. Herman*, 130 F. Supp. 2d 1 (D.D.C. 2000).

In *First Alabama Bank*, 692 F.2d 714, the Eleventh Circuit examined the constitutionality of an OFCCP compliance review similar to the case at bar. The Eleventh Circuit held that because of the contract, the bank expressly consented only to reasonable searches. *Id.* The compliance review in *First Alabama Bank* was then examined under the three part test enunciated in *See v. Seattle* and *NOPSI II*. Ultimately, the Eleventh Circuit concluded that the Department of Labor’s (hereinafter “DOL”) investigation met Fourth Amendment requirements. *Id.*, at 721-22.

Along with *First Alabama Bank*, the Board cites *Harris*, 970 F.2d 94, in which the Fifth Circuit held that a hospital that had signed agreements to comply with Title VI of the Civil Rights Act of 1964 consented to administrative searches that comport with constitutional

standards of reasonableness. The *Harris* Court concluded that the selection of Harris Methodist was arbitrary, and made without a plan containing neutral criteria under *NOPSI II*. *Id.*

Finally, the Board cites to *Beverly*, 130 F. Supp. 2d 1, which is another case with facts similar to the case at bar, involving the OFCCP and Executive Order 11246. The *Beverly* Court, like *Harris* and *First Alabama Bank*, examined the DOL's process in selecting Beverly for compliance review under *NOPSI II* and *Barlow*. The District Court held that the selection criteria were neutral, and neutrally applied. *Id.*, at 15-16.

In sum, the Board concluded that the existence of the government contract by itself does not remove BOA's ability to challenge OFCCP's selection and search of BOA on Fourth Amendment grounds. By agreeing to comply with Executive Order 11246, BOA has only consented to a constitutionally reasonable search. *Bank of America*, No. 00-079, at 15 (Mar. 31, 2003). But the traditional consent analysis may still remove the search from Fourth Amendment requirements. If BOA did not consent, the standard for "reasonableness" in this context, according to the Board, is set forth in *NOPSI II*. See discussion of Board's decision, *supra*, at 3.

Ultimately, the Board reversed the ALJ's decision granting BOA's Motion for Summary Decision. First, the Board addressed the issue of contemporaneous consent, stating that if BOA voluntarily consented to the compliance review, the requirements of the Fourth Amendment were satisfied. Any further consideration of the "reasonableness" inquiry under *Barlow* and *NOPSI II* would, therefore, be unnecessary. The Board dismissed BOA's argument that the language of the scheduling letter on its face rendered BOA's acquiescence to the compliance review involuntary. The language of the letter, according to the Board, does not indisputably establish that the letter was coercive or misrepresentative of OFCCP's authority to select BOA for compliance review. To the contrary, the Board concluded that the letter, which preceded the actual review by over 30 days, was "susceptible of interpretation both as to content and effect, and factors other than the letter could have entered into whether voluntary contemporaneous consent was given." *OFCCP, Department of Labor v. Bank of America*, No. 00-079, at 18 (Mar. 31, 2003) (internal citations omitted). Accordingly, the Board remanded, instructing the Court to consider evidence relevant to a determination of whether contemporaneous consent was voluntarily given for the compliance review. *Id.*, at 19. Specifically, the Board instructed that the actual behavior and communications between OFCCP and BOA employees, such as correspondences and telephone conversations, including the circumstances of the actual onsite review, would be particularly germane to the inquiry. *Id.*

The Board next addressed the question of whether OFCCP conducted its search pursuant to an administrative plan containing neutral criteria. *Bank of America*, No. 00-079, at 19 (Mar. 31, 2003).¹³ The Board was not willing to accept BOA's contentions that the undisputed facts established that the EEDS Manual was OFCCP's only administrative plan, and that it was not followed here, and thus it rejected Judge Huddleston's recommendation and remanded for further proceedings. *Id.* Initially, the Board made it clear that the "EEDS did not confer any

¹³ The Board pointed out that it has the power to review the record and reach its own conclusions, despite the fact that the OFCCP did not file an exception to this specific issue. The issue of neutral criteria is significant, according to the Board, because even "[i]f OFCCP had such a plan and implemented it, the motion for summary judgment should be denied on that ground alone as well." *Bank of America*, No. 00-079, at 19 (Mar. 31, 2003).

rights on BOA.” *Id.* In fact, private parties have unsuccessfully challenged agency action in the past on grounds that the agency failed to follow an internal agency manual or guideline in conducting its activities. *Id.* (citing *Sunbeam Appliance Co. v. EEOC*, 532 F. Supp. 96, 99 (N.D. Ill. 1982) and *Hall v. EEOC*, 456 F. Supp. 695, 702-03 (N.D. Cal. 1978)). In short, the Board concluded that OFCCP had no obligation to BOA to use only the EEDS procedures for selecting contractors for compliance reviews, but was only obligated to use selection procedures that met Fourth Amendment requirements under *NOPSI II* and *Barlow. Bank of America*, No. 00-079, at 21 (Mar. 31, 2003).

After a careful reading of the record, the Board concluded that the factual circumstances surrounding the issue of the reasonableness of the selection procedure were not ripe for summary decision. *Id.*, at 22. The Board rejected the ALJ’s decision that OFCCP acted arbitrarily simply by not following the EEDS. As support for its conclusion, the Board noted that the record contains evidence that the FY’94 Operational Plan, which OFCCP claimed it used to select the Charlotte facility, included instructions to conduct corporate management reviews, which were essentially compliance reviews. Meanwhile, the EEDS Manual, which BOA maintains was used, includes no mention of corporate management reviews. *Id.* Thus, the Board reasoned, the EEDS could not have been OFCCP’s exclusive basis for selecting contractors for compliance reviews as BOA argued. Moreover, the Depositions of Geathers, Deavers, and Gaudin indicate that much of the criteria that were used had been modified along the way by OFCCP officials for budgetary and geographical reasons.¹⁴ Therefore, the Board concluded that genuine issues of fact exist as to: what plan was actually used; what criteria was used; whether the criteria for contractor selection were neutral; and whether the review was actually conducted pursuant to a relevant plan and its neutral criteria. *Id.*, at 22. Specifically, the Board suggested that the Court consider the extent to which OFCCP relied on the EEDS Manual, the Revised FY’94 Operational Plan, or any plan devised by the Central, Regional, and District Office officials of OFCCP, in making its selection of the Charlotte facility.

PLAINTIFF’S POSITION

Plaintiff OFCCP filed its motion pursuant to 41 C.F.R. §60-30.23 seeking partial summary judgment on the Defendant’s claim that the compliance review at issue was conducted in violation of the Fourth Amendment. Plaintiff’s Motion for Partial Summary Judgment, at 3 (Nov. 6, 2003). OFCCP’s theory is that, as a matter of law, BOA contemporaneously consented to the compliance review and subsequent onsite investigation, and in the alternative, that OFCCP’s selection of the Charlotte facility comported with Fourth Amendment requirements.

Initially, Plaintiff contends that the undisputed facts establish that the Defendant contemporaneously consented to the compliance review and investigation, and thereby waived

¹⁴ Furthermore, the Board concluded that the criteria used by Geathers in selecting BOA’s Charlotte facility from among 7 other similarly situated contractors were not arbitrary on their face, and thus the surrounding factual circumstances were not undisputed. *Bank of America*, No. 00-079, at 23 (Mar. 31, 2003). In reaching that conclusion, the Board equated the OFCCP’s regional officials’ discretion to select a target contractor with that of a criminal prosecutor. *Id.* (“It is well accepted that a prosecutor’s choice of one out of a number of subjects for investigation or prosecution is well within her discretion and cannot be considered arbitrary for that reason alone.”).

any objection to its selection on Fourth Amendment grounds. More specifically, OFCCP claims that, by failing to object, challenge, or otherwise question OFCCP's process or authority to select BOA for review and conduct an onsite investigation, BOA freely and voluntarily consented to the search at issue under *Bustamonte* and *Barlow*, without any coercion or duress, express or implied. As a result, OFCCP believes the selection and search of the Charlotte facility was lawful as a matter of law.

OFCCP contends that BOA fully cooperated at every step of its investigation. Given the conditions and timing surrounding the investigation, along with BOA's relative experience with the OFCCP, BOA personnel, including its counsel, had every opportunity to object or otherwise challenge OFCCP's compliance review and investigation. In response to Defendant's claim that it had no choice but to acquiesce because of the "threatening" nature of the scheduling letter written under a "claim of lawful authority," OFCCP argues that the letter in no way coerced the Defendant because it did not state or even imply that BOA had no right to resist the search. *Id.*, at 19. Instead, OFCCP maintains that the scheduling letter merely identified its authority and intentions under Executive Order 11246, which is not a show of authority that makes any subsequent consent nonconsensual. *Id.* And, even if the letter had addressed the consequences of BOA's failure to comply, as the Defendant contends, OFCCP maintains that this would not be coercive to the point of rendering BOA's consent involuntary. *Id.*, at 21. The Plaintiff notes that any enforcement action undertaken by OFCCP would provide BOA with a full hearing before sanctions could be levied, thereby mitigating any immediate threat possibly perceived by BOA.

Second, and in the alternative, Plaintiff describes its selection of BOA for compliance review as a neutral decision making process, *id.*, at 7, and asserts that its process comports with Fourth Amendment requirements, *id.*, at 26. Following the Board's lead, OFCCP insists that its selection process is reasonable under the requirements set forth in *NOPSI II* and *Barlow*. Relying on *NOPSI II*, 638 F.2d at 907-908, OFCCP points out that Executive Order 11246 has been held to satisfy the first two elements of reasonableness in the context of administrative searches: first, that it is "authorized by statute," and second, that it is "properly limited in scope." The third element (whether the search was initiated in a neutral fashion), according to OFCCP, is met in the present case because the undisputed facts establish that the selection process here was conducted pursuant to an administrative plan containing specific neutral criteria.¹⁵ Specifically, OFCCP asserts that BOA was selected for review without any of the "unfettered discretion" that compelled the Fifth Circuit to rule against the government in *NOPSI II*.

OFCCP next argues that its neutral plan was applied in a neutral manner. Even though the exact plan was not memorialized in writing, which OFCCP maintains is not required under the applicable case law, OFCCP maintains that Ms. Gaudin, Mr. Geathers, and Mr. Deavers

¹⁵ OFCCP lists seven criteria upon which it relied in selecting BOA for compliance review: 1) Fortune 500 or 1000 company; 2) at least 4000-5000 employees; 3) multi-establishment facility; 4) corporate headquarters in Charlotte, NC; 5) facility not reviewed within preceding three years; 6) growing corporation with opportunities for affirmative action; and 7) diversity of industries reviewed. Plaintiff's Motion for Partial Summary Judgment, at 31 (Nov. 6, 2003). According to OFCCP, those criteria are similar to the ones employed in *First Alabama Bank*, 692 F.2d 714, which the Eleventh Circuit held to be "neutral" under *NOPSI II* and *Barlow*.

simply applied the seven criteria to the facilities within the Atlanta Region. The result was the selection of Bank of America for compliance review.

Finally, OFCCP urges that even if BOA is successful in obtaining summary decision, BOA is not entitled to dismissal of the case as BOA contends. Instead, OFCCP claims that if it is found to have violated BOA's Fourth Amendment right to be free from unreasonable searches and seizures, "[BOA] would be entitled only to suppression of the evidence obtained during the alleged unconstitutional search of Defendant's headquarters facility in Charlotte, North Carolina." Plaintiff's Reply Br., at 2.

DEFENDANT'S POSITION

The Defendant, Bank of America, filed its cross Motion for Summary Decision pursuant to 41 C.F.R. §60-30.23(e) requesting that this Court issue an Order dismissing the Plaintiff's administrative action based on its unconstitutional selection and search of Bank of America's Charlotte headquarters for an affirmative action compliance review. Defendant's Motion for Summary Decision, at 1 (June 18, 2004). Bank of America's theory is that, as a matter of law, OFCCP violated the Fourth Amendment of the U.S. Constitution when it reviewed BOA's Charlotte facility because the warrantless search was not conducted pursuant to an administrative plan containing neutral criteria, nor was the plan applied neutrally. Instead, BOA maintains that its selection was the result of "unfettered discretion, and personal preferences and biases" of OFCCP agents. Defendant's Memorandum in Support of America's Motion for Summary Decision, at 4 (June 18, 2004). Bank of America also denies consenting to the review and OFCCP's search of the Charlotte facility, arguing that it involuntarily acquiesced to the Government's claim of lawful authority.

Initially, Defendant contends that OFCCP's selection and search of its Charlotte headquarters was not conducted pursuant to a neutral plan.¹⁶ BOA specifically argues that OFCCP's selection program violated OFCCP's own policies and practices. In spite of the Department of Labor's Deputy Assistant Secretary's directive of 1995 that the EEDS Manual was to be used to select contractors for review, OFCCP admittedly failed to utilize those selection criteria when it selected BOA's Charlotte facility.

Second, BOA believes that none of the other documents of record (e.g. the November 19, 1993 list of corporate headquarters in the District and the revised FY '94 Operational Plan) that prescribe criteria for the selection of contractors could have been used by OFCCP to select the Charlotte facility because those documents did not exist on October 25, 1993, when BOA was first selected for corporate management review by the Regional Director. Bank of America contends that the OFCCP's "evolving" program was never memorialized in writing, and never made public. Therefore, no federal contractor, including BOA, was aware that it might be subject to a corporate management review, or whether its selection was proper.

¹⁶ Bank of America notes that OFCCP concedes that it did not select BOA's Charlotte facility pursuant to any published administrative plan containing neutral criteria. Thus, BOA's argument is focused on the implementation of a "new program" initiated by the OFCCP national office, as described in OFCCP's Motion for Partial Summary Judgment. Defendant's Memo, at 21; *see* Plaintiff's Motion for Partial Summary Judgment, at 13.

Next, the Defendant cites to “inconsistencies” throughout the record indicating that OFCCP did not follow the program it claims to have followed. BOA argues that Regional Director Gaudin did not choose contractors from diverse industries as she alleged; nor did the Regional Director actually focus on large, growing companies. Moreover, the Regional Director failed to choose contractors from four states in her region, despite her alleged desire for geographic diversity. And, although the Regional Director claimed to focus on “top five” corporations, only two on her list of six met that criterion, one of which was Bank of America.

In response to OFCCP’s explanation that it rejected Duke Power in favor of Bank of America because another utility had been selected within the region, BOA contends that the other utility company had merely been recommended. Moreover, OFCCP never explained, according to BOA, why specifically it chose the other utility company over Duke Power.

Lastly, BOA argues that there is no evidence in the record defining any reasoned or neutral basis by which OFCCP selected contractors from among those on the list under OFCCP’s “multi-factor plan.” Def.’s Memo, at 24. According to BOA, OFCCP selected from the list using personal preferences and biases. Specifically, BOA rejects OFCCP’s claim that it limited its focus to Charlotte-based contractors due to budget and travel constraints, as one contractor on its list is located 90 miles north of Charlotte. But, even assuming OFCCP limited its selection to the Charlotte area, BOA maintains that it failed to provide any reason for choosing BOA from that list. Bank of America believes that the Regional Director’s statement that “banks are notorious for having the worst record of affirmative action” is evidence that the OFCCP’s agents allowed personal biases to factor into the selection of BOA’s headquarters.

Bank of America also addressed the issue of consent, arguing that Plaintiff’s position is without merit. First, BOA contends that it could not consent to OFCCP’s selection and search of its Charlotte facility because the Government in effect announced that BOA had no right to resist the search. Bank of America insists that by citing to Executive Order 11246 and the implementing regulations, OFCCP’s Notice of Compliance Review was the equivalent of an announcement that it had a warrant, thereby rendering useless any effort by Defendant to halt or limit the search.

Second, BOA emphatically insists that it did not freely and voluntarily consent under the Fourth Amendment. According to Defendant, OFCCP’s inspection of the Charlotte facility was the product of Bank of America’s acquiescence to the OFCCP’s claim of lawful authority. Specifically, BOA claims that the scheduling letter advised the Defendant that it had been selected, and that OFCCP had the authority to search and seize Bank of America’s documents and property pursuant to Executive Order 11246 and the applicable regulations. Defendant’s Memo. in Support of Bank of America’s Mot. for Sum. Dec., at 29. Instead of asking for Defendant’s permission to conduct the review, BOA believes OFCCP improperly “asserted that it had the right to conduct the review because [BOA] had been selected pursuant to the law.” *Id.* The only way to interpret OFCCP’s notice, according to BOA, is that it had been selected “pursuant to the law governing the Bank’s affirmative action compliance obligations.” *Id.*, at 30.

Thus, BOA argues that it had no choice but to acquiesce to OFCCP's claim of lawful authority. *Id.* Bank of America claims that the scheduling letter warned that had it failed to comply with the OFCCP's directives, OFCCP was authorized to initiate enforcement proceedings against BOA under the applicable regulations, (DX 1; PX 9) (Notice of Compliance Review, November 24, 1993). Bank of America claims that the OFCCP's citation to the regulations that allow OFCCP to cancel, terminate, or suspend its federal contract, placed Bank of America in the position of having to acquiesce, or face what it believed were inevitable sanctions.

Bank of America further disagrees with OFCCP's assertion that the Defendant could have, and was aware that it could have challenged its selection and the subsequent onsite investigation. In response, BOA maintains that it had no reason to suspect it had been improperly selected. Moreover, BOA claims OFCCP refused to share information regarding the selection of a number of other Bank of America facilities. Therefore, as the argument goes, BOA was in no position to challenge a selection it assumed was performed by means of a plan with neutral criteria.

Finally, BOA believes that if contractors are forever barred from challenging their selection once a compliance review begins, they will be placed in an impossible position, creating "perverse incentives" for both parties. Defendant's Memo. in Support of Bank of America's Mot. for Sum. Dec., at 35. On the one hand, a contractor could cooperate in the beginning, thereby waiving any objection to a potentially unconstitutional search. Or it may challenge each selection without a reasonable basis or without knowing how to prevent the possibility of legal action, all the while subjecting itself to debarment simply by levying an objection. Forcing a contractor to object to each selection and search, according to BOA, is contrary to the public's interest in encouraging cooperation with the OFCCP's compliance reviews. *Id.*, at 36. Meanwhile, the Government will be placed in a position of insurmountable power, forcing contractors to cooperate in an effort to avoid the risk of debarment. As a result, BOA believes that OFCCP could improperly select a contractor, and unless the contractor objects, then proceed with compliance review with the comfort of knowing the contractor will be unable to challenge its selection.

ISSUES

1. Whether Bank of America consented to OFCCP's compliance review, which included a desk audit and onsite inspection, of BOA's Charlotte facility under Executive Order 11246, thereby removing the application of the Fourth Amendment.
2. If not, whether OFCCP utilized and implemented an administrative selection plan that satisfies the "reasonableness" standard of the Fourth Amendment.

DISCUSSION

The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, found at Title 29 C.F.R. Part 18, and the OFCCP Rules of Practice, found at 41 C.F.R. §60-30.23, provide that an administrative law judge may enter summary judgment for either party if the pleadings, depositions, affidavits, material obtained by discovery, or other materials show that there is no genuine issue of material fact. 29 C.F.R. §18.40; 41 C.F.R. §60-30.23; *see* Fed. R. Civ. P. 56(c).¹⁷ The standard is virtually identical to that found in Rule 56(c) of the Federal Rules of Civil Procedure. Summary judgment is appropriate when the record “show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”¹⁸ Fed.R.Civ.P. 56(c); *see* 41 C.F.R. §60-30.23. No genuine issue of material fact exists when the “record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary judgment has the burden of establishing the absence of evidence to support the non-moving party’s case. *Celotex Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986).

Here, I agree with the representations of the parties, and it is clear from the record, that there are no material facts in dispute concerning the Defendant’s Fourth Amendment challenge, and the only issue is one of law. For the following reasons, I conclude that Plaintiff OFCCP is entitled to judgment as a matter of law on the issue of the Defendant’s Fourth Amendment challenge to its selection for compliance review. .

The Supreme Court clearly defined “consent” in the context of official searches under the Fourth Amendment in *Bustamonte*, 412 U.S. 218. To render a warrantless search constitutionally permissible, the subject of the search must freely and “voluntarily” consent—*i.e.* without official coercion or duress. *Id.* The Court recognized that the issue of “voluntariness” resides somewhere between two competing interests: (1) the government’s interest in conducting the effective enforcement of laws; and (2) society’s deep interest in notions of fairness, privacy, and justice. *Id.*, at 225. As a result, no single criterion can establish the existence of coercion, or as the Court stated it, when a subject’s “will has been overborne.” *Id.* Thus, the Court held that only careful scrutiny of all the surrounding circumstances will determine the presence or absence of “coercion.” *Id.*, at 226-27.

¹⁷ Title 29 C.F.R. Part 18 provides that the Federal Rules of Civil Procedure apply to situations not controlled by Part 18 or rules of special application, and that an administrative law judge may take any appropriate action authorized by the Rules of Civil Procedure for the District Courts.

¹⁸ It is important to note here that typically when faced with cross-motions for summary judgment, a court must rule on each party’s motion on an individual and separate basis, determining in each case whether a judgment may be entered for the moving party. *See Held v. American Airlines, Inc.*, 13 F.Supp.2d 20, 23 (D.D.C. 1998). Such a separate analysis is not necessary here because the parties’ cross-motions address the exact same issue and the exact same set of facts. In fact, the parties have stipulated to many of the material factual circumstances that affect the outcome of the instant determination. Thus, I have consolidated the analysis for both motions into one for the sake of convenience and simplicity.

I find that the totality of the circumstances in the case at bar demonstrates that OFCCP did not coerce BOA into consenting to the compliance review, including the subsequent onsite investigation. In other words, I find that BOA's consent was voluntary, and thus the compliance review did not run afoul of the Fourth Amendment.

First, I find it to be significant, as OFCCP argues, that BOA did not object to or otherwise challenge OFCCP's selection or investigation of BOA's Charlotte facility at any time until 1997 (when it amended its complaint in District Court to add the Charlotte facility), well after the review, and well after OFCCP notified BOA of the alleged violations. Moreover, although the Defendant raised questions about the selection of its Tampa and Columbia facilities as early as 1994, and brought suit to enjoin the compliance reviews in 1995, the Defendant did not raise similar concerns about the Charleston facility until 1997.

The Supreme Court's long standing Fourth Amendment jurisprudence, along with common sense, instructs that a subject's effort or failure to object, challenge, or otherwise disagree with an official search is a highly relevant factor to consider. *See United States v. Cotnam*, 88 F.3d 487, 495 (7th Cir. 1996), *cert. denied*, 519 U.S. 942 (1996) ("A person can, however, consent to the entry of their home or hotel by officers, and consent need be neither express nor verbal.") *citing Bustamonte*, 412 U.S. at 222. Here, BOA failed to demonstrate any indicia of reluctance to cooperate with OFCCP.¹⁹ Once the scheduling letter was received, BOA did not raise objections or refuse to comply, but submitted each document requested, along with many other correspondences, without a single objection. When OFCCP officials arrived at BOA's Charlotte facility in April, 1994 to conduct its onsite investigation, BOA did not refuse access to its facility, but BOA representatives permitted OFCCP officials to proceed with their inspection without a single objection.

In response, BOA contends that it could not, and indeed was in no position to challenge OFCCP's review and search of the Charlotte facility.²⁰ The heart of BOA's argument focuses on the November 24, 1993 scheduling letter. Relying on *Bumper v. State of North Carolina*, 391 U.S. 543 (1968), BOA argues that by citing to Executive Order 11246 and the implementing regulations in the scheduling letter, OFCCP in effect announced that it possessed a warrant or the equivalent of a warrant, and therefore had lawful authority to search—authority to which BOA was forced to acquiesce. Def.'s Memo in Support of Motion for Summary Judgment, at 27-28.

In *Bumper*, a criminal defendant sought to suppress on Fourth Amendment grounds a .22-caliber rifle obtained during a search of his residence. *Id.*, at 545. Upon arriving at the defendant's house, a police officer falsely announced, "I have a search warrant to search your house." *Id.*, at 546. The owner of the house, believing the officer had a search warrant, responded, "Go ahead." *Id.* The officers entered the premises and found the .22-caliber rifle in the kitchen. Because the officer misrepresented the existence and validity of a search warrant, the Court held that the subject of the search had "in effect...no right to resist the search." *Id.*, at 550. In other words, the government's burden of proving voluntary consent cannot be

¹⁹ In its most recently filed brief, BOA admits: "It is undisputed that the Bank did not object to the Government's entry prior to or during the compliance review." Defendant's Reply Brief, at 2 (August 2, 2004).

²⁰ Bank of America does not explain why, in contrast, it *was* in a position to challenge the review of its Tampa and Columbia facilities.

discharged by showing no more than acquiescence to a claim of lawful authority. *Id.*, at 548-49. In the case at bar, BOA equates the scheduling letter to a warrant, or a claim of lawful authority, to which it was forced to acquiesce. However, a plain and reasonable reading of the scheduling letter compels me to disagree.²¹

I find that, contrary to BOA's claim, OFCCP did not in effect announce that it had a warrant or its equivalent when it cited to the regulations by which federal contractors are governed. Instead, OFCCP simply placed BOA on notice of the controlling authority governing federal contractors. Any other interpretation offered by BOA defies common sense, and eludes explanation, particularly when the scheduling letter is compared to an actual warrant and the facts of *Bumper*. First, a warrant provides a government official with undeniable access to search a person or premises—i.e., a valid warrant precludes any attempt by the subject to refuse access. Neither Executive Order 11246, nor the implementing regulations, provide undeniable access; a federal contractor always has the option of refusing compliance and access to its facilities (as BOA did with its Tampa and Columbia facilities). Certainly, merely citing to the executive order and the regulations that authorize the review does not provide the government with undeniable access to a contractor's premises. Nor am I aware of any authority holding that simply citing to a statute or regulation by which an individual, company, or other entity is required to abide is the equivalent of a claim to possess a warrant, let alone unconstitutionally coercive.²²

Second, it is clear that BOA has grossly mischaracterized the language and effect of the scheduling letter. Unlike the officer in *Bumper*, OFCCP did not make a single misrepresentation to BOA.²³ Instead, OFCCP simply informed BOA of its obligations as a federal contractor to comply with Executive Order 11246 and the implementing regulations. Bank of America's first brief contains a number of statements mischaracterizing the scheduling letter. For example, BOA states that "the Government claimed it had the equivalent of a warrant," Def.'s Memo, at 28; that "the government assured [BOA] that its review of [the Charlotte facility] would be

²¹ Although the Board specifically stated that the letter itself was not indisputably coercive or misrepresentative of OFCCP's authority, and that other factors, including the parties' behavior, the communications between the parties, and the circumstances surrounding the onsite review would be particularly germane to interpreting the force and effect of the letter, BOA has not proffered or relied on any such evidence to support its claim of coercion, but has relied strictly on the language of the scheduling letter.

²² Defendant fails to suggest exactly how OFCCP should have placed BOA on notice of the compliance review, so as not to offend BOA's concept of the Fourth Amendment. Frankly, I am unable to suggest anything other than a letter closely resembling the scheduling letter at issue here. If OFCCP did not cite to the applicable statutes and regulations in the scheduling letter, BOA (along with any other contractor selected for compliance review) would likely object that it was not provided proper notice of the alleged violations and the controlling authority. Moreover, by accepting BOA's position, every government regulatory agency, including OFCCP, would be left incapable of performing the duties which Congress has authorized it to do—i.e., monitor those contractors within its jurisdiction, notify them that they are subject to review, and initiate compliance reviews.

²³ Hypothetical examples and analogies from the criminal context are appropriate and instructive here. The effect of the scheduling letter approaches the facts of *U.S. v. Savage*, 459 F.2d 60 (5th Cir. 1972), in which an officer arrived at a residence seeking to search the premises without a warrant. The subject asked if the officer could get a warrant; the officer accurately replied, "Yes, we probably can." The Fifth Circuit held such a statement not to be coercive. Because the officer did nothing more than inform the defendant of what the officer had a legal right to do, and that therefore there was no misrepresentation involved in obtaining the defendant's consent, the statement did not render any subsequent consent involuntary. *Id.*

conducted under lawful authority,” *id.*, at 29; and that OFCCP “advised [BOA] that it...had the authority to search and seize [BOA’s] documents and property,” *id.* Furthermore, BOA complains that OFCCP “did not ask...permission to conduct a review,” but instead “asserted that it had the right to conduct the review because [BOA] had been selected pursuant to the law.”²⁴ *Id.* However, the scheduling letter does not contain any of the language presented by the Defendant; nor could the actual language of the scheduling letter reasonably be interpreted in the fashion urged by the Defendant.

Accordingly, a close look at the scheduling letter is appropriate here. The scheduling letter dated November 24, 1993 simply begins as follows:

Your establishment located at One NationsBank Plaza, Charlotte, NC has been selected for a compliance review under Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (formerly 2012) and the implementing regulations at 41 CFR Chapter 60. In addition, the review will include an examination of your firm’s compliance with the Federal Contractor Veterans’ Employment Report (VETS-100) requirements (38 U.S.C. 4212(d)) and the Employment Eligibility Verification (I-9) Report requirements of the Immigration Reform and Control Act of 1986.

(DX 1; PX 9)(Notice of Compliance Review, November 24, 1993). By citing to the controlling statutes and regulations which govern Defendant’s contract with the government, OFCCP has not misrepresented its authority in any way. It has not misled BOA in any way, or promised, commanded, or induced BOA into action. Nor has it intimidated, harassed, threatened, deceived, or tricked BOA into complying with the review process.

The next two (2) paragraphs politely describe how the compliance review will be conducted, and outline the phases BOA can expect throughout the process, “include[ing] a desk audit and onsite review.” *Id.* Next, the scheduling letter describes which material and documents are to be submitted during the desk audit phase: “For desk audit purposes we request that you submit...” *Id.* The letter explains the purpose of the desk audit, which is “to assist [OFFCP] in preparing for the onsite review, and therefore, to reduce the amount of onsite time.” *Id.* Again, BOA has made no misrepresentation of authority, or any statement insisting or even implying that BOA has no right to resist the review. In other words, OFCCP has not coerced BOA into consenting against its will.

Bank of America contends that OFFCP “warned [BOA] that it was authorized by regulations to ‘initiate enforcement proceedings’ if the Bank failed to comply with the OFCCP’s directives.” Def.’s Memo, at 30. However, OFCCP’s scheduling letter made no such assertion or even suggestion. In fact, the scheduling letter contains no “directives” other than a *request* for information for desk audit purposes. Additionally, Bank of America insists that OFFCP

²⁴ Nothing in the relevant statutes, regulations, or case law obliges OFCCP to obtain permission from a contractor to conduct a compliance review.

“expressly relied on regulations which provide that federal contracts may be cancelled, terminated or suspended, and federal contractors may be debarred, for failure to comply with the OFCCP’s request for information.” *Id.* (citing to 41 C.F.R. §60.1.26 (July 1, 1993)). This is wholly and completely inaccurate. In fact, OFCCP’s scheduling letter cites specifically to 41 C.F.R. §60-2.2—not 41 C.F.R. §60-1.26—and states the following:

You should note, however, that 41 CFR 60-2.2 authorizes the initiation of enforcement proceedings if materials submitted for desk audit do not represent a reasonable effort to meet the requirements of the regulations.

(DX 1; PX 9) (Notice of Compliance Review). Plainly, 41 C.F.R. §60-2.2 describes what will happen if the desk audit materials that are submitted do not demonstrate that the contractor has complied with the regulations governing the contract; but they do not indicate what will happen if the contractor refuses to provide materials or access during the onsite review, *see* 41 C.F.R. §60-1.26, as BOA contends. At no point throughout the scheduling letter does OFCCP discuss the consequences of failure to comply with the review. Nevertheless, BOA contends the letter is threatening and coercive.

But even assuming that the letter specifically cited to 41 C.F.R. §60-1.26, BOA’s decision to provide documents and access to its Charlotte facility would still have been voluntary under the Fourth Amendment. First, Title 41, Part 60-1.26 of the Code of Federal Regulations (July 1, 1993), 41 C.F.R. §60.126, which was in effect at the time of the scheduling letter, but which was not actually cited to in the scheduling letter (as BOA claims), does not preclude a federal contractor from challenging a compliance review, nor does it impose automatic sanctions for doing so. That provision explains that a refusal to submit an Affirmative Action Program, or refusal to allow an onsite review to be conducted, “may result in the institution of administrative or judicial enforcement proceedings to enforce the order and to seek appropriate relief.” 41 C.F.R. §§60-1.26(1)(iv), (v) (July 1, 1993); *see* (DX 24).²⁵ Stated another way, no sanctions, injunctions, or even enforcement proceedings are automatically levied or administered against a contractor who refuses to submit an Affirmative Action Program or allow an onsite review under 41 C.F.R. §60-1.26. Rather, if a contractor refuses to submit materials or permit an onsite review, OFCCP *can choose* to initiate enforcement proceedings, and the contractor can then challenge the review and/or search before an administrative tribunal. 41 C.F.R. §§60-1.26(a), (b); *see* 41 C.F.R. §60-1.26(c). Only *after* an administrative hearing can sanctions, injunctions, or other relief be imposed.²⁶ *Id.*; *see* 41 C.F.R. §60-1.26(d).

²⁵ See also 41 C.F.R. §60-1.26(a)(2) (July 1, 1993), which states: “[i]f a contractor refuses to submit an affirmative action program, or refuses to supply records or other requested information, or refuses to allow the compliance agency access to its premises for an on-site review; and if conciliation efforts under this chapter are unsuccessful, OFCCP, notwithstanding the requirements of this chapter, may go directly to administrative enforcement proceedings to enjoin the violations, to seek appropriate relief, and to impose appropriate sanctions, or any of the above.” *See* (DX 24).

²⁶ In its most recent brief, BOA offers a different take on its claim that its fears of sanctions persuaded it not to challenge OFCCP’s review, arguing that any entitlement to a full administrative hearing is still unfair under the Fifth Amendment, because it would not be able to sufficiently prepare for a hearing on a Fourth Amendment issue if it challenged the compliance review. Relying on *OFCCP v. The Boeing Co.*, 1999-OFC-14, Order Granting Motion to Remove from Expedited Hearing Procedures, Granting Document and Other Discovery, and Notice of Hearing, at 8-

Second, had the scheduling letter actually contained a specific reference to 41 C.F.R. §60-1.26, as BOA contends, it would still not be coercive, misleading, or misrepresentative of any authority held by OFCCP to conduct a compliance review. Rather, it would simply be a citation to the regulations by which all federal contractors are required to abide. Surely, merely citing to a statute or regulation that governs the process under question is not coercive, nor does it misrepresent an official's authority.

By way of analogy, I note that the scheduling letter is no more coercive or misleading than the language contained in a typical subpoena. Like the scheduling letter, a subpoena places individuals and parties on notice that documents or testimony are requested in a particular proceeding, and cites to the authority under which it is issued and enforced. Indeed, subpoenas typically expressly warn a party of the consequences of noncompliance, and arguably are more assertive, aggressive, and threatening than OFCCP's Notice of Compliance Review. I am unaware of any authority holding that the statutory and regulatory citations in a subpoena, standing alone, are coercive to the extent that they automatically overbear an individual's decision to cooperate, in violation of the Fourth Amendment. To accept Bank of America's position that the scheduling letter is coercive and that it provided BOA with no choice but to comply, simply because it cited to the statutes and regulations that govern contractors, would lead to the conclusion that every subpoena ever issued in any proceeding before any tribunal was coercive, and therefore unconstitutional, simply because it cited to the authority by which it was issued or enforced. Unlike Defendant, I am unable to make that leap here.

The remainder of the scheduling letter consists of a simple request by OFCCP for BOA to submit its Affirmative Action Program for purposes of the desk audit within thirty (30) days to Mr. Jerome Geathers. (DX 1; PX 9). Finally, the letter explains to BOA which documents OFCCP intends to examine during the onsite review phase. *Id.* Again, there is nothing in the scheduling letter from beginning to end that misrepresents OFCCP's obligation to perform compliance reviews, or BOA's right to deny OFCCP access. In other words, OFFCP's

9 (Aug. 16, 1999), in which the defendant actually refused to comply with the OFCCP's review, BOA contends that the expedited hearing procedure, which arises when a contractor refuses access to materials or facilities, "handicaps a government contractor's ability to identify or defend against an unconstitutional selection." Def.'s Reply Br., at 4. Specifically, BOA claims that the OFCCP's expedited procedures would have left it with little access to discovery materials and little time to prepare for a hearing had it refused to comply. *Id.*; see 41 C.F.R. §60-30.33. Thus, as the argument goes, BOA was forced to consent. In *Boeing*, ALJ Stuart Levin granted Boeing's motion for removal from expedited hearing procedures on Fifth Amendment due process grounds where the defendant challenged the OFCCP's review on Fourth Amendment grounds, stating that "no useful purpose will be served by depriving the contractor of its Fifth Amendment right to due process in pursuing its Fourth Amendment defense." *Boeing Co.*, 1999-OFC-14, at 8. Thus, Judge Levin made clear that the issue to be determined was not whether Boeing had established facts sufficient to warrant a finding that the compliance inquiry violated Boeing's Fourth Amendment right, but whether Boeing had presented a sufficient basis for concluding that its Fourth Amendment defense could not fairly proceed under the restrictive discovery provisions imposed by the expedited hearing rules. *Id.*, at 8-9. It is difficult to understand how this decision adds anything to the Defendant's argument. Whether or not the expedited hearing process may hamper a defendant's ability under the due process clause of the Fifth Amendment to present a legitimate Fourth Amendment challenge to a compliance review is very different from, and irrelevant to, the inquiry here—that is, whether BOA voluntarily consented to the compliance review. Furthermore, Judge Levin's decision in *Boeing*, in which he removed the case from the expedited hearing procedure so that the parties could conduct discovery, in fact demonstrates that had BOA challenged the compliance review, the issue would have been fully adjudicated before sanctions or debarment.

scheduling letter, on its face, cannot be interpreted as forcing BOA to “acquiesce to a claim of lawful authority.”

Bank of America’s next argument is equally without merit. Defendant contends that its perception of the scheduling letter as threatening, and its fears about the consequences of non-compliance were “not...illusory,” as OFCCP suggests. Def.’s Memo, at 32. Bank of America’s position that forcing a federal contractor to challenge each compliance review on Fourth Amendment grounds places it in an impossible position is also untenable. I disagree on both counts.

First, as mentioned above, Executive Order 11246 and the implementing regulations provide OFCCP with the *choice* to initiate enforcement proceedings should a federal contractor refuse to submit desk audit materials or allow access to its facility, 41 C.F.R. §60-1.26. They certainly *do not* preclude a federal contractor from refusing or otherwise challenging OFCCP’s compliance review on Fourth Amendment grounds. Thus, the “coercion” that BOA claims exists must be coming from some source beyond the plain language of the regulations themselves. Courts have held that a finding of “involuntariness” must involve more than just a subjective belief of coercion; rather the existence of some objectively improper action on the part of the officials should be considered. *United States v. Crowder*, 62 F.3d 782 (6th Cir. 1995), *cert. denied*, 516 U.S. 1057 (1996); *but see also Fewless ex rel. Fewless v. Board of Educ. of Wayland Union Schools*, 208 F.Supp.2d 806, 167 Ed. Law Rep. 153 (W.D.Mich.) Jul 11, 2002) (questioning whether the presentation of objective evidence is *required* to establish coercion or is simply one factor to be considered; citing *Bustamonte*, 412 U.S., at 229, which instructs that account be taken of the vulnerable subjective state of the consenting party). Here, BOA has provided no objective evidence of any improper action on the part of OFCCP that could conceivably render its cooperation involuntary, or any objective evidence that would support its argument that the “risk of noncompliance” coerced its consent.

The record is clear that OFCCP officials did not act improperly at any point in requesting the audit materials or during the onsite review. I agree with OFCCP that BOA “undertook no action from which [OFCCP] could reasonably infer that [BOA] objected to the compliance review and/or the submission of documents” until BOA added the Charlotte facility to its complaint in U.S. District Court on February 25, 1997. Plaintiff’s Memo, at 9. Thus, the only “evidence” of coercion is BOA’s belatedly articulated and subjective allegation that the scheduling letter and citations therein forced it to consent.

It is important to note that BOA’s allegation that it perceived that it had no choice but to comply with the request for compliance review is not supported by a shred of evidence, objective, subjective, or otherwise. Thus, despite the fact that there has been extensive discovery in this matter, including the time it has been before me, there is no testimony, direct or hearsay, or any other evidence, wherein any representative of BOA has even suggested that BOA representatives only complied with the request for compliance review because they believed that they had no choice, or because they feared the “risk of noncompliance.” Indeed, the only evidence in this regard, as conceded by BOA, is that BOA representatives cooperated fully and without objection. Moreover, it appears that the language of the scheduling letter did not coerce BOA into complying with the request for review of its Tampa and Columbia facilities, nor did

the “risk of noncompliance” prevent BOA from challenging the request for compliance review of those facilities.

But even setting aside the lack of any evidence to support BOA’s claim of a perceived threat of sanctions, such a perception is clearly unreasonable. The regulations are clear that a contractor’s refusal to provide documents or access *may* result in the institution of administrative or judicial enforcement proceedings. 41 C.F.R. §60-1.26(a)(1) (July 1, 1993); (DX 24). In other words, OFFCP may or may not choose to initiate enforcement proceedings. It is important to note that the governing regulations actually encourage OFCCP and federal contractors to remedy any apparent compliance deficiencies through conciliation, mediation, and/or persuasion efforts *before* initiating enforcement proceedings. *See* 41 C.F.R. §§60-2.2 (b), 60-1.20(b) (“Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion.”). Subsequently, the only “risk of noncompliance” is a possible enforcement proceeding before an administrative tribunal where both parties would be allowed to present claims, defenses, and evidence in support of their respective positions. *See* 41 C.F.R. §§60-1.26(c), (d). At no time before that is the Department of Labor in any position to levy penalties against a federal contractor. Thus, contrary to BOA’s claim, sanctions are not automatic and inevitable.²⁷ It is difficult to understand how requiring a contractor to follow an established adjudicatory process in order to challenge OFCCP’s authority to conduct a compliance review on Fourth Amendment grounds can be seen as threatening, coercive, misleading, unreasonable, or otherwise in violation of the Fourth Amendment. Accordingly, I find that, even if there were evidence to establish that BOA had such a perception, BOA’s perception of any possible threat of sanctions or debarment is unreasonable under the circumstances, and does not render its consent involuntary.

Bank of America further argues that OFCCP’s consent theory creates “perverse incentives” by forcing federal contractors to make a choice between two courses of action: (1) “cooperate at the outset, and thereby waive any objection it may have in the future if it subsequently discovers that it was subject to an unconstitutional search”; or (2) “challenge each and every selection and refuse to cooperate even if: (a) it has no reasonable basis to do so; and (b) it cannot obtain the information for determining whether it would be reasonable to do so without resort to legal action.” Def.’s Memo, at 35. However, having to make such a choice does not amount to coercion and certainly does not render BOA’s consent involuntary under the standards set forth by the Supreme Court.

However dramatically BOA paints its choices, the argument is unconvincing. As a federal contractor facing compliance review, BOA is in no more of a precarious position than a defendant targeted for a search in the criminal context. Like any person subject to a warrantless

²⁷ In support of its contention that the “risk of noncompliance” forced its consent, BOA cites to *First Alabama Bank of Montgomery v. Donovan*, 692 F.2d 714 (11th Cir. 1982) and *Beverly Enterprises, Inc. v. Herman*, 130 F.Supp.2d 1, 6-7 (D.D.C. 2000), in which sanctions were imposed and a federal contractor was debarred. It is important to note that the two contractors were sanctioned and debarred only after an administrative hearing. The fact that those two contractors in that case were sanctioned and/or debarred for noncompliance may be evidence that there is a *risk* associated with noncompliance, but is not relevant or at all persuasive as to whether that outcome is inevitable. Because BOA may have faced a risk does not equate to BOA being coerced into consenting against its will under the Fourth Amendment. The fact remains that a contractor is entitled to an administrative hearing before sanctions or other penalty can be levied.

search, BOA is faced with a choice, and like any person faced with the choice between consenting to or challenging a warrantless search, BOA must accept the consequences of its actions. Bank of America cannot now withdraw its consent simply because it dislikes the outcome. Accepting BOA's argument would render coercive every decision to consent in any context simply because the target of the search had to make that choice. Here, Bank of America chose to cooperate with the compliance review by unequivocally consenting to both the desk audit and onsite review. The unsettling nature of such a dilemma has never been held to violate the Fourth Amendment, and I am not prepared to do so here.

Moreover, BOA's first "choice," as presented in BOA's brief, is not an accurate statement of the law. It is well-settled that consent given during a warrantless search can be withdrawn or limited in scope by the consenting party at any time during the search. *See e.g., Florida v. Jimeno*, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents."). Thus, by initially consenting, a federal contractor does not give blanket consent throughout the process, as BOA suggests.

Lastly, and certainly most curiously, BOA contends that it did not challenge the compliance review because it had no reason to suspect that the OFCCP had inappropriately targeted it or that the OFCCP did not follow its own established neutral criteria for selecting government contractors. Def.'s Memo, at 34. BOA claims that it reasonably believed that OFCCP had acted lawfully in selecting its Charlotte headquarters. Presumably, BOA now presents this argument as support for its contention that it did not voluntarily consent to the compliance review. However, I am unable to accept the notion that simply because BOA believed OFCCP was acting lawfully, BOA was therefore involuntarily coerced into consenting to the compliance review. Again, turning to the criminal context, if a person who is asked by a police officer if his house may be searched convinces himself that the police officer has probable cause to do so, and then consents, absent other evidence of trickery or coercion, the fact that the police officer may not in fact have had probable cause to conduct the search does not render the consent involuntary under the Fourth Amendment.

In sum, I find that there is no evidence to support a claim that BOA's submission to the request for compliance review was the product coercion or duress, or was anything other than voluntary.

CONCLUSION OF LAW

Based on the foregoing, and after a close examination of the totality of the circumstances, I find that as a matter of law Bank of America's decision to provide OFCCP with the requested documents and access to its Charlotte facility was unequivocal and unconditional, and was uncontaminated by duress or coercion. As a result BOA's consent to the compliance review was voluntary under *Bustamonte*. Because BOA consented, OFCCP's actions are removed from the requirements of the Fourth Amendment. Consequently, and as the Board held in its decision, any further consideration of whether OFCCP selected BOA based on neutral criteria—i.e., the "reasonableness" inquiry under *Barlow* and *NOPSI II*—is unnecessary. Therefore, OFCCP is entitled to partial summary judgment on the issue of the Defendant's Fourth Amendment challenge to its selection for review.

ORDER

For the foregoing reasons, it is hereby ORDERED that Plaintiff's Motion for Partial Summary Judgment is GRANTED. It is further ORDERED that Defendant's Motion for Summary Decision seeking dismissal of the case is DENIED.

The merits of the compliance action filed by OFCCP have not yet been litigated. A notice of hearing and prehearing order will be forthcoming after consultation with the parties.

SO ORDERED.

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LINDA S. CHAPMAN
Administrative Law Judge