



Issue Date: 23 July 2010

CASE NO.: 2010-OFC-00002

IN THE MATTER OF

**OFFICE OF FEDERAL CONTRACT COMPLIANCE
PROGRAMS, U.S. DEPARTMENT OF LABOR,
Plaintiff**

v.

**FRITO-LAYS, INC.,
Defendant**

**RECOMMENDED DECISION AND ORDER GRANTING
DEFENDANT'S MOTION FOR SUMMARY DECISION
AND DISMISSING THE COMPLAINT**

This matter arises under Executive Order 11246, as amended by Executive Order 11375, Executive Order 12086 and Executive Order 13279 (the "EO") and the implementing regulations at Title 41 Chapter 60 of the Code of Federal Regulations. On April 28, 2010, the United States Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP") filed an administrative complaint alleging that Frito-Lay, Inc. ("Frito-Lay" or "Defendant") refused to provide data for applicants and hires as required by the EO and regulations. The complaint was filed under the expedited procedures set forth at 41 C.F.R. § 60-30.31.

Frito-Lay filed an answer on May 21, 2010, denying that it was in violation of the EO and regulations and setting forth affirmative defenses. The Parties have filed Motions for Summary Decision. As set out in the Motions, the material facts are not in dispute and the issue before the Court is a purely legal issue.

FACTS

Frito-Lay is a federal contractor subject to the EO and the regulation issued pursuant to the EO. On July 13, 2007, OFCCP sent Frito-Lay a Scheduling Letter stating the OFCCP had selected its Dallas Baked Snack facility for a compliance review pursuant to the EO. In the Scheduling Letter, OFCCP requested that Frito-Lay submit data for the 2006 affirmative action plan year and for the first half of 2007. Subsequently, OFCCP requested data for the remainder of 2007 and back to July 13, 2005. Frito-Lay supplied OFCCP with this requested data.

Relying on the information Frito-Lay provided, OFCCP conducted an analysis of hiring at the Dallas facility. OFCCP alleges this analysis revealed an adverse impact in hiring of

females for the period June 13, 2006 through December 31, 2007. Based on this finding, OFCCP alleges it decided that it needed to determine if the adverse impact continued beyond December 31, 2007. As a result, on November 10, 2009, OFCCP requested that Frito-Lay submit additional data for applicants and hires for the period January 1, 2008, through October 31, 2009 (the “2008 and 2009 data”). Frito-Lay has refused to provide the 2008 and 2009 data.

The issue before the Court is whether the temporal scope of the desk audit phase of a compliance review can be extended beyond the date that the contractor received its Scheduling Letter.

DISCUSSION

Summary decision is appropriate “if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision” as a matter of law. 29 C.F.R. § 18.40; Flor v. U.S. Dep’t of Energy, 93-TSC-0001, slip op. at 10 (Sec’y Dec. 9, 1994). If the non-moving party fails to “show an element essential to his case, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.” Rockefeller v. U.S. Dep’t of Energy, ARB No. 03-048, ALJ No. 2002-CAA-00005, slip op. at 4 (ARB Aug. 31, 2004) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986)).

The EO prohibits federal contractors from discriminating against employees or applicants for employment and requires contractors to take affirmative action to provide equal employment opportunities. The contractors are required to develop and maintain written Affirmative Action Plans (“AAP”). The Secretary of Labor is responsible for enforcing contractor compliance with the EO and OFCCP is empowered to conduct compliance evaluations of contractors to determine whether they are taking affirmative action and providing equal opportunity in their hiring and employment practices.

OFCCP’s compliance evaluation may consist of compliance reviews, off-site records reviews, compliance checks, and focused reviews. § 60-1.20(a)(1)-(4). In this case, OFCCP was conducting a compliance review of the Frito-Lay Dallas facility. Compliance reviews may proceed in three stages. First, OFCCP may conduct a desk audit at its offices of the written AAP and supporting documentation. § 60-1.20(a)(1)(i). If the desk audit of the AAP and supporting documentation reveal “unresolved problem areas,” OFCCP may then conduct an on-site review of the contractor’s establishment. § 60-1.20(a)(1)(ii). Finally, and “where necessary” OFCCP may conduct an off-site analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review. § 60-1.20(a)(1)(iii). If the contractor refuses to submit to a compliance evaluation, OFCCP may bring an enforcement action. In this case, although initiated in July 2007, the compliance review is still in the desk audit phase.

Frito-Lay argues that OFCCP has impermissibly attempted to extend the timeframe for review of the Dallas facility beyond the July 2007 date that the compliance review was initiated.¹

¹ As Frito-Lay has voluntarily provided data through December 31, 2007, only the request for the 2008 and 2009 data is before the Court.

Frito-Lay argues that OFCCP's regulatory framework, as reflected in the regulations, the comments accompanying the publication of the regulations and OFCCP's Federal Contract Compliance Manual ("FCCM"), establishes the temporal scope of a 41 C.F.R. § 60-1.20(a)(1) compliance review as the contractor's previous affirmative action plan year at the time the contractor received the Scheduling Letter and, if the contractor was more than six months into its current affirmative action plan at the time it received its Scheduling Letter, up to the date the contractor received the Scheduling Letter. Additionally, in circumstances where OFCCP is investigating discrimination, OFCCP's regulatory framework permits OFCCP to investigate the entire two year period preceding the date the contractor received its Scheduling Letter. Frito-Lay argues that nothing in OFCCP's regulatory framework permits OFCCP to extend the review period in a compliance review to employment activity that occurred after the date the contractor received its Scheduling Letter.

OFCCP counters that the applicable regulations at 41 C.F.R. Chapter 60 entitle OFCCP to the requested data and information, that applicable case law supports its position and that Frito-Lay cannot rely upon the FCCM in refusing to produce the requested data and information. For the reason enumerated below, I find OFCCP cannot require Frito-Lay to produce the 2008 and 2009 data and that the Administrative Complaint should be dismissed.

The current matter takes place in the context of a compliance review conducted pursuant to 41 C.F.R. § 60-1.20(a)(1), and pursuant to a Scheduling Letter approved by the Office of Management and Budget ("OMB"). A compliance review is initiated with a desk audit. *See* 41 C.F.R. § 60-1.20(a)(1)(i). The OMB-approved Scheduling Letter that initiates the compliance review calls for a review of a contractor's previous AAP and supporting documentation and, if the compliance review was initiated more than six-months into the contractor's AAP year, a review of the contractor's AAP data for the current AAP year at the time the audit was initiated. Accordingly, the Frito-Lay compliance review was to cover the period January 2006 to July 2007.

OFCCP argues that the "unambiguous regulations" required Frito-Lay to keep the requested records and to produce them to OFCCP upon request. OFCCP first cites 41 C.F.R. §§ 60-1.12(a), 60-3.4 and 60-3.15 for the proposition that once the compliance evaluation was started by the July 2007 Scheduling Letter, Frito-Lay was obligated to maintain and preserve the 2008 and 2009 data until a final disposition of the case. Even if relevant to the matter under investigation, there is no allegation that Frito-Lay has failed to maintain and preserve the 2008 and 2009 data. While a contractor is obligated to maintain and preserve the data, there is nothing in 41 C.F.R. §§ 60-1.12(a), 60-3.4 or 60-3.15 that requires contractors to permit OFCCP access to these materials as part of an ongoing compliance evaluation.

OFCCP also cites 41 C.F.R. §§ 60-1.43 which requires contractors to permit OFCCP access to materials "as may be relevant to the matter under investigation . . ."² The regulation states that "[e]ach contractor shall permit the inspecting and copying of such books and accounts and records, including computerized records, and other material *as may be*

² OFCCP also cites § 60-1.20(f) which requires a contractor to provide full access to all relevant data that the compliance officer determines necessary for an off-site analysis. In this case, the compliance review has not yet proceeded to off-site analysis and no such authority is cited for the desk audit phase.

relevant to the matter under investigation and pertinent to compliance with the Order, and the rules and regulations promulgated pursuant thereto by the agency, or the Deputy Assistant Secretary.” *Id.* (emphasis added). OFCCP argues that the 2008 and 2009 data is relevant to OFCCP’s investigation of Frito-Lay’s compliance with the EO and implementing regulations. But the language of the regulation is clear that OFCCP’s authority is limited to information *relevant* to the matter under investigation. As noted above, this compliance evaluation was to cover the period January 2006 to July 2007. As this is the matter under investigation, Frito-Lay is only required to permit access to materials that are relevant to that investigation. Far from being unambiguous, I find nothing in the regulations that would require Frito-Lay to permit OFCCP access to the 2008 and 2009 data.³

The regulatory comments and the FCCM support Frito-Lay’s argument that there is a temporal scope to the compliance review. The type of information sought by OFCCP—hires and applicant data—is requested in Itemized Listing 10(a) of OFCCP’s Scheduling Letter. Itemized Listing 10 addresses the time period that data is to cover:

Data on your employment activity (applicants, hires, promotions, and terminations) for the preceding AAP year and, if you are six months or more into your current AAP year when you receive this listing, for the current AAP year.

OFCCP explained in its regulatory comments that the FCCM would be where it defined the parameters of a compliance review:

The Federal Contract Compliance Manual (FCCM) contains the policy guidance interpreting the Executive Order and regulations, as well as Agency instructions for implementing the regulatory provisions. OFCCP’s Compliance Manual currently describes the procedures for conducting compliance reviews. The aspects of implementation addressed in the Manual include the time frames for conducting a review, how to open and close a review, and how frequently reviews should be conducted. The FCCM is the appropriate medium to specify the procedures for conducting the different types of compliance evaluations.

See 62 Fed. Reg. 44174, at 44180.

Finally, OFCCP assured contractors in its comments on the final regulations for 41 C.F.R. § 60-1.20 that any “[c]ontractor fears of . . . unending evaluations are unfounded.” *Id.* OFCCP continued:

OFCCP always has been sensitive to contractor concerns about the amount of time, money and personnel resources consumed by compliance reviews OFCCP intends to continue to follow the currently prescribed time frames [in the

³ Assuming that § 60-1.20(f) grants OFCCP access to data beyond the current AAP during an off-site analysis, why is § 60 silent about this authority during the desk audit phase and why is § 60-1.20(f) in the regulations if the unambiguous regulations have already granted OFCCP this authority during the desk audit phase?

FCCM] whenever the compliance review is the method used to evaluate a contractor's performance. *Id.*

While the FCCM confers no substantive rights on any party, the OFCCP's regulatory scheme clearly establishes the FCCM as the source for guidance on the temporal scope of a 41 C.F.R. § 60-1.20(a)(1) compliance review. As cited in the regulatory comments, the provisions of the FCCM provide guidance as to the intent and meaning of OFCCP's regulations. The fact that OFCCP's comments to its regulations under 41 C.F.R. Part 60-1 repeatedly refer to the FCCM as the place where the OFCCP will address these issues supports Frito-Lay's contention that the FCCM cannot be ignored in deciding the central legal issue of this case—whether there is a temporal scope to a 41 C.F.R. § 60-1.20(a)(1) compliance review and, if so, what is it.

The FCCM establishes the review period for a compliance review at FCCM, Section 2C03:

- a. *General:* The EOS [Equal Opportunity Specialist] should evaluate the contractor's performance (e.g., goals progress, good faith efforts, personnel activity, etc.) for at least the last full AAP year. Current year performance should also be examined if the contractor is six months or more into its current AAP year. For example, if the AAP is established on a calendar year basis, and the compliance review is scheduled for August 1988, the EOS would evaluate the contractor's performance from January 1, 1987 through June 30, 1988 (1/1/87 through 12/31/87 under the prior AAP, and 1/1/88 through 6/30/88 under the current AAP).
- b. *When Discrimination Found:* Note, however, that if potential discrimination is found, analysis of personnel activity/policy implementation should be extended to cover the normal liability period (providing coverage can be established during the full liability period). The normal liability period for a compliance review is the full two years *preceding* the date the contractor received the Scheduling Letter. Additionally, where the alleged discrimination involves a continuing violation, the analysis may be extended further.

FCCM, Section 2C03 (emphasis added). With regard to cases asserting a continuing violation, the FCCM states:

Application of Continuing Violation Theories: OFCCP applies the continuing violation theory in compliance reviews and complaint investigations. The theory will be applied in the following situations:

1. **Series of Individual Discriminatory Acts:** A continuing violation may be identified where the discrimination involves a series of closely related acts, *the last of which occurred within the 2-year period preceding the initiation of the compliance review* (Scheduling Letter). . . . The acts must be sufficiently related to form a pattern of discrimination.

2. Maintenance of a Discriminatory Policy or System: A continuing violation may be found where a contractor maintains a discriminatory policy or practice *into the 2-year, or 180-day period*. The violation may focus on one particular employment practice, such as promotions or compensation, or it may deal with discrimination across-the-board in areas including initial placement, promotions, transfers and salary. It is not necessary under this subtheory to show a discrete act representing the alleged discriminatory policy occurred during the *2-year or 180-day period*. It is sufficient to show that the policy or system *continued into* the period, and that if there have been a personnel action, the policy or system would have been applied in the allegedly discriminatory manner.

FCCM, Section 7B01(b) (emphasis added).

In addition, the comments to OFCCP's August 19, 1997 regulations state that OFCCP's "policy and practice are to examine the contractor's personnel policies and activities for the two years preceding the initiation of the review, and to assess liability for discriminatory practices dating back two years." 62 Fed. Reg. 44174, at 44178.

Nothing in OFCCP's regulations, comments to its regulations, or the FCCM suggests that OFCCP intended to extend audits forward past the date that the contractor received the initial desk audit Scheduling Letter. Indeed, everything in the regulations and interpretive guidance on the regulations suggests that compliance reviews look backwards from the date the review was initiated.

Comments to its regulations provide assurances that compliance reviews will not be unending:

Thus, the agency's practice normally has been to conduct a compliance review no more frequently than once every two years. Additionally, the agency's Compliance Manual instructs the compliance officer to complete the compliance review within 60 days from the date the AAP is received.

See 62 Fed. Reg. 44174, at 44180 (citing FCCM, Section 2C04).

The compliance review was envisioned as something that the Agency intended to complete quickly and not something, as in this matter, where OFCCP still has not completed its desk audit almost three years after it initiated the compliance review. The regulations and FCCM do not speak of analyzing data going forward because that was not envisioned as part of the 41 C.F.R. § 60-1.20(a)(1) compliance review procedure when OFCCP promulgated its regulations.

The previous sections demonstrate that OFCCP established the temporal scope of a 41 C.F.R. § 60-1.20(a)(1) compliance review in its comments to its regulations, and through its guidance in the FCCM. Moreover, those sources establish OFCCP's intent regarding the relevant time frame for a 41 C.F.R. § 60-1.20(a)(1) compliance review at the time it promulgated its regulations.

“A court looks to an agency’s intent at the time [of] promulgation when scrutinizing any subsequent challenged interpretation” *United Farmworkers of Am. v. Chao*, 227 F. Supp. 2d 102, 109, n.14 (D.D.C. 2002) (rejecting DOL’s asserted regulatory interpretation because it was inconsistent with the Agency’s original regulatory intent as established in the Agency’s own comments accompanying the final regulation). *See also S.G. Loewendick & Sons, Inc. v. Reich*, 70 F.3d 1291, 1295 (D.C. Cir. 1995) (declining to defer to DOL’s interpretation of an OSHA regulation because it was contrary to OSHA’s intent at the time the regulation was promulgated, as reflected in the comments included with final publication of the rule).

As the comments accompanying OFCCP’s August 19, 1997 final regulations directly state that OFCCP’s “policy and practice are to examine the contractor’s personnel policies and activities for the two years preceding the initiation of the review, and to assess liability for discriminatory practices dating back two years,” 62 Fed. Reg. 44174, at 44178, and repeatedly allude to the FCCM as the authority establishing the time frame for its compliance evaluations, 62 Fed. Reg. 44174, at 44180, the only conclusion regarding the original regulatory intent for the temporal scope of a compliance review is that it is for two years preceding the date that the compliance review was initiated. The comments to the regulations directly limit the scope and the FCCM, which specifically was referenced in the regulatory comments, establish that as the appropriate time frame for a compliance review.

OFCCP argues that case law establishes that the EO and implementing regulations grant “broad power” to OFCCP, particularly in the area of access to records and documents. However, this power of OFCCP and other administrative agencies is not unfettered. In *EEOC v. Ford Motor Credit Company*, 26 F3d 44 (6th Cir. 1994) the EEOC began an investigation on July 26, 1991. A preliminary on-site investigation revealed possible discrimination and on April 8, 1992, EEOC issued an administrative subpoena duces tecum asking for data from January 15, 1980, to the present. When Ford refused to comply with the subpoena, EEOC brought an enforcement action. The district court stated the request was arbitrary and an abuse of authority given to EEOC and narrowed the temporal scope of the subpoena. Of significance to this case, the subpoena was limited to times before July 26, 1991.

On appeal, EEOC argued that the district court’s order must be reversed because it was based on a fundamental misunderstanding of the law concerning EEOC’s “broad power” to investigate employment practices. The Sixth Circuit stated:

Commenting on EEOC’s subpoena power under Sec. 2000e-8, the Supreme Court has noted that “[s]ince the enactment of Title VII, courts have generously construed the term “relevant” and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer.” *Shell Oil*, 466 U.S. at 68-69, 104 S.Ct. at 1631. We agree with EEOC that Congress intended for it to have broad access to information relevant to inquiries it is mandated to conduct, but this leaves open the question of exactly what material is broadly relevant to a given investigation. EEOC’s position, as confirmed at oral argument, is essentially that it is entitled to any material which EEOC deems relevant in its discretion. We must reject this position.

In determining the proper scope of the data request, the Court did not include any period after the investigation began.

OFCCP has not cited any cases where this broad power was extended during the desk audit phase to time periods after the date of the scheduling letter. Nor has it cited any cases where it has previously insisted on receiving data for periods after the current AAP year at the time the compliance review initiated. In Frito-Lay's Counter Reply, it is asserted that out of 74 OFCCP compliance reviews that Frito-Lay has been subject to since January 1, 2007, this is the only one where OFCCP has insisted on receiving data for periods that occurred after the current AAP year at the time the compliance review initiated. This assertion has not been countered. Considering the lack of evidence that OFCCP has ever insisted on this type of data, it would appear that OFCCP's position in this matter is a marked departure from how OFCCP has interpreted its own regulations and has conducted its compliance reviews in the past.

In summary, I find that the EO, regulations, case law and the FCCM contemplate that the temporal scope of the desk audit phase of a compliance review cannot be extended beyond the date that the contractor received its Scheduling Letter. Accordingly, Frito-Lay's Motion for Summary Decision should be granted.

RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED THAT:

Summary Decision be entered for the Defendant, Frito-Lay, and that the Complaint be **HEREBY DISMISSED.**

So ORDERED.

A

**LARRY W. PRICE
ADMINISTRATIVE LAW JUDGE**

NOTICE OF APPEAL RIGHTS: To appeal, you must file exceptions ("Exception") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's recommended decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Any request for an extension of time to file the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the Exception is due. *See* 41 C.F.R. § 60-30.28.

On the same date you file the Exception with the Board, a copy of the Exception must be served on each party to the proceeding. Within fourteen (14) days of the date of receipt of the Exception by a party, the party may submit a response to the Exception with the Board. Any request for an extension of time to file a response to the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the response is due. *See 41 C.F.R. § 60-30.28.*

Even if no Exception is timely filed, the administrative law judge's recommended decision, along with the record, is automatically forwarded to the Board for a final administrative order. *See 41 C.F.R. § 60-30.27.*