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Office of Administrative Law Judges
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Issue Date: 04 January 2019

Case No.: 2018-NQW-00002

In the Matter of:

CHRISTINA WATERS,
Complainant,

v.

METRO CONTRACTING SERVICES, LLC,
Respondent,

and

ADMINISTRATOR, WAGE AND HOUR DIVISION,
Party-in-Interest.

DECISION AND ORDER

This case arises under Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts, and the implementing regulations codified at 29 C.F.R. Part 9. This matter involves a complaint filed by Christina Waters (Complainant), concerning a service contract for janitorial services obtained by Metro Contracting Services, LLC (Respondent).

A formal hearing was held on October 9, 2018, in Valdosta, Georgia, at which time the parties were afforded a full opportunity to present evidence and argument. Complainant and Respondent appeared at the hearing and were represented by counsel. The Administrator did not appear. Complainant's Exhibit 2 was admitted into evidence,¹ and Respondent's Exhibits 1-4 were admitted into evidence. The parties presented witness testimony and closing arguments at the hearing. The record is now closed, and the matter is ripe for adjudication.

The findings and conclusions that follow are based upon a complete review of the entire record, in light of the arguments of the parties, applicable statutory and regulatory provisions, and pertinent precedent.

Procedural History

This case involves a contract for janitorial services at Moody Air Force Base acquired by Respondent Metro Contracting Services LLC in March 2016. Complainant Christina Waters

¹ Complainant did not offer an Exhibit 1.

worked as a janitor for the prior contract holder, CRJ Management Services, Inc. The parties dispute whether Respondent offered a right of first refusal of employment to Ms. Waters when it acquired the contract.

On March 23, 2017, the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) issued a determination letter following an investigation of Respondent under Executive Order 13495. The letter stated the Administrator's determination that Respondent "complied with the requirements of the E.O. and its regulations concerning the 23 Contracting Squadron janitorial contract FA 4830-16-C-0003 performed at Moody Air Force Base, Georgia." "The investigation concerned the time period of March 14, 2016 through September 22, 2016," and "revealed that the employer provided the complainant with an employment application to complete, which she did not do, and nonetheless made her a bona-fide offer of employment, which she declined." Therefore, the investigation found no violation.

By letter received by the WHD on April 24, 2017, Ms. Waters stated she was "filing the following appeal based off the decision made from Case ID: 1794177 not being offered the first right of refusal." She stated that Respondent's claim that it gave her an application she never returned was untrue, and that Respondent had given differing accounts as to why she wasn't hired. Ms. Waters stated that the investigators did not contact project manager Tony Marshall or assistant manager Allen Magrahm, both of whom informed Respondent "that they recommended that I be hired" and provided her contact information to Respondent. She asked that DOL's determination "be overturned" and "for your reconsideration in obtaining my backpay and my job which I am intitled to for not being hired back for Metro not complying with DOL regulations [sic]."

The WHD issued a letter dated May 8, 2018, in response to Ms. Waters' April 24, 2017 letter requesting reconsideration of the determination that no violation occurred. WHD again determined that Respondent met its obligation to provide Ms. Waters with a bona fide, express offer of employment. WHD determined that on March 10, 2016, Metro Contracting was awarded the janitorial contract for Moody Air Force Base to immediately replace the predecessor contractor, CRJ Management, on March 14, 2016. On March 11, 2016, Respondent attempted to meet with the incumbent employees of CRJ, but they had been sent home before their shift ended. CRJ vacated the workplace on March 11, 2016, taking all personnel records, equipment, and supplies. Respondent was not provided with a list of the incumbent employees, and began trying to locate them. Respondent extended offers of employment to day-shift workers at a March 12 meeting, and extended offers of employment to all night shift workers who reported on March 14, 2016. Ms. Waters had a telephone conversation with Jennifer Yates, Respondent's Business Manager, on March 16, 2016, and came to the office to pick up an application in April 2016. The WHD determined that Respondent's "application" was a formality used to gather information about its new workforce due to the lack of records provided to Respondent when it acquired the contract, as all employees who submitted an application were hired. The WHD concluded that the invitation to submit a job application was tantamount to a job offer in these specific circumstances, and determined that Respondent had made a bona fide job offer to Ms. Waters. The WHD found that neither the materials submitted with Ms. Waters' request for reconsideration nor its own additional investigation produced evidence justifying a reversal of

the earlier determination. The WHD again found no violation of the E.O. or DOL's implementing regulations.

By letter received on June 5, 2018, Ms. Waters requested a hearing before OALJ in this matter. The case was originally scheduled for hearing to commence on August 21, 2018, in Atlanta, Georgia. I granted Complainant's motion for a change of venue, and the hearing was rescheduled to October 9, 2018, in Valdosta, Georgia. On September 18, 2018, I issued an Order Denying Complainant's Motion to Compel and Order Denying Respondent's Motion for Protective Order. As noted above, the hearing was held on October 9, 2018.²

Issues Presented

Whether Metro Contracting Services offered a right of first refusal of employment to Ms. Waters in compliance with the regulations?

If there was a violation of the regulations, whether that violation was abated by the offering of employment two days after the contract went into effect?

(TR 6).³

Summary of the Evidence

Testimony of Lee Jones (TR 15-27)

Mr. Jones is the principal owner of CRJ Management Services, Inc. (CRJ). CRJ was the predecessor contractor for the janitorial services contract at Moody Air Force Base (Moody AFB), prior to Metro Contracting Services (Respondent or Metro). CRJ's contract term had ended in December 2015, and the contract was extended on a month-to-month basis for "approximately six months." (TR 24). There was a "re-compete" for the janitorial services contract, and another company (not CRJ or Metro) was selected first; CRJ continued to provide janitorial services on a month-to-month basis while the contracting office worked through the contract bids. CRJ received notice that its janitorial contract was being terminated on the same day as the termination; "they told me to get all of my things off the base by I believe it was 5:00," and he had to "scramble." (TR 19). Mr. Jones stated that he had "approximately six hours or so to get out of town." (TR 20). This happened "somewhere in the first part of March" 2016. (TR 20).

Mr. Jones testified that he was aware of and complied with the requirement to provide a list of current employees to the contracting officer upon the termination of the contract. He provided a seniority list with the employees' anniversary dates. Ms. Waters was on the list.

² The regulations provide that the ALJ shall issue a decision within 60 days after completion of the hearing, 29 C.F.R. § 9.34(h), meaning that a decision should have issued by December 10, 2018. Unfortunately, I became ill for an extended period beginning December 6, which took me away from work on several occasions throughout December. I apologize for the delay in issuing this Decision and Order.

³ The following abbreviations are used in this Decision and Order: TR – transcript of hearing; CX – Complainant's Exhibit; RX – Respondent's Exhibit.

Mr. Jones testified that Ms. Waters was “an outstanding employee,” with “no problems whatsoever.” (TR 16-17). She did everything she was asked to do, and would fill in wherever needed. Mr. Jones testified he would rate Ms. Waters “an A, an A-plus, against any employee.” (TR 18). He emphasized her dependability when CRJ’s contract was only month-to-month. Mr. Jones never met Ms. Waters in person.

Mr. Jones was not contacted by Ms. Waters after Metro acquired the contract, and he did not know whether Ms. Waters had contacted anyone else at CRJ. CRJ was not contacted by Metro or any of its employees after Metro acquired the contract.

Testimony of Tony Marshall (TR 28-65)

Mr. Marshall was the project manager for CRJ’s custodial contract at Moody Air Force Base. After retiring from a 23-year career in the U.S. Army, Mr. Marshall worked as the project manager on a custodial contract for a company called M and M, and he was “left on to hire with CRJ” when CRJ obtained the custodial contract. (TR 29). As the project manager, he was in charge of overseeing the daily operations the company.

When CRJ’s contract terminated, Mr. Marshall told the employees “that [he] would be open and as [he] found out information [he] would relay that information to them, that [he] knew that stuff.” (TR 30). Regarding reemployment rights, Mr. Marshall told the employees that based on his prior experience and knowledge, everyone on the current contract would be contacted and had the right to accept or refuse employment with the new contractor.

When asked whether he was aware of the requirement that the predecessor contractor provide a list of employees to the new contractor or the contracting officer, Mr. Marshall replied: “I know that the contracting office would provide all that information, and they would go through contracting to get the necessary lists.” (TR 31-32). Mr. Marshall knew the purpose of the list was to facilitate giving the former employees a right of first refusal of employment with the new contractor. Mr. Marshall testified that the contracting office’s representative on this contract was Dan Burton, and someone “would ... have gotten the list from him.” (TR 33). Mr. Marshall later acknowledged that Mr. Burton worked in quality control, not contracting. CRJ’s office was on the base, about 100 meters from the contracting office. When Metro took over the contract, it took over the same spaces, so Metro would have worked in the same office.

Mr. Marshall spoke with Mr. Yates, who said he’d talked to Debbie Johnson for information about prior employees. Ms. Johnson was a senior employee who worked in the child development center. Ms. Johnson should have had a contact list of employees, and would have had Ms. Waters’ phone number. Mr. Marshall believed Ms. Johnson didn’t like Ms. Waters. Some CRJ employees took shortcuts, but Ms. Waters and a few others did not, so they did not fit in with the other group. Mr. Marshall heard that some former employees who had been fired by CRJ were hired by Metro after they took over the janitorial contract.

Mr. Marshall testified that he provided Ms. Yates with information about Ms. Waters on the day CRJ was packing up to leave Moody AFB. Mr. Yates had come to the office, and Mr.

Marshall invited him into his office and “told him a little background of the company first of all, I told him how things was run, gave him a rundown of all the employees.” (TR 35). Mr. Marshall “strongly recommended” that Mr. Yates hire employees Ellen Mangram (the assistant manager), Christina Waters, Toya, and Pam Cherry, and provided their information. (TR 35). Mr. Marshall said Ms. Waters was an hourly worker who was dependable, “that’s why she has more hours than anybody.” (TR 36). Mr. Marshall stated that was “the last I heard of that.” (TR 35).

Mr. Marshall never wrote up Ms. Waters for being late to work. He considered her the “number one employee besides my assistant manager.” (TR 36). He knew she wanted her position back because of her financial situation; “I knew she needed her job and wanted her job.” (TR 36). Ms. Waters had been through a divorce and had three children, and had “a few other financial issues,” so Mr. Marshall knew she needed her job. (TR 37).

Mr. Marshall testified that he knew Ms. Waters filled out an application for employment at Metro, and turned it in, because he called Tony Cosby. Ms. Waters had told him that she’d called Ms. Yates and left a message, and after a while, Ms. Yates had called her back. Later, Ms. Waters told Mr. Marshall she hadn’t heard back from Ms. Yates, and Mr. Marshall told her to go out to Moody AFB and see Tony Cosby, the project manager. Mr. Marshall told Ms. Waters to “talk with him, fill out the application and make sure that he sends the application up.” (TR 37). Ms. Waters called Mr. Marshall and told him she’d sent the application up and spoken with Mr. Cosby. Then, Mr. Marshall called Mr. Cosby and talked with him on the phone, saying that Ms. Waters was a stellar employee and really needed her job. Mr. Marshall asked Mr. Cosby—“project manager to project manager”—to “make sure.” (TR 38). Mr. Marshall testified that Mr. Cosby gave assurances that he had Ms. Waters’ application and “sent it off,” and was waiting to hear from Ms. Yates. (TR 38). Mr. Cosby said he had it taken care of, and Ms. Waters would be okay. These three conversations—the call from Ms. Waters about not hearing from Ms. Yates, the call from Ms. Waters after filling out an application at Moody AFB, and the call to Mr. Cosby—happened on the same day. Ms. Waters called Mr. Marshall in the morning, and he told her to go fill out an application; then she called again that evening and told him she had gone to Metro and filled out an application. Based on the calls reflected in his phone records, Mr. Marshall believes these conversations happened on March 15. Mr. Marshall’s telephone records do not show a call to Mr. Cosby on March 15; the records show calls to Mr. Cosby’s number on March 29 and March 30 only. Mr. Marshall stated that did not change his testimony that these events happened on March 15, because CRJ had a telephone, and he might have called Mr. Cosby on his CRJ work phone. Mr. Marshall was “absolutely sure I called him. We had a conversation.” (TR 60). When questioned about the fact that Mr. Cosby was not hired by Metro until March 17, Mr. Marshall responded that Mr. Cosby “was working in the office that day because he told me he was there, and I had talked with him. He said he was in the office.” (TR 61). Mr. Marshall testified that while there is no record of a call to Mr. Cosby on March 15 in his phone records, “I did call him.” (TR 61). Mr. Marshall had no reason to call Mr. Cosby other than Ms. Waters, and both times he called Mr. Cosby, it was “to gain information on and about Ms. Waters’ application and why she wasn’t being hired.” (TR 62). Mr. Cosby told Mr. Marshall that he had her application and had sent it up to the company, and was waiting to hear back from the Yateses. Mr. Cosby said Ms. Waters would be taken care of and hired back.

Ms. Waters contacted Mr. Marshall a few times after that day, to say she hadn't heard anything from Metro and to ask what she should do. Ms. Waters told Mr. Marshall she had been trying to call Ms. Yates. Mr. Marshall told her to give it time, because Mr. Cosby had told him he'd take care of everything. Mr. Marshall had called Mr. Cosby because he'd heard from other employees that Metro was not going to hire Ms. Waters back. Mr. Marshall was at Pizza Hut talking with some former CRJ employees, who also worked at Metro, and asked about employees that weren't hired back, including Ms. Waters; a prior CRJ employee named Pam Cherry told him, "oh, they say they they're not going to hire her back out there." (TR 42-43).

Mr. Marshall testified that the CRJ contract was terminated on a Friday, and none of the night shift workers should have reported to work that Friday night, because he "let the employees know not to come in that night." (TR 47). "I think I called every employee and let them know not to come in to work." (TR 47). He told "every employee," including Ms. Waters, that they could have a job with the successor contractor, and the contractor would contact them. (TR 47). Mr. Marshall did not know why every employee except Ms. Waters came in shortly thereafter and filled out an application and was hired. Mr. Marshall did not recall sending the employees home early after Metro asked to speak with them.

Mr. Marshall testified his relationship with Ms. Waters was professional, not personal. He acknowledged "a number of conversations with Ms. Waters" reflected on his phone records, and explained that he had calls with other employees too. He acknowledged four calls with Ms. Waters on March 15, including one call for 57 minutes, and said they spoke "[a]bout jobs... it was about the job and the situation, everything is going to be all right, and the steps to do to get her job back." (TR 49). Mr. Marshall and Ms. Waters made ten telephone calls to one another between March 14 and 15, "[b]ecause she wasn't getting a call from contractor, from Metro." (TR 49). Once Mr. Marshall found out the contract had started, he told Ms. Waters something was wrong, and she needed "to go out there and see Tony Cosby." (TR 50). That conversation happened the day Ms. Waters went to Moody AFB to see Mr. Cosby. It was in March, and could not have been in April, according to Mr. Marshall; it was shortly after he received word from other employees that they were getting hired back.

Mr. Marshall testified that he did not want to be rehired by Metro, and he "had made that very clear to John Yates there." (TR 52). He is retired and disabled through the VA, and he spent time with his mother after the CRJ contract ended.

Mr. Marshall's telephone records for January through May 2016 were admitted as CX-2.

Testimony of Christina Waters (TR 66-74)

Ms. Waters worked for CRJ under the janitorial contract at Moody AFB. She worked in the youth center, and was employed by CRJ at the time Respondent acquired the contract.

Ms. Waters testified that she realized she needed to fill out an employment application after she spoke with Jennifer Yates on the telephone. This call happened sometime between March 14 and March 16. Ms. Waters was given the phone number for Ms. Yates by Ron Major and called her, and Ms. Yates called "right back." (TR 71). Ms. Waters said she wanted her job

back. Ms. Yates asked if Ms. Waters was called “Tina,” which was a nickname that only the CRJ employees used for Ms. Waters. Ms. Yates said she needed to get back to Ms. Waters about a position after she spoke with the project manager to see which positions were available, because they had filled some positions. Ms. Yates said she would get back in touch with Ms. Waters within a few days. When Ms. Waters did not hear from Ms. Yates, she was “informed by Mr. Marshall that [she] needed to go out and fill out an application.” (TR 67). Ms. Waters testified that she had a military identification card that provided access to the base, so she went to the office in person and filled out an application, and left the application with Tony Cosby. This happened around March 28 or 29. Mr. Cosby said he would give the application to Ms. Yates, and to call if she didn’t hear anything by the next day. When she did not hear from Ms. Yates, Ms. Waters called Mr. Cosby; she did not reach him the next day, but called again and “finally got him.” (TR 67). Mr. Cosby said he wasn’t at the office but Mr. Yates was, and as soon as he got to the office, he would relay the information to Mr. Yates and have Mr. Yates call her back.

Ms. Waters also testified that she called Tony Cosby, the project manager for Metro, after she didn’t hear back from Ms. Waters following the initial call. After they spoke, she “didn’t hear anything back from him after that, and so [she] took it upon [herself] to go on post ... to go fill out the application.” (TR 72). She sat in the office, completed the application, and placed it in Mr. Cosby’s hands. He said he would get in contact with Mr. and Ms. Yates and let them know she had filled out the application. Ms. Waters called the next day, but Mr. Cosby didn’t answer or respond. She called a total of two or three times, “[a]nd he never did get back with me.” (TR 73). When she didn’t hear from Mr. Cosby, Ms. Waters filed a complaint with DOL.

Ms. Waters was not working another job at the time that Metro acquired the janitorial contract. Ms. Waters was unemployed at the time of the hearing.

Ms. Waters did not show up for work at Moody AFB on Friday, March 11 because Mr. Marshall had told her “that the contract had already been canceled. And the day shift already had to leave, so the night crew had no reason to come in.” (TR 69). Mr. Marshall “informed us that someone would get in contact with us from the new contract.” (TR 70). Ms. Waters did not know why the other night shift employees showed up and filled out an application. She believed she was not hired because she “did not hang around with most employees.” (TR 70).

Testimony of Tony Cosby (TR 75-80)

Mr. Cosby was the project manager for Metro Contracting Services at Moody AFB. He met Mr. Yates on March 16, 2016 for an interview, and he believed his official start date was March 17.

Mr. Cosby does not know Ms. Waters personally, but remembered “that one time she did come in.” (TR 76). That was the first time Mr. Cosby met Ms. Waters. Mr. Cosby did not recall the exact date of this meeting, but Metro had been on the property for a while before this meeting took place. Ms. Waters told him who she was and that she had worked for the previous company. She said “that she wasn’t informed about coming in to work, about the job, being hired.” (TR 76). She said she had just learned about the right to be rehired. His “QA” was going out on a call, so he gave Ms. Waters the application, and left with the QA. He told Ms.

Waters he would contact Mr. Yates. He did not remember whether Ms. Waters ever turned in the application, but if she had, he would have contacted Ms. Yates about it. If Ms. Waters had turned in the application packet, Mr. Cosby would have considered it important; he did not recall ever receiving the application packet back from Ms. Waters.

Mr. Cosby had worked as a project manager before, and was familiar with the rule that employees of the predecessor contractor may have the right to be hired by the successor contractor. Mr. Cosby had spoken with Mr. Marshall one time in 2012 when Mr. Cosby first moved to Atlanta; they did not have a conversation around March 2016 concerning Ms. Waters.

Testimony of Ronald Major (TR 81-95)

Mr. Major was an employee of CRJ. He worked the night shift, cleaning up at the gym, with Ms. Waters. The length of the shift varied based on what he had to do each night. When needed, he would fill in at the child development center, where his cousin worked. After Metro “took over” the janitorial contract, Mr. Major worked for Metro. (TR 83).

The day CRJ’s contract ended, Mr. Major “went to work for CRJ. When I got there, wasn’t nobody there to let us in. They were sitting out. There wasn’t nobody there.” (TR 83). Mr. Major carpooled to work with his cousin, Lisa Howell. CRJ was “cleaning out the place” and “taking their truck somewhere,” so Mr. Major and Ms. Howell “just didn’t work.” (TR 83). Mr. Major would not have “burned [his] gas” to go out to the base if he had known CRJ was closed down, but he “didn’t even know.” (TR 91). Mr. Major spoke with Ms. Yates, who told Mr. Major to come back on Monday to fill out an application.

Mr. Major and Ms. Howell went back on Monday and “all of us put in an application” with Metro. (TR 84). After the lady in the office (Ms. Yates) asked which other employees he knew and whether he had phone numbers for them, Mr. Major called Ms. Waters and told her Metro was hiring, and to come in and complete an application. He told Ms. Waters that Metro “told me to fill out a[n] application and we going to have first choice to work.” (TR 84-85). Mr. Major called Ms. Waters from “right at the office,” after he was told Metro was hiring, they had to put in an application, and they would get first choice to get a position. (TR 85). Mr. Major told Ms. Waters “what the lady said, to come put a[n] application in.” (TR 86). Ms. Waters did not come in while Mr. Major was there, and he does not know whether she ever did come in to fill out the application. Ms. Waters never came back to work while Mr. Major was working at Metro.

All employees who came in and completed an application went back to work. “If you put a[n] application, you went back to work.” (TR 90). Mr. Major testified: “Now, if you didn’t put no application in, you can’t go to work.... It’s just that simple.” (TR 87).

Testimony of Lisa Howell (TR 96-116)

Ms. Howell worked for CRJ until its janitorial contract ended. She started working night shift in the child development center, and then moved to night shift in the youth center. She knew Ms. Waters through working together in the youth center and because Ms. Waters “was a

supervisor one point of time.” (TR 97). Ms. Howell recalled one time that Ms. Waters was late to work while serving as the “key-holder”; Ms. Howell called Mr. Marshall to say she was the only one at the youth center and could not get inside. Ms. Waters came in with the keys about 30 minutes later and said she had overslept. Other than being late a couple of times, Ms. Waters did everything she was supposed to do in her job. One night, Ms. Waters told Ms. Howell that she “already got another job” in the medical field. (TR 101). Ms. Howell did not remember the date of that conversation.

On Friday, March 11, 2016, Ms. Howell carpooled to work with her cousin, Mr. Major, and found that nobody was there. Mr. Major called Mr. Marshall and asked what was going on, because nobody was at work but no one had called them. Mr. Marshall said “they told us to turn in the keys.” (TR 102). Mr. Marshall said, “you all don’t do nothing, don’t go to work, don’t do nothing because they not – they told us to turn in the keys, and that’s what we going to do, we going to turn in the keys.” (TR 103). Ms. Howell had a set of keys, and did not want to be responsible for them, so Mr. Marshall told her to give the keys to Amos Wright. When Ms. Howell met with Mr. Wright to give him the keys, Mr. Wright said they were going to move everything; “they were moving vehicles out the way, hide them and stuff, because they didn’t want Metro to use or have nothing that was theirs, let them bring they own supplies and stuff.” (TR 103). Mr. Wright worked on the day shift and was already there when she and Mr. Major arrived. No one had told Ms. Howell or Mr. Major about CRJ’s contract ending until they arrived at work and called Mr. Marshall.

Tony Marshall had told everybody to be at the golf course for a meeting on Saturday “about our job, because Metro wanted to speak.” (TR 110). Ms. Howell and Mr. Major couldn’t attend the meeting due to a funeral. Mr. Marshall told them to go to the funeral and he would get with them later, but he didn’t, and they “didn’t still really know what was going on.” (TR 104-05, 111). On Monday morning, they called the Metro office and were told “all we got to do is go back and resubmit our application.” (TR 105). Ms. Howell and Mr. Major went in and completed applications, and “when I went and got resubmitted I had my job. They hired me right on the spot.” (TR 105). Metro “had told everybody” to come in and fill out the application packet, and Ms. Howell knew a couple other employees who went in. When Ms. Howell filled out the application, Ms. Yates told her to come to work, and was wondering where her night shift workers were. Every former employee Ms. Howell knew who came in and filled out the application got their job back.

Ms. Howell was with Mr. Major when he called Ms. Waters and told her to come in and fill out an application. She did not know whether Ms. Waters ever came in.

Ms. Howell earned vacation time and had lunch breaks. When she first started with CRJ, she worked from 4:30 p.m. to 10:00 p.m.; later, she worked from 6:00 or 6:30 p.m. to 11:00 p.m. With Metro, Ms. Howell worked 7:00 or 7:30 a.m. to 4:00 or 4:30 p.m.; the times varied, but the shift was seven or eight hours. At the time of the hearing, Ms. Howell worked for AMHRDOC contracting services.

Testimony of Jennifer Yates (TR 117-151)

Ms. Yates is the business manager of Metro Contracting Services. Mr. Yates is her father, and is the president of Metro. Metro has been in the business of government contracting for 10 years; Ms. Yates has been in the business for about four years. Metro has contracts over various parts of the country.

Metro submitted a bid for the janitorial services contract at Moody AFB when bids were solicited, but it was not selected and another company was awarded. “When the re-compete happened” on the contract, Metro was asked to revise its numbers “because now they were going to the next person, which was [Metro].” (TR 118, 137). CRJ’s contract term had ended in December 2015, and they were on a month-to-month basis after that. Metro received a call on March 9 that its bid was accepted and the contract would start on Monday, March 14, 2016. Ms. Yates and her father arrived in Valdosta on the night of March 10th, and did a walk-through at Moody AFB on Friday, March 11. They met Mr. Marshall during the walk-through on March 11. Mr. Marshall was in the office, and had already received the call from contracting that the contract would end that day. Ms. Yates described Mr. Marshall as “a little upset.” (TR 119).⁴ She testified that Mr. Marshall asked Mr. Yates to hire him and keep him on as project manager, but Mr. Yates let him know they would not be hiring him as Metro’s project manager. After that, Mr. Marshall “kind of turned a little bit” and “became a little upset.” (TR 119). The Yateses “asked him to please have the employees just come in early,” and the contracting officer asked him to “have the employees when they come in to stay in the office so that Metro can give them their information and meet with them so that they can be hired.” (TR 119).

Mr. Yates and Ms. Yates continued with the walk-through of the base, then left to go eat “because we were going to just[,] going to come back and meet with everybody at the end of the day so that we could give them the hiring packet to bring back on Monday.” (TR 119). When they got back to the office, no one was there. They called Mr. Marshall and asked where the employees were, because they wanted to meet with them. Mr. Marshall said he’d sent the employees home early, and “it’s your due diligence on how you find them.” (TR 120). The Yateses went to the child development center where Debbie Johnson worked, as she had been there for 20 years, in the belief she would have the most contacts. “And by word-of-mouth she made phone calls, and we had to meet then off the base” because the workers’ base passes had been deactivated. (TR 120). Ms. Yates arranged a meeting for the CRJ employees at the golf course on Saturday.

While the Yateses were still on base Friday night, Ms. Howell, Mr. Major, and Leonard Howell came in to work. The Yateses explained they were the new contractor and were having a meeting on Saturday. Ms. Howell and Mr. Major said they could not be at the meeting, and said they needed to wait on Ms. Waters to arrive because she is the key holder. They chatted a bit while they waited, and explained to the Yateses that the night shift was just four workers: the three of them and Ms. Waters. After waiting a bit, they called Ms. Waters, who said she was not coming to work because CRJ was not on the contract anymore. Mr. Marshall had called Ms. Waters with the news, but had not called the three of them.

⁴ Ms. Yates testified that in her experience, it was unusual for a contracting office to “walk in today” and say “you’re done today.” (TR 140).

On Saturday, Ms. Yates met with “all of the other employees from CRJ. All of them came in to the golf course.” (TR 121). They filled out a sheet stating which position they currently worked in, their hours, their hourly rate, and “everything that [Ms. Yates] needed to know from them as a CRJ employee.” (TR 121-22). Ms. Yates handed out the hiring packets and “told them all to report to work Monday morning with the packet.” (TR 122). The night shift workers—Ms. Howell, Mr. Major, Mr. Howell, and Ms. Waters—were not at the Saturday meeting. CRJ only had 11 employees on the project, which was “nowhere near enough to run the project,” so Ms. Yates told the employees at the Saturday meeting to spread the word among friends and family that Metro needed people. (TR 122). Metro believed it would need at least double the number of employees that CRJ had employed.

On Monday, when Metro opened the office, all of the CRJ employees showed up, along with “other people that just got by word-of-mouth that we were hiring.” (TR 122). Metro hired everybody that walked in that day, even those who couldn’t start for two weeks, because it “needed people.” (TR 123). Ms. Yates was working in the back office, and “as I hired them each person came in one by one to get their acceptance, signature.” (TR 123). Ms. Yates overheard Mr. Major in the front room saying, “Tina, you better come in, you better come in, they hiring, come on in and get your application, we all in here, everybody in here, come in and get your application.” (TR 123). Ms. Yates heard Mr. Major give her phone number to Ms. Waters. Ms. Yates was not on the phone call between Mr. Major and Ms. Waters. When Mr. Major came into Ms. Yates’ office, he told her that he had called Tina (Ms. Waters) and told her to come in, that she was the only employee he didn’t see there, and that she said she was going to come in and fill out the application. Ms. Yates didn’t ask Mr. Major for Ms. Waters’ phone number; “[h]e said she was coming in.” (TR 145).

Ms. Yates continued hiring throughout the day Monday. She didn’t speak to Ms. Waters until two days later. On that day, March 16, Ms. Waters called her, and Ms. Yates had a six-minute conversation with Ms. Waters. At that point in time, Metro had not been given an employee list, and had no way to contact prior employees. Metro had asked for the CRJ employee list “[w]hen we took the contract over,” but the contracting officer said she didn’t have one and would see what she could come up with. (TR 148). Metro did not receive the CRJ employee list from the contracting office until June 14, 2016 (three months later).⁵ Metro did not have contact information for Ms. Waters before Ms. Waters called on March 16. When Ms. Waters called, Ms. Yates told her the “[s]ame conversation that I told all of them,” which was to come in to the office and fill out the application to be hired, because they were hiring people. (TR 125). Ms. Yates was not trying to screen anybody or weed anybody out in her hiring; she “needed hands, bodies.” (TR 125). She didn’t know Ms. Waters and “wouldn’t choose not to hire Ms. Waters.” (TR 129). She was ready to hire Ms. Waters, and told her to come in.

It was Ms. Yates’ understanding that under the Executive Order, a job offer could be verbal or written. Ms. Yates testified that she made a verbal job offer to Ms. Waters on March

⁵ The contracting officer told Ms. Yates that “she couldn’t even get in touch with CRJ in the last 30 days,” so she went back through old emails to find an email from December 16 with a Seniority List. (TR 147). That list was not current, as “five or six of them he had already terminated anyway.” (TR 147). Ms. Waters was on that list. Ms. Yates had followed up with the contracting officer “multiple times,” and was told the officer was “getting to it” and would “find it.” (TR 149).

16, 2016, offering her employment with Metro. Ms. Waters just needed to come in and fill out the application, and she would have been hired.

Ms. Yates stayed in Valdosta for four days, and her father stayed for two weeks. Metro had “an outside source that we use that handles all of our contracting,” Phil Hubble, and he was also at Moody AFB with the Yateses in March 2016. (TR 141). Mr. Hubble was there working, and stayed along with Mr. Yates for two weeks “getting the contract off.” (TR 141). Weeks after the telephone conversation between Ms. Yates and Ms. Waters, Mr. Marshall said Ms. Waters came in and picked up the application packet. When Ms. Waters came in, Mr. Yates was no longer there, so Ms. Yates estimated this would have happened in April.

With regard to Mr. Marshall’s testimony that he spoke with Mr. Cosby on March 15, Ms. Yates testified that Metro had not even spoken to Mr. Cosby yet on March 15. They spoke to Mr. Cosby for the first time on March 16 and hired him that day, and Mr. Cosby started employment with Metro on March 17. They got Mr. Cosby’s name from Dan Burton, who worked in quality control on the base; Mr. Cosby had been the project manager on the janitorial contract before Mr. Marshall, and Mr. Burton said he was good and they should call him, and provided Mr. Cosby’s contact information. Metro then reached out to Mr. Cosby.

Ms. Yates testified that under the contracting standards, the prior contractor is supposed to leave 30 days’ worth of supplies for the new contractor, but Mr. Marshall “cleared everything out.” (TR 128). When Metro showed up Monday morning, they had no supplies and had to go to the store and buy things to get started.

When Ms. Waters came in, Mr. Cosby called Ms. Yates and let her know, and said he gave Ms. Waters the application and Mr. Yates’ phone number. Mr. Cosby had called Ms. Yates to talk about an issue in one of the restrooms, as he and Mr. Burton were about “to go on a run” to look into the restroom issue. (TR 130). While they were talking, Mr. Cosby said, “oh, and Ms. Waters came in.” (TR 131). Ms. Yates asked about the visit and Mr. Cosby said he gave Ms. Waters a hiring packet and told her to just fill it out and bring it back, because he had to go out on the flight line with Mr. Burton to view the particular rest room. That was the only time Mr. Cosby mentioned Ms. Waters to Ms. Yates. Mr. Yates never received a call from Ms. Waters. After this case was filed, Ms. Yates confirmed with Mr. Cosby that Metro never received an application from Ms. Waters; Mr. Cosby said she never gave the application back to him. Mr. Cosby and Ms. Yates have looked through the files, and there is no application from Ms. Waters in there.

CRJ had 11 employees. All of them except Ms. Waters were hired and started on Monday, March 14, 2016, with the exception of Amos Wright, who was helping to move vans for CRJ and started on March 15. Ms. Yates hired 18 employees the first week Metro had the contract, and hired a total of 26 employees within 60 days of the start of the contract. Metro needed employees to work under the contract, and there was never a time that Ms. Yates would not have hired Ms. Waters. Ms. Waters was the only CRJ employee who “never came in and did the paperwork in a timely fashion.” (TR 132). If Ms. Waters had submitted the application, she would have been hired at a rate of \$10.15 per hour and would have worked from 8:00 p.m. to 12:00 a.m. (night shift) in the youth center, where Metro understood she had worked before.

Metro hired everyone “in the position that they were in until we were on our feet rolling, and then we can move people around.” (TR 150). Metro also needed employees “to completely fill the gym, which no one was working in.” (TR 151). Ms. Waters would have had a position.

Two months after Ms. Waters picked up the application packet, Metro received a letter from the Department of Labor regarding a complaint by Ms. Waters. Ms. Yates was “[c]ompletely shocked” to receive the complaint because Metro was still hiring at that time and still could have hired Ms. Waters. (TR 134). Ms. Yates asked Mr. Cosby, “did she ever bring this application back, why didn’t we hire her?” (TR 135). Mr. Cosby responded that Ms. Waters never brought the application packet back. Ms. Yates asked him to go back through all of the applications. The DOL office in Washington, D.C., had Ms. Yates “send up every acceptance of all the employees,” and Ms. Yates sent what she had in her files, but she did not have any application from Ms. Waters. (TR 135).

Later, Mr. Benjamin, the “director of the Department of Labor for Georgia,” advised Ms. Yates that because the initial job offer was made verbally, she should “offer a position today” if she had a position open, and provide a written offer to send to Ms. Waters so she could go to work. (TR 126). Ms. Yates wrote an offer letter dated February 3, 2017, and sent it to Mr. Benjamin. The offer letter was admitted as RX-4. Ms. Yates did not hear back from Ms. Waters. Ms. Yates called Ms. Waters and left a message asking whether she wanted the position or not, and then sent an email to Mr. Benjamin letting him know she had not received a response to the letter or the phone message. Ms. Yates had not seen Ms. Waters in person prior to the hearing.

When Metro obtained the new contract for janitorial services at Moody AFB, they were told that the contracting office “didn’t want to ride out their full month with [CRJ] anymore, it was just already too many problems.” (TR 136-37). Ms. Yates did not know whether Moody AFB paid CRJ through March 11, 2015, but when asked by Ms. Waters’ attorney what she had heard or could speculate, she stated she had heard that Moody AFB held CRJ’s final invoice because CRJ owed money to employees, didn’t pay employees’ 401(k) accounts, and didn’t return keys. Ms. Yates did not know whether that report was substantiated or unsubstantiated.

Metro’s contract term ended on September 30, 2017. Metro continued providing janitorial services on a month-to-month basis, through contract modifications, until December 2017.

Complainant’s Exhibit 2 (CX 2)

As noted above, Mr. Marshall’s telephone records for January through May 2016 were admitted as CX-2.

Respondent’s Exhibits 1-4 (RX 1-4)

Ms. Yates’ telephone records for March 16, 2016 were admitted as Respondent’s Exhibit 1. The records show one incoming phone call from Ms. Waters’ telephone number at 1:56 p.m. on March 16, 2016, lasting six minutes in duration.

A blank copy of the “Pre-Employment Application” for Metro Contracting Services was admitted as Respondent’s Exhibit 2. It consists of a three-page application to be completed by the applicant; a one-page sheet “for office use” with areas for screening information, reference checks, and hiring data; the State of Georgia Employee’s Withholding Allowance Certificate (Form G-4); a Direct Deposit form; the USCIS Form I-9, Employment Eligibility Verification form; and the federal Employee’s Withholding Allowance Certificate (Form W-4).

Respondent’s Exhibit 3 is an email chain consisting of the following: an email sent December 10, 2015, from the contracting officer (Allison Lewis) to Mr. Jones at CRJ requesting a Seniority List with the names of all service employees working under the janitorial contract by December 16, 2015; an email sent December 16, 2015, from Mr. Jones to Ms. Lewis with the CRJ Seniority List; an email sent June 14, 2016, from Ms. Lewis to Ms. Yates, forwarding the CRJ Seniority List; and an email sent September 17, 2018 from Ms. Yates forwarding the email chain to her attorney. The attached CRJ Seniority List includes Ms. Waters.

The Offer Letter dated February 3, 2017, from Metro to Ms. Waters, was admitted as Respondent’s Exhibit 4. The letter states that Metro is offering Ms. Waters a part-time janitor position effective February 3, 2017, at Moody Air Force Base. The shift is Mondays, Wednesdays, and Fridays from 8 a.m. to 1 p.m.

Findings of Fact and Conclusions of Law

The issue in this case is whether Metro complied with Executive Order 13495 by offering Ms. Waters a right of first refusal of employment under Metro’s janitorial contract at Moody AFB.

Executive Order 13495 begins by noting that “[w]hen a service contract expires, and a follow-on contract is awarded for the same service, at the same location, the successor contractor ... often hires the majority of the predecessor’s employees. On some occasions, however, a successor contractor ... hires a new work force, thus displacing the predecessor’s employees.” To serve the interests of economy and efficiency, and to prevent disruption in the delivery of services during the transition period between contractors, the Executive Order (EO) provides for the nondisplacement of qualified workers under service contracts. Specifically, where one contract succeeds another to provide the same or similar services at the same location, EO 13495 requires that the service contract include a clause requiring the contractor “to offer those employees (other than managerial or supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of the award of the successor contract, a right of first refusal of employment under the contract in positions for which they are qualified.”

The implementing regulations for EO 13495 are found in 29 C.F.R. Part 9. Section 9.12 provides, in relevant part:

[A] successor contractor or subcontractor shall fill no employment openings under the contract prior to making good faith offers of employment (i.e., a right of first

refusal to employment on the contract), in positions for which the employees are qualified, to those employees employed under the predecessor contract whose employment will be terminated as a result of award of the contract or the expiration of the contract under which the employees were hired. The contractor and its subcontractors shall make a bona fide, express offer of employment to a position for which the employee is qualified to each employee and shall state the time within which the employee must accept such offer, but in no case shall the period within which the employee must accept the offer of employment be less than 10 days.

29 C.F.R. § 9.12(a)(1). The regulation further provides that the “successor contractor’s obligation to offer a right of first refusal exists even if the successor contractor has not been provided a list of the predecessor contractor’s employees or the list does not contain the names of all persons employed during the final month of contract performance.” *Id.* § 9.12(a)(2). “The obligation to offer employment under this part shall cease upon the employee’s first refusal of a bona fide offer to employment on the contract.” *Id.* § 9.12(b)(1). The contractor must establish a time limit for the employee’s response to the offer of employment, which cannot be less than 10 days. *Id.* § 9.12(b)(2). The offer of employment may be made in writing or orally, in a language the employee understands. *Id.* § 9.12(b)(3). An offer of employment is presumed to be a bona fide offer “even if it is not for a position similar to the one the employee previously held but one for which the employee is qualified.” *Id.* § 9.12(b)(4). Further, “[a]n offer of employment to a position on the contract under different employment terms and conditions, including changes to pay or benefits, than the employee held with the predecessor contractor will be considered bona fide, if the reasons are not related to a desire that the employee refuse the offer or that other employees be hired for the offer.” *Id.* § 9.12(b)(5).

Here, the parties agree that Ms. Waters called Ms. Yates on Wednesday, March 16, 2016, and they discussed Ms. Waters’ employment. The parties dispute the contents of the conversation and whether Ms. Yates, on behalf of Metro, offered Ms. Waters a job in this call. The parties also dispute what happened when Ms. Waters came in to the Metro office, and whether she completed the application packet and submitted it during her visit. The parties agree that Metro made a written job offer on February 3, 2017, at the suggestion of DOL, and there does not appear to be any dispute that Ms. Waters did not accept the February 2017 job offer.

Ms. Waters contends that she called Ms. Yates herself after getting the phone number from Mr. Major, and Ms. Yates told her she would have to check on available job positions and call her back. She contends that when Ms. Yates did not call back, she went to the Metro offices in person, completed the application packet, and gave the completed packet to Mr. Cosby. Ms. Waters contends she called Mr. Cosby the next day to follow up, and either never reached him or spoke with him and was told he’d check on her application and call her back. She never heard anything from Metro after that, and filed a complaint with DOL.

Metro contends that Ms. Yates offered a position to Ms. Waters in the March 16 telephone conversation, with the instruction that Ms. Waters should come in and complete the application packet. Metro contends that Ms. Waters did not come in until early April, at which time she picked up an application packet but never returned it. Metro contends it had a position available for Ms. Waters but she never submitted an application packet to accept employment.

Although Ms. Yates' telephone records (RX 1) confirm that a six-minute telephone call occurred on March 16, 2016, between Ms. Waters and Ms. Yates, the dispute about the content of that call depends in large part on the credibility of the witnesses. Similarly, the dispute about what happened when Ms. Waters came to the Metro office to obtain an application packet from Mr. Cosby depends on whose account is more credible. Accordingly, I begin my analysis with credibility determinations, taking into account the witnesses' demeanor at the hearing and the evidence before me.

I find that Ms. Waters is not a credible witness. There are inconsistencies within her testimony. For example, Ms. Waters testified that after she did not hear from Ms. Yates following their March 16 telephone conversation, she was informed by Mr. Marshall that she needed to go out to Metro and complete an application. Later in her testimony, Ms. Waters testified that after she did not hear from Ms. Yates following their March 16 telephone conversation, she called Mr. Cosby; after she also didn't hear back from Mr. Cosby, she "took it upon [herself]" to go to Metro and fill out an application packet. Similarly, she testified that after leaving a completed application with Mr. Cosby, she called the next day to follow up and did not reach him, then called again and "finally got him," and Mr. Cosby told her he would relay the information to Mr. Yates, who was in the office and would call her back. Later in her testimony, Ms. Waters testified that after leaving the completed application with Mr. Cosby, she called the next day to follow up, and although she called two or three times, Mr. Cosby never got back with her. Further, there are inconsistencies between Ms. Waters' testimony and the testimony of Mr. Marshall, as discussed in more detail below. Additionally, Ms. Waters testified that she believed there was a reason Metro did not contact her, and it was because she did not "hang around with most employees." Ms. Waters testified that when Ms. Yates asked if she was "the one that they called Tina," that let her know "that somebody had already given her the information." (TR 70, 72). Contrary to Ms. Waters' suggestion that someone had poisoned Metro against her, leading Metro to withhold a job offer from her, the record is clear that Ms. Yates learned about "Tina" from Mr. Major, when he called Ms. Waters from the Metro offices to let her know Metro was hiring and she should come in and complete the application packet. Ms. Waters knew this interaction occurred, because she spoke with Mr. Major at the time, and she obtained Ms. Yates' phone number from Mr. Major. Ms. Waters' allegations of an effort to exclude her by other employees and Metro is baseless and contradicted by the record. Finally, Ms. Waters' argument that she was diligently pursuing this position at all times is belied by the fact that she did not come into Metro to complete an application when Mr. Major called her on March 14 to let her know they were hiring on the spot; she did not come in for nearly two weeks after speaking with Ms. Yates on March 16; and she did not accept the offer of employment in February 2017, despite the fact that she remained unemployed

through the date of the hearing. I found her demeanor at the hearing to be evasive and her testimony not forthcoming. For all of these reasons, I find her not credible.

I find that Mr. Marshall is not a credible witness. There are inconsistencies within his testimony, and parts of his testimony are contradicted by other evidence in the record. Most strikingly, Mr. Marshall testified that he called Mr. Cosby on March 15 to inquire about Ms. Waters' application for employment with Metro, which was the same day Ms. Waters had completed the application at Metro. When confronted with the fact that his phone records did not show a call to Mr. Cosby on March 15, Mr. Marshall stated his testimony was correct, and perhaps he had used a CRJ work telephone to place the call to Mr. Cosby on March 15. There are several problems with this testimony: Mr. Cosby was not hired by Metro until March 16, and started on March 17; Ms. Waters did not call Ms. Yates until March 16, and did not go to the Metro offices until March 28 or 29; Mr. Marshall should not have had a CRJ work phone on March 15, after leaving CRJ's employment on March 11; and, as noted above, Mr. Marshall's own telephone records did not show a call to Mr. Cosby on March 15. Assuming *arguendo* Mr. Marshall simply remembered the date wrong, problems remain. Mr. Marshall testified that he spoke with Ms. Waters and told her to go to Metro and complete the application packet; that she called him after submitting the application packet at Metro; that he called Mr. Cosby "project manager to project manager" and was assured Mr. Cosby had Ms. Waters' application in hand and had sent it to Ms. Yates; and that these three calls all happened on the same day. The only calls on Mr. Marshall's phone records to Mr. Cosby's number were made on March 29 and March 30. (TR 60). Although Mr. Marshall testified that he was "absolutely sure" he talked to Ms. Waters twice on the day he claims she completed the application (TR 57), no calls to Ms. Waters' number appear in Mr. Marshall's phone records for March 29 or March 30.⁶ That is, despite numerous telephone calls between Mr. Marshall and Ms. Waters in the period covered by the phone records in CX 2, there are no dates in which Mr. Marshall spoke with both Ms. Waters and Mr. Cosby. The evidence in the record contradicts Mr. Marshall's claim that he spoke with Ms. Waters on the day she submitted an application to Metro, and he spoke with Mr. Cosby the same day to confirm that Metro had the application. I find his testimony not credible.

I also find that Mr. Marshall was not credible in his description of his relationship with Ms. Waters. The telephone records show a great many calls between the two, which are not consistent with Mr. Marshall's description of their relationship as purely professional. (See TR 48). Mr. Marshall testified that he does not socialize with Ms. Waters. When asked if they are "really good friends," he answered, "We – I know her. She's just like any other employee." (TR 63-64). The extent of the telephone calls between Mr. Marshall and Ms. Waters is not consistent with a relationship that is not personal, and I find Mr. Marshall was not honest in this regard.

⁶ Ms. Waters called Ms. Yates from telephone number (229) 561-1223. (RX 1). The descriptions of Ms. Waters' phone calls with Mr. Marshall, including one call on March 15 that lasted 57 minutes (TR 48), also correspond to telephone number (229) 561-1223. (CX 2). There are many calls on many dates between Mr. Marshall (telephone number (229) 560-1314) and Ms. Waters (telephone number (229) 561-1223) throughout the months covered by the records in CX 2 (December 2015 through June 2016), but there are no calls between the two on March 29 or March 30. (See CX 2 at 50-51).

Mr. Marshall testified that after CRJ's contract ended on Friday, March 11, he let the employees know not to come in that night, so none of the night shift workers should have reported to work. Mr. Major and Ms. Howell both testified that Mr. Marshall had not contacted them to inform them of the end of the contract. As Mr. Major and Ms. Howell both reported to work that night, I find their accounts more credible. I credit Mr. Major's testimony that he would not have wasted his gas reporting to work if he had known the contract had ended. Therefore, I find Mr. Marshall's testimony about the activities of March 11 not credible.

For all of these reasons, I find Mr. Marshall not credible.

I find Ms. Yates was a credible witness. She testified in a consistent and forthcoming manner, and her testimony is detailed and supported by other evidence in the record. As discussed in more detail below, I credit her accounts of Metro's interactions with Mr. Marshall and other CRJ employees on March 11-14, her account of her telephone conversation with Ms. Waters on March 16, her description of discussions with Mr. Cosby regarding Ms. Waters, and her testimony that Metro never received a completed application packet from Ms. Waters.

Mr. Cosby's testimony was brief, and he answered several questions by stating that he could not recall the event. I find he was not being evasive, and that he truthfully could not recall these events due to the passage of time. Mr. Cosby had a single interaction with Ms. Waters in March or April 2016, and the hearing was held in October 2018—two and one-half years later. On the subjects that Mr. Cosby recalled and discussed, I find he was credible. His account of his interaction with Ms. Waters is consistent with Ms. Yates' testimony as to what Mr. Cosby told her at the time, and I find he was a credible witness.

I also credit the testimony of Mr. Major and Ms. Howell. Although Mr. Major was an animated witness with a conversational style, his memory was good, his testimony was detailed, and his account was consistent with other evidence in the record. Similarly, I find Ms. Howell accurately recalled and explained the events of March 2016.

Having made these credibility determinations, I turn to the parties' disputes and find as follows. On Friday, March 11, the CRJ contract ended and Metro conducted a walk-through at the base. I credit Ms. Yates' testimony that she and her father asked Mr. Marshall to have the CRJ employees available to meet with them at the end of the day, and that Mr. Marshall instead sent the employees home early. I find, as Ms. Yates testified, that Mr. Marshall had asked to be hired by Metro as its project manager, and when Mr. Yates said no, Mr. Marshall became upset with Metro. This is consistent with Ms. Howell's description of Mr. Marshall's attitude Friday night; she testified that when she arrived at work Friday night and found CRJ gone, she and Mr. Major called Mr. Marshall to ask what was going on, and Mr. Marshall told them "don't do nothing ... they told us to turn in the keys, and that's what we[re] going to do, we[re] going to turn in the keys." Ms. Howell also stated that employee Amos Wright told her they were moving everything, "because they didn't want Metro to use or having nothing that was

theirs, let them bring [their] own supplies and stuff.” After becoming upset with Metro and sending the employees home early, Mr. Marshall told the Yateses it was up to their own “due diligence” to find the former CRJ employees.

Metro arranged a meeting off-base, at a golf course, for former CRJ employees on Saturday. Ms. Yates asked long-time employee Debbie Johnson to spread news of the meeting to former CRJ employees through her contacts. On Saturday, all of the day shift employees came to the meeting, and Metro handed out the hiring packets and told the workers to report to work Monday morning with the packet. Ms. Howell, Mr. Major, and Mr. Howell were not at the meeting, as they had to attend a funeral that day. Ms. Waters also was not at the meeting; there is no evidence in the record that she was notified of this meeting.

CRJ had 11 janitorial employees, four of whom had been on the night shift (Ms. Howell, Mr. Major, Mr. Howell, and Ms. Waters). Metro believed it would need at least twice that many employees, and told people at the meeting to spread the word that Metro needed workers.

On Monday, March 14, 2016, the former CRJ day shift workers reported to the Metro offices and were hired. Mr. Major and Ms. Howell also reported to the Metro offices on Monday, after Mr. Major had spoken with Ms. Yates when he mistakenly reported for work Friday night, and Ms. Yates had told him to come back on Monday and fill out the application packet. Mr. Major and Ms. Howell completed the application packets and were hired on the spot. Every former employee who came in and submitted the application packet was hired. Ms. Yates asked Ms. Howell where the night shift workers were. While Mr. Major was in the office, Ms. Yates asked him which other employees he knew and whether he had telephone numbers for them. Mr. Major called Ms. Waters from the Metro offices and told her Metro was hiring and to come in and complete the application and they would have first choice to work. Mr. Major told Ms. Yates that he had called Tina (Ms. Waters) and she was coming in.

Ms. Waters did not come to the Metro offices on March 14 to submit an application. She called Ms. Yates on March 16, and they spoke for six minutes. Ms. Waters testified that Ms. Yates did not offer her a job in this call; instead, she said she had to check with her project manager to see which positions were available and would call her back. Ms. Yates testified that she told Ms. Waters the same thing she told the other CRJ employees: yes, we need people and we are hiring, so just come in and submit the application packet to be hired back.

As detailed above, I find that Ms. Yates is credible, and that Ms. Waters is not credible. I credit Ms. Yates’ testimony that she knew nothing about Ms. Waters and had no reason not to hire her; indeed, Ms. Waters presented evidence that she was considered a good employee and had no disciplinary record. I also credit Ms. Yates’ testimony that she was not trying to weed people out; it is consistent with Metro’s actions in hiring every other former CRJ employee on Monday, March 14, 2016, and actively seeking out the former employees through Ms. Johnson (on Friday night), through the Saturday

meeting (when former employees were asked to spread the word), and through the conversations with Mr. Major and Ms. Howell on Monday, when Ms. Yates asked where the night shift employees were and whether Mr. Major had telephone numbers for other employees. The record as a whole shows that Metro was trying to find and hire the former CRJ workers; it does not support the claim that Metro was trying to exclude Ms. Waters. Additionally, I credit Ms. Yates' testimony that Metro was still hiring on March 16, and still needed "to completely fill the gym, which no one was working." Ms. Yates testified she had hired 18 employees by the first week, and 26 employees within 60 days, and in fact was still hiring when Metro received notice of Ms. Waters' complaint with DOL. As Metro was still working to fill positions on March 16 when Ms. Yates spoke with Ms. Waters, I reject Ms. Waters' testimony that Ms. Yates said she had to check with her project manager to see if there were any positions available. For all of these reasons, I credit Ms. Yates' account of the March 16 telephone conversation. I find that Ms. Yates told Ms. Waters to come in and complete the application packet, and she would be hired.

Ms. Waters had no reason to doubt the offer, as Mr. Major had told her the same thing on Monday: Metro was hiring everyone back with "first choice to work," you just had to come in and complete the application. Having heard first-hand from Mr. Major that Metro was hiring the former employees back on the spot upon submission of the application packet, and then having received an offer from Ms. Yates to come in and submit the application packet to be hired because Metro needed people, there is no ambiguity about the meaning of Ms. Yates' statement: Ms. Yates was offering employment to Ms. Waters. All Ms. Waters had to do to accept employment was come in and complete the application packet.

Based upon the foregoing, I find that Ms. Yates verbally offered employment to Ms. Waters in the March 16 telephone call.

Next, the parties dispute whether Ms. Waters completed an application packet. Metro contends that Ms. Waters came in more than two weeks later and picked up an application packet, but never returned it. Ms. Waters contends she came into the Metro offices and completed the application packet in person, and placed it in the hands of Mr. Cosby before leaving.

As set forth above, I find the testimony of Ms. Yates credible, and the testimony of Ms. Waters not credible. Additionally, Ms. Yates' testimony is consistent with Mr. Cosby's recollection that Ms. Waters came in "that one time." Mr. Cosby recalled that Ms. Waters said she'd worked for the previous company but had not been informed about being hired, and he gave her an application and then left with the "QA." Mr. Cosby did not recall ever receiving the completed application back from Ms. Waters. Ms. Yates recalled that Mr. Cosby told her Ms. Waters had come in and he gave her an application and told her to just fill it out and bring it back, because he had to go out on the flight line with Mr. Burton to look at the restroom. Ms. Yates testified that Metro never received a completed application from Ms. Waters. After Ms. Waters filed her complaint, Ms. Yates and Mr. Cosby looked through all the files, but Metro had no application from Ms.

Waters. In contrast, Ms. Waters' accounts are inconsistent. As also discussed above, she first testified that she went to the Metro offices to fill out an application because Mr. Marshall told her she needed to do so, and later testified she did so after calling Mr. Cosby. She first testified that after leaving a completed application with Mr. Cosby, she called to follow up and eventually reached Mr. Cosby, who said he would have Mr. Yates call her back; then later testified that she never did reach Mr. Cosby in her follow-up calls. Mr. Marshall's account, offered to corroborate Ms. Waters' claim that she handed a completed application to Mr. Cosby, lacks any credibility (as discussed in more detail above). The timeline offered by Mr. Marshall is contradicted by other evidence; his claim of the calls with Ms. Waters before and after her trip to Metro and the call to Mr. Cosby to confirm his receipt of the application all on the same day is contradicted by Mr. Marshall's telephone records; and Mr. Cosby testified that he never spoke with Mr. Marshall about Ms. Waters.⁷ (TR 78).

Relying on the more credible testimony of Ms. Yates and Mr. Cosby, and discounting the accounts of Ms. Waters and Mr. Marshall, which I find are not credible, I find that Ms. Waters came to the Metro offices in late March or early April and picked up an application packet, but never submitted the completed application packet to Metro in order to be hired. Accordingly, I find that Ms. Waters never accepted the offer of employment made by Ms. Yates on March 16, 2016.

In addition to the oral offer of employment made on March 16, 2016, Metro made a written offer of employment to Ms. Waters on February 3, 2017. (RX 4). Ms. Waters did not accept that offer either.

In sum, I find that Ms. Yates and Mr. Cosby are credible, and I credit their accounts of the events at issue in this case. I find that Ms. Waters and Mr. Marshall are not credible, and I give little weight to their accounts of the events at issue. I find that Ms. Yates, on behalf of Metro, made a verbal offer of employment to Ms. Waters on March 16, 2016, to work as a janitor under Metro's service contract at Moody AFB. I find that Ms. Waters did not accept the offer of employment. I find that Metro made a subsequent written offer of employment to Ms. Waters by letter dated February 3, 2017, and Ms. Waters did not accept that offer of employment.

Based upon the foregoing, I find and conclude that Metro complied with Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts, by offering a right of first refusal of employment to Ms. Waters. Metro offered to hire Ms. Waters on March 16, 2016, and told her to come into the office and complete the application packet. Ms. Waters did not come in until late March or early April, at which time she picked up the application packet but never returned it, and thus never accepted the offer of employment.

⁷ Although Mr. Marshall's telephone records show calls to Mr. Cosby's number on March 29 and 30 (TR 60), neither party identified Mr. Cosby's telephone number or the duration of either call. Thus, the record does not establish whether the two men actually engaged in any conversation on those dates, much less the substance of any conversation.

Accordingly, the Administrator's determination that no violation occurred will be affirmed.⁸

ORDER

IT IS HEREBY ORDERED that:

Complainant Christina Waters' appeal of the Administrator's findings and determination is **DENIED**, and the Determination of the Administrator, Wage and Hour Division is **AFFIRMED**.

MONICA MARKLEY
Administrative Law Judge

MM/jcb
Newport News, VA

NOTICE: To appeal, you must file a written petition for review with the Administrative Review Board ("ARB") within 20 days of the date of this Decision and Order. See 29 C.F.R. § 9. Your petition must refer to the specific findings of fact, conclusions of law, or order at issue.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

⁸ Metro submitted that if a violation were found to have occurred on March 14, 2016, the court should address whether the violation was abated when the offer of employment was made on March 16, 2016. (TR 6). Upon close review, Complainant has not presented the argument that her job offer on Wednesday, March 16, 2016, is nevertheless in violation of the Executive Order because other offers were made on Monday, March 14, 2016. Complainant's sole argument is that Metro never offered her a job: not in the March 16 telephone call or after she came into the office and completed the application packet. Those arguments are fully addressed in this decision. Complainant made no argument that a violation occurred through offers made on March 14, and I find that argument forfeited. Even if the argument had been made, I would find it unavailing. First, Metro had not made any job offers for janitorial positions in the gym as of March 16, 2016, when Ms. Waters was offered a position. Second, because Metro required more workers than CRJ had employed, the offers made on Monday did not displace any workers under the prior service contract. Third, and most critically, Ms. Waters did not accept the offer of employment when it was made, and therefore she cannot show harm from a two-day difference in when the rejected offer was given.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents. Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

The ARB's Rules of Practice require that the petitioner provide to the ARB an original and four copies of the petition and any other papers submitted to the ARB. However, if you e-File your petition, only one copy need be uploaded.

A copy of any petition must also be provided to the Chief Administrative Law Judge, Office of Administrative Law Judges, 800 K Street, NW, Washington, DC 20001-8002.

A copy of the petition must be served upon the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210; the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210; and all other parties.

Service is to be in person or by mail. Service by mail is complete on mailing, and the petition is considered filed upon the day of service by mail. The petition must contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and the manner of service and the names of the person or persons served, certified by the person who made service.