



**Issue Date: 17 September 2012**

**Case No.: 2012-OFC-00004**

*In the Matter of:*

**U.S. SECURITY ASSOCIATES, INC.,**

*Plaintiff,*

v.

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

*Defendant.*

**ORDER DISMISSING PLAINTIFF'S COMPLAINT  
FOR LACK OF SUBJECT MATTER JURISDICTION**

On June 21, 2012, the Office of Administrative Law Judges received a filing from U.S. Security Associates, Inc. entitled "Administrative Complaint for Declaratory Relief."<sup>1</sup> The filing seeks declaratory relief from 21 compliance review searches formally scheduled by the Office of Federal Contract Compliance Program (OFCCP). The Plaintiff avers that the Office of Administrative Law Judges (OALJ) has subject matter jurisdiction pursuant to Executive Order 11246, as amended by Executive Order 11375, Executive Order 12086, and Executive Order 13279; the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq.; 41 C.F.R. § 60-30.1; and Federal Rule of Civil Procedure 57.

On June 25, 2012, I issued an Order instructing the parties to file briefs, no later than 10 days from the date of the Order, addressing OALJ's authority to conduct a hearing on a contractor or subcontractor's request for declaratory relief in the absence of an administrative complaint filed by OFCCP under 41 C.F.R. § 60-30.5. The Plaintiff and Defendant filed briefs on July 5, 2012.

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<sup>1</sup> The cover letter to this filing refers to the Plaintiff as "U.S. Security Alliance."

## The Parties' Contentions

### *Plaintiff's Brief*

According to Plaintiff, congressional statutes and department regulations invest the OALJ with jurisdiction to entertain declaratory actions. Plaintiff reasons that Congress delegated to the Department of Labor (DOL) the power to determine private rights and obligations through rulemaking and adjudicatory power. Congress codified federal agency adjudicatory power in the Administrative Procedure Act (APA) to set certain minimum and mandatory baselines of procedure common to federal agency adjudicatory proceedings. *See* 5 U.S.C. § 551. The APA specifically anticipated and recognizes the obligation of federal agencies to entertain Declaratory Judgments in agency adjudications. Thus, in the same way Congress delegated authority to and mandated the Courts of the United States to entertain Declaratory Judgment actions, so too Congress delegated such authority and mandate to the federal agencies in adjudicatory proceedings before the federal agencies.

Plaintiff states that “[t]he APA specifically granted federal executive agencies, among others, the power to determine private rights and obligations by *adjudication*.” Plaintiff’s Brief at 6. (Emphasis in original).<sup>2</sup> The DOL exercised that delegated authority to create an adjudicatory body with the creation of the OALJ. With the establishment of an administrative court to adjudicate issues relating to regulations the DOL promulgated, the DOL enacted rules governing the administration of such hearings pursuant to its obligations under the APA.<sup>3</sup> These Rules of Practice and Procedure are binding on all adjudicatory proceedings before the OALJ.

The DOL also created OFCCP and OFCCP thereafter issued a narrow set of Rules of Practice, applicable by their very words, only to proceedings the OFCCP initiates before the OALJ. In the Plaintiff’s interpretation, OFCCP’s Rules of Practice do not truncate the Department’s Rules of Practice (or the APA) or otherwise address in any fashion the rights of private parties to initiate Declaratory Judgment complaints.

The Plaintiff states that both OALJ’s and OFCCP’s Rules of Practice apply to OFCCP adjudicatory actions unless silent as to a procedure or practice. The Plaintiff proffers that both sets of rules are silent as to the rules of practice governing adjudicatory proceedings private parties initiate before OALJ. While neither set of rules specifically reference Declaratory Judgments, Plaintiff argues that they also do not restrict their use.

According to Plaintiff, the APA explicitly made declaratory actions available as relief not just to the executive agency, but private parties seeking suit against the agency. Section 554(e) provides in pertinent part, “[t]he agency, with like effect as in the case of other others, and in its sound discretion, may issue a declaratory order to terminate a

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<sup>2</sup> *See* 5 U.S.C. § 554(a), which provides in part, “This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after an opportunity for an agency hearing.”

<sup>3</sup> *See* 5 U.S.C. § 544(b).

controversy or remove uncertainty.” The plain language of the APA provides the DOL, and by extension the OALJ, the ability to issue a declaratory judgment in appropriate situations. Plaintiff argues that the APA does not assume that such declaratory relief is available solely to a federal executive agency, such as the DOL. Section 554(b) notes in part, that private persons may serve as moving parties to initiate proceedings within the regulatory framework of the administrative agency.<sup>4</sup>

According to Plaintiff, the DOL and the OFCCP have both exercised their discretion to import declaratory judgments into the rules of practice before the OALJ and in OFCCP practice, in particular. Plaintiff reasons that because the OALJ explicitly incorporates the Federal Rules of Civil Procedure into the Rules of Practice and Procedure (F.R.C.P.), F.R.C.P. 57 (Declaratory Judgment) is incorporated without restriction or caveat. *See* 29 C.F.R. § 18.1. The OFCCP Rules of Practice also incorporate F.R.C.P. 57 by incorporating the Federal Rules of Civil Procedure. *See* 41 C.F.R. Part 60-30.1.

Plaintiff argues that the OFCCP Rules of Practice, as a whole, do not apply any rules or restrictions as to the Complaints of other parties other than those proceedings OFCCP initiates before the OALJ, or those, as here, arising under the Vietnam Veterans’ Readjustment Assistance Act of 1974 (VEVRAA) and Section 503 of the Rehabilitation Act (Section 503). Plaintiff points out that the first sentence of Part 60-30.1 does not state that “this part provides the rules of practice for all administrative proceedings involving OFCCP.” Plaintiff argues that nothing in Part 60-30.1 operates to divest private parties of their right to proceed before the OALJ, even assuming OFCCP somehow had inherent legal authority to truncate the “clear” mandate of the APA and the DOL Rules of Practice which “champion” declaratory judgments and specifically adopt it via incorporation of F.R.C.P. 57, without restriction or caveat. Plaintiff’s Brief at 10.

### *Defendant’s Brief*

Defendant argues that the OFCCP Rules of Practice grant jurisdiction to OALJ only for enforcement actions instituted by the Office of the Solicitor on behalf of OFCCP. *See* 41 C.F.R. § 60-30.5. The executive orders that Plaintiff cites vest the authority to initiate enforcement actions with the Secretary of the Department of Labor. *See* Executive Order 11246, Section 208 (as amended). Pursuant to this authority, the DOL promulgated regulations providing, *inter alia*, the rules of practice for administrative proceedings to enforce equal opportunity under Executive Order 11246. Thus, Defendant argues that 41 C.F.R. § 60-30.5 expressly limits the authorization to institute such proceedings to the individuals named therein. According to Defendant, the regulations do not expressly authorize the initiation of a hearing before OALJ by the filing of an administrative complaint or other motion for relief filed by a contractor or subcontractor. *See also*, 41 C.F.R. §§ 60-250.65(b)(2) and 60-300.65(b)(2), 60-741.65(b)(2) (for enforcement

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<sup>4</sup> “When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleadings.” (Emphasis added).

proceedings under VEVRAA and Section 503, complaints are to be filed by designated individuals within the Office of the Solicitor).

Defendant proffers that case law provides additional support for the position that OALJ's adjudicatory authority with respect to OFCCP actions is limited to matters initiated by the Office of the Solicitor on behalf of OFCCP. In *OFFCP v. E.E. Black, Ltd*, Case No. 77-OFCCP-7-R, Order Denying Motion to Disqualify the Secretary of Labor, the Assistant Secretary of Labor explained that "[i]nvestigative findings of violations which are not conciliated are referred to the Solicitor's Office for legal action and only that office is authorized to issue administrative complaints." *Id.* at 4 (*citing* 41 C.F.R. §§ 60-741.29(b)(1); 60-30.5(a)).

Defendant argues that the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, upon which Plaintiff relies, provides an additional remedy that is available only in matters properly before the U.S. district courts, not administrative courts such as the OALJ. *See* 28 U.S.C. § 2201(a). Defendant further argues that F.R.C.P. 57 does not provide independent adjudicatory authority for OALJ as it expressly provides that the Federal Rules of Civil Procedure govern the practice and procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. In *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950), the Supreme Court explained "[T]he operation of the Declaratory Judgment Act is procedural only.'...Congress enlarged the range of remedies available in *federal court* but did not extend their jurisdiction." (Internal citation omitted)(Emphasis added). Therefore, Defendant states that if OALJ were inclined to consider declaratory relief, it would need to establish an independent basis of jurisdiction in order to proceed under the Declaratory Judgment Act.

Defendant argues that the OALJ's jurisdiction under Executive Order 11246, VEVRAA, and Section 503 is limited to actions initiated by the Office of the Solicitor on behalf of OFCCP. As the Declaratory Judgment Act cannot provide a basis for jurisdiction for the OALJ and there is no other independent basis for jurisdiction in the OALJ, there is doubt as to OALJ's authority to hear the Complaint based upon that Act. According to Defendant, the Declaratory Judgment Act is limited to United States district courts. Because OALJ is not a United States district court, OALJ lacks jurisdiction to entertain an application for declaratory relief as provided by 28 U.S.C. § 2201 or F.R.C.P. 57.

### **Discussion**

OALJ has subject matter jurisdiction over Executive Order 11246, as amended by Executive Order 11375, Executive Order 12086, and Executive Order 13279 when an administrative complaint is filed under 41 C.F.R. § 60-30.5. The regulation expressly limits authorization to institute such proceedings to "[t]he Solicitor of Labor, Associate Solicitor for Labor Relations and Civil Rights Regional Solicitors and Regional Attorney upon referral from the Office of Federal Contract Compliance Programs..." 41 C.F.R. § 60-30.5(a). The subject of the expedited hearing procedure at 41 C.F.R. § 60-30.31 *et seq.* is often based on the refusal of a contractor or subcontractor "to give access to or to supply records or other

information as required by the equal opportunity clause ... or ... to allow an on-site compliance review to be conducted” but such proceedings are initiated by the filing of an administrative complaint under 41 C.F.R. § 60-30.5. 41 C.F.R. § 60-30.32(a).

Thus, the regulations contemplate that OALJ obtains the regulatory authority to adjudicate an OFCCP dispute only upon the filing of an administrative complaint by OFCCP through the Office of the Solicitor. The regulations do not expressly authorize the initiation of a hearing before OALJ by the filing an administrative complaint or other motion for relief by a contractor or subcontractor. Therefore, OALJ does not have subject matter jurisdiction over Plaintiff’s Complaint under Executive Order 11246 and 41 C.F.R. § 60-30.

Plaintiff’s argument that F.R.C.P. 57 is applicable to its Complaint also fails because F.R.C.P. 57 does not provide independent adjudicatory authority for OALJ. While Plaintiff argues that F.R.C.P. 57 is applicable because it was incorporated by reference in OALJ’s Rules of Practice, OALJ’s Rules of Practice do not establish jurisdiction for proceedings before this Office. Further, the Federal Rules of Civil Procedure expressly provide that such rules govern the procedure for obtaining declaratory judgments *under 28 U.S.C. § 2201*. This Complaint was not filed under 28 U.S.C. § 2201, and F.R.C.P. 57 is therefore inapplicable. The Declaratory Judgment Act provides for filing a pleading seeking declaratory relief in “any court of the United States.” 28 U.S.C. § 2201. OALJ is not a “court of the United States” in this context, and therefore, the Declaratory Judgment Act it is not applicable to this Complaint.

Inasmuch as Plaintiff has failed to establish that OALJ has subject matter jurisdiction pursuant to Executive Order 11246, as amended; the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq.; 41 C.F.R. § 60-30.1; or F.R.C.P. 57, Plaintiff’s Complaint is hereby DISMISSED.

SO ORDERED,

**STEPHEN L. PURCELL**  
Chief 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.