

**U.S. Department of Labor**

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**Issue Date: 27 November 2012**

**Case No.: 2013-OFC-00001**

*In the Matter of:*

**ENERGY SERVICES, INC.;**  
**ENERGY MISSISSIPPI, INC.;**  
**ENERGY TEXAS, INC.;**  
**ENERGY NUCLEAR OPERATIONS, INC.;**  
**ENERGY OPERATIONS, INC.; and**  
**ENERGY GULF STATES, LOUISIANA, LLC.**

*Plaintiff*

v.

**OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS,**  
**UNITED STATES DEPARTMENT OF LABOR,**

*Defendant.*

Appearances: Alexa L. Morgan, Esquire  
John C. Fox, Esquire  
*Fox, Wang & Morgan P.C.*  
San Jose, California  
*For Plaintiff*

M. Patricia Smith, Solicitor of Labor  
Christopher Wilkinson, Associate Solicitor  
Beverly I. Dankowitz, Deputy Associate Solicitor  
Consuela A. Pinto, Counsel for Litigation and Regional Coordination  
Theresa Schneider Fromm, Senior Attorney  
Kiesha N. Cockett, Attorney  
*Office of the Solicitor*  
*Division of Civil Rights and Labor Management*  
Washington, DC  
*For Defendant*

Before: **STEPHEN L. PURCELL**  
Chief Administrative Law Judge

**DECISION AND ORDER DISMISSING PLAINTIFFS’  
COMPLAINT FOR LACK OF SUBJECT  
MATTER JURISDICTION**

On October 26, 2012, the United States Department of Labor, Office of Administrative Law Judges (OALJ) received a filing from the above-named Plaintiffs, entitled “Administrative Complaint for Declaratory Relief.” The filing seeks declaratory relief from compliance review searches scheduled by the Office of Federal Contract Compliance Programs (OFCCP) pursuant to Executive Order 11246, as amended, Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, as amended, and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, 38 U.S.C. § 4212, as amended.<sup>1</sup> On November 5, 2012, the parties were directed to file briefs 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.

**BACKGROUND**

In *U.S. Security Associates, Inc. (“USSAI”)*, 2012-OFC-4 (Sept. 17, 2012), *appeal pending*, ARB No. 13-003, the plaintiffs – who were represented by the same law firm as Plaintiffs in the instant matter – filed a similar Administrative Complaint for Declaratory Relief. In that matter, I found 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 under 41 C.F.R. § 60-30.5, and therefore OALJ did not have subject matter jurisdiction to entertain an administrative complaint filed by the target of an OFCCP compliance review seeking declaratory relief from that compliance review.

In the instant case, Plaintiffs’ arguments are similar to those presented in *USSAI*. Plaintiffs argue that Congress, through the grant of adjudicatory powers to agencies in the Administrative Procedure Act (APA), 5 U.S.C. § 551, et seq., specifically anticipated and recognized the obligation of federal agencies to entertain declaratory judgments in agency adjudications. (Plaintiff’s brief at 2).

Plaintiffs further argue that, pursuant to the APA, the Department of Labor (DOL) adopted and issued Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18, and that those Part 18 rules incorporate the declaratory judgment provision at Rule 57 of the Federal Rules of Civil Procedure (FRCP). *See* 29 C.F.R. § 18.1(a) (providing for the application of the FRCP in any situation not provided for or controlled by Part 18 or a statute, executive order or regulation) Plaintiffs also argue that

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<sup>1</sup> Some of OFCCP’s compliance review selection letters also indicated that there would be an examination of compliance with reporting requirements under the Federal Contractor Veteran’s’ Employment (VETS-100) report, and the Employment Eligibility Verification (I-9) report requirements of the Immigration Reform and Control Act of 1986. *See* Plaintiffs’ brief, Exhibit B.

OFCCP's procedural rule at 41 C.F.R. § 60-30.1 incorporates FRCP 57. Thus, Plaintiffs argue that DOL adopted declaratory judgment relief in OALJ proceedings via the APA.

Plaintiffs further argue that OFCCP's rules of procedure only address the procedure for OFCCP to initiate an action to enforce Executive Order 11246,<sup>2</sup> and do not limit OALJ jurisdiction to OFCCP-initiated complaints. (Plaintiffs' brief at 9).

Defendant argues in its brief that the OFCCP regulations at 41 C.F.R. §§ 60-30.5, 60-250.65(b)(2), and 60-741(b)(2) expressly limit authorization to institute proceedings before OALJ to the Solicitor of Labor, Associate Solicitor for Labor Relations and Civil Rights, Regional Solicitors and Regional Attorney upon referral from OFCCP. (Defendant's brief at 3-5). According to Defendant, Plaintiffs also cannot rely on OALJ rules of procedure at 29 C.F.R. Part 18 because the governing OFCCP regulations apply the Federal Rules of Civil Procedure rather than OALJ's Part 18 rules. *See* 41 C.F.R. § 60-30.5. Defendant further notes that the APA only authorizes declaratory relief in administrative courts; it does not mandate it. *See* 5 U.S.C. § 554(e). Defendant argues that "no legal authority requires an agency to issue declaratory rulings. At best, such rulings are merely permissible under the APA." Defendant asserts that its rules of procedure at 41 C.F.R. Part 60-30 reflect a decision by OFCCP not to make declaratory relief available as a remedy. (Defendant's brief at 7-8). Defendant further argues that the APA itself does not provide subject matter jurisdiction for OALJ. (Defendant's brief at 8-9). Defendant states:

Administrative courts like the OALJ are tribunals of limited jurisdiction. . . . Accordingly, agencies only have such adjudicatory authority as is conferred on them by statute or regulation. As the tribunal for the Department, the OALJ only has the adjudicatory authority that is conferred on it by regulation.<sup>3</sup> In this case, 41 C.F.R. Part 60-30 *et. seq.* expressly limits the OALJ's authority to adjudicate OFCCP claims to those that are filed by the Office of the Solicitor.

(Defendant's brief at 9) (citations omitted).

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<sup>2</sup> Plaintiffs argue that OFCCP's procedural rules at 41 C.F.R. §§ 60-30 apply only to Executive Order 11246 actions, and not to actions arising under Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, as amended, or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 4212, as amended. Thus, according to Plaintiffs, OFCCP's procedural rules "attach only when OFCCP is instituting a complaint to enforce equal opportunity under Executive Order 11246..." (Plaintiff's Brief at 9). The regulations governing Rehabilitation Act and Vietnam Era Veteran's actions, however, both expressly provide that 41 C.F.R. § 60-30 applies to enforcement proceedings before OALJ. 41 C.F.R. § 60-250.65(b)(3); 41 C.F.R. § 60-741.65(b)(3).

<sup>3</sup> I note, however, that where a statute requires an agency to afford an opportunity for a hearing "on the record," it is a convention of statutory construction that the agency is required to afford an opportunity for a formal APA hearing, meaning a hearing before an administrative law judge. Thus, it is common for DOL to afford an opportunity for an ALJ hearing for cases arising under such a statute, even if DOL has not yet published final rules implementing that statute. In the instant case, however, OALJ's adjudicatory authority derives from Executive Order and regulation, rather than statute.

## DISCUSSION

Plaintiffs' arguments in the instant matter in support of OALJ jurisdiction to hear its declaratory judgment motion are grounded in the fact that the APA permits agencies to issue declaratory orders in administrative adjudications, that OALJ's rules of practice and procedure incorporate the Federal Rules of Civil Procedure in situations not covered by OALJ's rules or other applicable laws, and that OFCCP's rules of practice and procedure adopt the Federal Rules of Civil Procedure for situations not covered by OFCCP's rules.

### *1. The Administrative Procedure Act*

The Administrative Procedure Act section governing agency adjudications at 5 U.S.C. § 554(e) provides, in pertinent part, that “[t]he agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.”

Initially I note that 5 U.S.C. § 554 applies to “adjudications required by statute to be determined on the record after opportunity for an agency hearing.” 5 U.S.C. § 554(a) (emphasis added). Executive Order 11246 is not a statute, and neither Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, as amended, nor the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 4212, as amended, provide for on-the-record hearings. Thus, I find that Section 554(e) not to be applicable to this matter because OALJ's jurisdiction over OFCCP administrative complaints is afforded by Executive Order and regulation rather than by statute.

Assuming *arguendo* that Section 554(e) applies even where the agency adjudication is being conducted by virtue of a regulation or Executive Order rather than a statutory requirement to provide an opportunity for an on-the-record hearing, the APA does not, in itself, afford OALJ with subject matter jurisdiction. OALJ's subject matter jurisdiction over OFCCP administrative complaints originates from E.O. 11246 and the regulations at 41 C.F.R. § 60-30.5, 41 C.F.R. § 60-250.65(b)(3), and 41 C.F.R. § 60-741.65(b)(3). These regulations provide authority for OALJ to adjudicate administrative complaints, but only when such administrative complaints are filed by designated officials within the Office of the Solicitor upon referral by OFCCP. Regulatory silence on the question of declaratory orders does not create authority, by default under Section 554(e) of the APA, for OALJ to adjudicate an administrative complaint brought by the target of a compliance review seeking a declaratory order.

Moreover, as OFCCP argues in its brief, Section 554(e) affords an “agency” the *discretion* to issue declaratory orders.<sup>4</sup> OFCCP issued regulations that narrowly define the types of cases that may be heard by OALJ – specifically administrative complaints filed by specifically designated members of the Office of the Solicitor. There is no evidence that this conferral of adjudicatory authority upon OALJ included a broad exercise of discretion by OFCCP to also authorize OALJ to adjudicate declaratory judgment actions initiated by the target of a compliance review.

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<sup>4</sup> “Agency” in this context, means OFCCP rather than an administrative law judge. *Compare* 5 U.S.C. § 557(b) (distinguishing between the “agency” and the “presiding employee”).

That adjudication of an action in the nature of a declaratory judgment is a matter committed to the discretion of OFCCP is consistent with the description of the Secretary of Labor's authority in Executive Order 11246:

The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, *as the Secretary may deem advisable* for compliance, enforcement, or educational purposes.

E.O. 11246, § 208(a) (emphasis added).

Thus, arguably the Office of the Solicitor, upon referral of the matter from OFCCP, could file an administrative complaint with OALJ seeking a declaratory order concerning OFCCP's authority to select certain targets for a compliance review. But the regulations unambiguously limit the authority to commence proceedings before OALJ to certain officials within the Office of the Solicitor, and make no provision for the initiation of proceedings by other parties, even if that party is the target of a compliance review.<sup>5</sup>

2. *OALJ's Rules of Practice and Procedure at 29 C.F.R. Part 18*

As OFCCP argued in its appellate brief, the procedural rules used for enforcement actions pursuant to OFCCP administrative complaints are OFCCP's rules themselves, and for situations not covered by those rules, the Federal Rules of Civil Procedure apply. OALJ's Rules of Practice and Procedure at 29 C.F.R. Part 18, Subpart A, are not used in OFCCP administrative complaint cases. Thus, the cross reference to the Federal Rules of Civil Procedure found in OALJ's rules of practice and procedure at 29 C.F.R. § 18.1(a) is not applicable in the instant proceeding.<sup>6</sup>

3. *OFCCP's Rules of Practice and Procedure at 41 C.F.R. Part 60-30*

OFCCP's rules for adjudicating administrative complaints refer to the Federal Rules of Civil Procedure for situations not covered by OFCCP's rules. 41 C.F.R. § 60-30.1. But it is too big a jump to find that this regulation's cross reference to the FRCP to fill procedural gaps can give an administrative law judge authority reserved to Article III courts. For example, FRCP 38 and 39 address the right to trial by jury. But Plaintiffs could not argue in good faith that OFCCP, through its cross reference to the FRCP, thereby created a right to a jury trial before an ALJ.

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<sup>5</sup> I acknowledge that the First Circuit Court of Appeals held in *Neely v. Benefits Review Board*, 139 F.3d 276 (1<sup>st</sup> Cir. 1998), that an ALJ could entertain a request by a Longshore claimant for a declaration of coverage. In that case, however, the Solicitor of Labor supported the claimant's request before the First Circuit.

<sup>6</sup> Assuming arguendo that OALJ's rules of practice and procedure are applicable, I would find that FRCP 57 is nonetheless not a rule that OALJ could use in a OFCCP proceeding for the same reasons stated in Discussion, Part 3 of this decision – namely that Rule 57 is explicitly a rule governing the procedure for obtaining a declaratory judgment from a U.S. district court under 28 U.S.C. § 2201 -- and a mere cross reference in OALJ's rules to the Federal Rules of Civil Procedure to fill procedural gaps cannot confer jurisdiction to OALJ in matters reserved to Article III courts.

Similarly, FRCP 57 expressly governs procedures for obtaining a declaratory judgment under 28 U.S.C. § 2201. As I previously found in *USSAI*, the federal Declaratory Judgment Act provides a mechanism for obtaining declaratory relief *in federal district court*. Moreover, neither Rule 57 nor the Declaratory Judgment Act constitutes an independent basis for the district court's subject matter jurisdiction.<sup>7</sup>

#### 4. Summary

The United States Department of Labor, Office of Administrative Law Judges is an administrative tribunal of limited jurisdiction. OFCCP has, by regulation, afforded OALJ with subject matter jurisdiction to adjudicate administrative complaints enforcing Executive Order 11246, as amended, Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, as amended, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 4212, as amended, when, and only when, that administrative complaint is filed by the Solicitor of Labor, Associate Solicitor for Labor Relations and Civil Rights, Regional Solicitors or Regional Attorney upon referral from OFCCP. The regulations do not afford OALJ with subject matter jurisdiction to adjudicate administrative complaints under those laws when filed by the target of a compliance review. Plaintiffs arguments as to why the APA, OALJ's rules of practice and procedure, and OFCCP's rules of practice and procedure provide OALJ with such subject matter jurisdiction are unavailing.

### **ORDER**

Based on the foregoing, the above-captioned matter is hereby **DISMISSED** for lack of subject matter jurisdiction.

**STEPHEN L. PURCELL**  
Chief Administrative Law Judge

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<sup>7</sup> In their brief, Plaintiffs challenge my finding in *USSAI* that OALJ is not a "court of the United States" within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201. Plaintiffs challenge is based, not on any citation of legal authority, but simply argument. They assert that my finding, "necessarily [and erroneously] means that no administrative court could hear declaratory relief actions...." (Plaintiff's Brief at 5). Plaintiffs' premise, however, (by finding that OALJ was not a court of the United States within the meaning of 29 U.S.C. § 2201, I had also necessarily found that no federal agency has the authority to hear declaratory judgment actions) is not accurate. My holding in *USSAI* was only that 29 U.S.C. § 2201 is not, in itself, a law that gives subject matter jurisdiction to OALJ. Moreover, it is not clear why Plaintiffs challenge this finding in *USSAI* inasmuch as Plaintiffs state in their brief they are not claiming OALJ derives its authority to adjudicate declaratory relief actions through the Declaratory Judgment Act, 29 U.S.C. § 2201. (Employer's brief at 6).

**NOTICE OF APPEAL RIGHTS:** The administrative law judge's Decision and Order Dismissing Plaintiffs' Complaint for Lack of Jurisdiction, along with the record, will be forwarded to the Administrative Review Board ("Board") for a final administrative order. *See* 41 C.F.R. § 60-30.27.

You may file exceptions with the Board within 14 days of the date of receipt 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 Ave NW, Washington, DC 20210. Any request for an extension of time to file the exceptions must be filed with the Board, and copies served simultaneously on all other parties, no later than 3 days before the exception are due. *See* 41 C.F.R. § 60-30.28.

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