U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 October 2015

Case Numbers: **2015-OFC-00002**
2015-OFC-00003
2015-OFC-00004
2015-OFC-00005
2015-OFC-00006
2015-OFC-00007
2015-OFC-00008

In the Matter of:

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

Plaintiff

v.

CONVERGYS CUSTOMER MANAGEMENT GROUP, INC.
Respondent.

RECOMMENDED DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR A DECISION ON THE PLEADINGS AND DIRECTING DEFENDANTS TO COMPLY WITH EXISTING LAW AND IMPLEMENTING REGULATIONS UNDER THREAT OF IMPOSED SANCTIONS

These cases arise under Executive Order No. 11246,[1] as amended by Executive Order No. 11375,[2] Executive Order No. 12086,[3] and Executive Order No. 13279,[4] section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793, section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA"), 38 U.S.C. § 4212, and the rules and regulations pursuant to 41 C.F.R. Chapter 60. Jurisdiction over this action exists under sections

[1] 30 Fed. Reg. 12319 (Sept. 28, 1965).
[2] 32 Fed. Reg. 14303 (Oct. 17, 1967).
[3] 43 Fed. Reg. 46501 (Oct. 10, 1978).
[4] 67 Fed. Reg. 77141 (Dec. 16, 2002).

208 and 209 of Executive Order 11246, 41 C.F.R. §§ 60-1.26, 60-300.65 and 60-741.65, and 41 C.F.R. Part 60-30.

Executive Order No. 11246 prohibits Federal contractors and subcontractors from discriminating against their employees based on color, religion, sex, national origin, or age, and requires Federal contractors and subcontractors to take affirmative action to employ, advance in employment, and otherwise treat qualified applicants and employees without discrimination based on their color, religion, sex or national origin. Section 503 of the Rehabilitation Act protects employees of Federal contractors and subcontractors from discrimination based on disability. Section 402 of VEVRAA protects employees of Federal contractors and subcontractors from discrimination based on disability and veteran status.

I. PROCEDURAL BACKGROUND

On December 15, 2014, counsel for the Office of Federal Contract Compliance Programs, United States Department of Labor ("OFCCP" or "Plaintiff") filed seven (7) Administrative Complaints ("Complaints") against Convergys Customer Management Group, Inc. ("Respondent"). Plaintiff alleged that Respondent failed to submit an affirmative action program ("AAP") and supporting data in response to scheduling letters sent in April and May 2013 and continued to fail to provide this information despite Plaintiff's follow-up requests. (Complaints ¶¶ 8-12). Additionally, Plaintiff requested the expedited hearing procedures outlined in 41 C.F.R. 60-30.31.

On December 22, 2014, the Office of Administrative Law Judges ("Office") issued a *Notice of Docketing* ordering Respondents to either submit the AAPs as referenced in the scheduling letters attached to Plaintiff's Complaints or to show cause why this matter should not proceed under the expedited hearing procedures.[5] Respondents replied on January 27, 2015 by filing a *Motion Opposing Expedited Hearing Procedures and to Permit Discovery*, asking this Office to waive or modify the expedited hearing procedures.[6]

On February 26, 2015, Plaintiff filed a *Motion for Decision on the Pleadings with Brief in Support and Response to Defendant's Motion Opposing Expedited Hearing Procedures and to Permit Discovery* ("Motion for Decision on the Pleadings" or "Plaintiff's Opposition"). In this Motion, Plaintiff asserts that OFCCP is entitled to a judgment as a matter of law and requests that this Office deny Respondent's *Motion Opposing Expedited Hearing Procedures and to Permit Discovery*. In response, Respondent filed a *Memorandum in Opposition to Plaintiff's Motion for Decision on the Pleadings; and Defendant's Renewed Request for a Hearing* ("Resp. Response") on March 9, 2015, asserting that a genuine dispute remains regarding material facts.

After this Office granted Plaintiff leave to file a "concise reply brief" on March 18, 2015, Plaintiff filed a reply brief again asserting that Respondent has failed to raise an issue of material fact that would allow it to avoid judgment as a matter of law ("Plaintiff's Reply"). In this reply

[5] In the *Notice of Docketing*, this Office also issued an *Order of Consolidation* by which the seven Administrative Complaints filed with this Office and docketed under separate OALJ case numbers were consolidated for the purposes of determination before this Office.

[6] Respondents also filed seven *Answers to the Administrative Complaint and Requests for Hearing* ("Resp. Answer") on December 31, 2014.

brief, Plaintiff further asserts that under the standard set forth in *Donovan v. Lone Steer Inc.*, 464 U.S. 408 (1983), Plaintiff is entitled to an order requiring Respondent to provide its AAPs and supporting data as a matter of law.

Before this Office are two motions: (i) *Motion Opposing Expedited Hearing Procedures and to Permit Discovery*, submitted by Respondent; and (ii) *Motion for Decision on the Pleadings*, submitted by Plaintiff. The granting of Plaintiff's *Motion for Decision on the Pleadings* obviates the need for a ruling on Respondent's *Motion Opposing Expedited Hearing and to Permit Discovery*.

II. FACTUAL BACKGROUND ACCORDING TO THE PARTIES

A. Plaintiff

According to the Administrative Complaints, Plaintiff sent seven separate scheduling letters to Respondent "on or about April 1, 2013."[7] (Complaints ¶ 8.) Each scheduling letter requested that Respondent submit documentation of its AAP and stated that the "AAPs and supporting data were needed to conduct the desk audit phase of its compliance review." (Complaints ¶ 9.) After making "numerous status inquires and follow-up requests" and failing to receive the requested documents or information, Plaintiff "issued a Show Cause Notice on or about February 5, 2014," to which Respondent again failed to reply (Complaints ¶¶ 11-12.) Plaintiff explains that the Administrative Complaint alleges neither that Respondent has violated any requirements with respect to its affirmative action program, nor that Respondent has refused to permit Plaintiff to conduct an on-site inspection; rather, the Administrative Complaint simply alleges that the Respondent has refused to supply records or other information as required by the equal opportunity clause.

B. Respondent

According to Respondent's Answer, "on or about March 27, 2013, OFCCP issued twenty-six (26) Corporate Scheduling Announcement letters ('CSALS') indicating that OFCCP had selected 26 Convergys establishments for audit." "Soon thereafter," Respondent received the scheduling letters. (Resp. Answer ¶¶ 1-2.) In response, Respondent "requested evidence that the OFCCP properly selected the facility at issue for a desk audit" and only received "conclusory assurance that the Company [Respondent] was neutrally selected." (Resp. Answer ¶ 5.) According to a conversation between Respondent and OFCCP's National Office in Washington, D.C., "17 of Convergys's facilities were under audit." (Resp. Answer ¶ 7.) The National Office "refused to supply" a list of the facilities under audit. (Resp. Answer ¶ 7.) "Instead, on or about February 5, 2014, OFCCP issued formal 'Notices to Show Cause' ('NSCs') in approximately 20 at-issue audits." (Resp. Answer ¶ 7.) In an effort "to preserve any constitutional defenses and counterclaims, [Respondent] refused to supply the Agency with the requested documents." (*Motion Opposing Expedited Hearing Procedures and to Permit Discovery* at 2.)

[7] As stated in the *Notice of Docketing*, Plaintiff commenced proceeding against seven different establishments of the same company, Convergys Customer Management Group, Inc.. The scheduling letters were sent to each of the establishments as listed in the *Notice of Docketing*. *See Notice of Docketing* n. 2 at 2. This Order refers to each of these establishments and documents sent either to or from each collectively.

III. MOTION FOR JUDGMENT ON THE PLEADINGS

A. Applicable Law

a. Standard of Review for Motion for Judgment on the Pleadings

41 C.F.R. §§ 60-30.1-30.37 provides the rules of practice for administrative proceedings instituted by OFCCP that relate to the enforcement of equal opportunity under Executive Order 11246. To the extent that §§ 60-30.1-30.37 do not dictate the procedure to be used, § 60-30.1 directs that procedures be in accordance with the Federal Rules of Civil Procedure.

The regulations lack a specific provision regarding motions for judgment on the pleadings, although § 60-30.23 provides for summary judgment. Therefore, the Federal Rules of Civil Procedure are applicable to judgment on the pleadings. Rule 12(c) allows a party to move for judgment on the pleadings after the pleadings are closed. Rule 12(d) states that if, on a motion under Rule 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56, and all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Under § 60-30.23(d), the party moving for summary judgment is required to file a *Statement of Uncontested Facts* that sets forth all the alleged uncontested material facts that provide the basis for the motion. Failure by the nonmoving party to file a *Statement of Disputed Facts* "shall be deemed as an admission" to the *Statement of Uncontested Facts*. *Id.* Summary judgment "shall be rendered forthwith" under § 60-30.23 if

> the complaint and answer, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Summary judgment rendered for or against the Government or the respondent shall constitute the findings and recommendations on the issues involved.

The standard for granting summary judgment under § 60-30.23 is essentially the same as both the standard used in Federal Rule of Civil Procedure 56 and the standard for summary decision dictated by the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. 18.72. A material fact is one whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue exists when the nonmoving party produces sufficient evidence of a material fact that a factfinder is required to resolve the parties' differing versions at trial. Sufficient evidence is any significant probative evidence. *Id.* at 249, citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-90 (1968). No genuine issue of material fact exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The party moving for summary decision has the burden of establishing the "absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Zenith Radio Corp.*, 477 U.S. 317, 325 (1986). The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist.

Anderson, 477 U.S. at 257. In reviewing the request for summary decision, all of the evidence must be viewed in a light most favorable to the non-moving party. *See, e.g., Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001).

b. The Scope of This Tribunal's Review

This tribunal's review of Plaintiff's request for documents is limited. The regulations provide that the purpose of a hearing is (i) to give Plaintiff "an opportunity to demonstrate the basis for the request for sanctions and/or remedies"; and (ii) to give Respondent "an opportunity to show that the violation complained of did not occur and/or that good cause or good faith efforts excuse the alleged violations." 41 C.F.R. § 60-30.34(a).

The decision of the Administrative Law Judge ("ALJ") does not constitute the final administrative order. The presiding ALJ "shall propose findings and conclusions to the Secretary on the basis of the record." 41 C.F.R. § 60-30.15. The ALJ has the power to "[r]ecommend whether the respondent is in current violation of the order, regulations, or its contractual obligations, as well as the nature of the relief necessary to insure the full enjoyment of the rights secured by the order." 41 C.F.R. § 60-30.15(l). The ALJ's recommended decision and the record are certified to the Administrative Review Board ("ARB"), United States Department of Labor. It is the ARB that issues a final administrative order,[8] unless the ARB does not file an order within 30 days after the expiration of the time for filing exceptions. *See* 41 C.F.R. § 60-30.27, -30.30, -30.37. In that case, the ALJ's recommended decision becomes the final administrative order.[9] § 60-30.37.

c. The Regulations Require Contractors to Produce Certain Documents and Authorize OFCCP to Conduct Compliance Evaluations

The regulations at 41 C.F.R. § 60 have the force of law. Executive Order 11246 and its direct antecedents were issued pursuant to both constitutional and statutory authority. *See, e.g., Pan Am. World Airways, Inc. v. Marshall*, 439 F. Supp. 487, 491-92 (S.D.N.Y. 1977). The law

[8] "If the [ARB] concludes that the defendant has violated the Executive Order, the equal opportunity clause, or the regulations, an Administrative order shall be issued enjoining the violations, and requiring the contractor to provide whatever remedies are appropriate, and imposing whatever sanctions are appropriate, or any of the above. In any event, failure to comply with the Administrative order shall result in the immediate cancellation, termination and suspension of the respondent's contracts and/or debarment of the respondent from further contracts." § 60-30.30.

[9] It is this final administrative order that exposes a federal contractor to cancellation of government contracts and debarment from future contracts for failure to comply. § 60-30.30. Additionally, the final order is subject to the judicial review granted by the Administrative Procedure Act (APA). *See Entergy Servs. v. U.S. Dept. of Labor*, 2014 U.S. Dist. LEXIS 183517 at *34 (E.D. La. Dec. 15, 2014) (finding that "[t]he APA is the appropriate vehicle for [the] Court's review" of the Department of Labor's final action in a case arising from Executive Order 11246); *Lawrence Aviation Indus. v. Reich*, 28 F. Supp. 2d 728 (E.D.N.Y 1998) (reviewing a final order of the Secretary of Labor after administrative enforcement proceedings where the contractor was found to have violated Executive Order 11246). Although administrative orders are not reviewable until final, such consideration still allows sufficient judicial review of preliminary, procedural, or intermediate agency action. *See, e.g., FTC v. Std. Oil Co.*, 449 U.S. 232, 244-45 (1980) (commenting that if "the issuance of the complaint [a non-final action by the FTC] is not committed to agency discretion by law, a court of appeals reviewing [the] order [when it becomes final] has the power to review alleged unlawfulness in the issuance" of the complaint pursuant to the APA).

is settled that regulations "issued pursuant to such an executive order also carry the force and effect of law." *Legal Aid Soc'y v. Brennan*, 381 F. Supp. 125, 130 (N.D. Cal. 1974).

The regulations at 41 C.F.R. § 60, *inter alia*, provide that (i) contractors must maintain written AAPs; (ii) contractors must supply information regarding these programs to OFCCP upon request; and (iii) OFCCP is authorized to conduct compliance evaluations ranging from off-site desk audits to on-site reviews.

41 C.F.R. § 60-1.12(b) requires a contractor establishment under § 60-1.40 to develop and maintain a written AAP, to maintain its current AAP and documentation of good faith effort, and to preserve its AAP and documentation of good faith effort for the immediately preceding year. 41 C.F.R. § 60-1.12(c)(2) further requires the contractor to supply this information to OFCCP upon request. 41 C.F.R. § 60-1.20(a) authorizes OFCCP to conduct compliance evaluations to determine if the contractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated during employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin. A compliance evaluation may consist of any one or any combination of the following investigative procedures:

> (1) *Compliance review.* A compliance review may proceed in three stages:
> (i) A desk audit of the written AAP and supporting documentation
> (ii) An on-site review; and
> (iii) Where necessary, an off-site analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review.
>
> (2) *Off-site review of records.* An analysis and evaluation of the AAP (or any part thereof) and supporting documentation, and other documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of the Executive Order and regulations;
>
> (3) *Compliance check.* A determination of whether the contractor has maintained records consistent with § 60-1.12; at the contractor's option the documents may be provided either on-site or off-site; or
>
> (4) *Focused review.* An on-site review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.

OFCCP may institute administrative or judicial enforcement proceedings for violations of Executive Order 11246, the equal opportunity clause, the applicable regulations, or applicable construction industry equal employment opportunity requirements. In these proceedings, violations may be found based upon any of the following: a contractor's refusal to submit an affirmative action program; a contractor's refusal to provide data for off-site review or analysis as required by the regulations; a contractor's refusal to establish, maintain and supply records or other information as required by the regulations or applicable construction industry requirements.

41 C.F.R. § 60–1.26(a)(1). If a contractor refuses to submit an affirmative action program, or refuses to supply records or other requested information, OFCCP may immediately refer the matter to the Solicitor of Labor. 41 C.F.R. § 60–1.26(b).

d. The Amount of Protection Afforded by the Fourth Amendment of the United States Constitution Varies Depending On the Type of Investigation

The Fourth Amendment extends protections to businesses as well as private homes, and applies to administrative subpoenas as well as physical searches. *See, e.g., See v. City of Seattle*, 387 U.S. 541, 543-44 (1967). The touchstone of the Fourth Amendment is "that the disclosure sought shall not be unreasonable." *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 208 (1946). The protections necessary to make a search reasonable vary according to the context; a higher levels of protection is required for more intrusive inspections. *See, e.g., Camara v. Mun. Ct.*, 387 U.S. 523, 530-31 (1967). The type of compliance evaluation that OFCCP is seeking under §60-1.20(a) will determine the Fourth Amendment protection that a business is afforded.

i. Administrative Warrants

OFCCP's orders may be evaluated as administrative warrants or administrative subpoenas, depending upon whether nonconsensual entry onto non-public property is sought. A "[n]onconsensual entr[y] into areas not open to the public" requires the protections of an administrative warrant. *Donovan v. Lone Steer*, 464 U.S. 408, 414. In *Marshall v. Barlow's, Inc.* the Supreme Court articulated the general protections required before issuance of an administrative warrant:

> Probable cause in the criminal sense is not required. For purposes of an administrative search . . . probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular establishment. A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.

Marshall v. Barlow's, Inc., 436 U.S. 307, 319-21 (1978) (internal marks and citations omitted). The Court went on to say that a warrant could only issue if "the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." *Id.* at 323.

The Fifth Circuit weighed in on this issue in the context of Executive Order 11246. The court interpreted the general guidelines in *Barlow's* to require consideration of a number of factors, depending upon the context of the underlying case. In *United States v. Miss. Power & Light Co.*, the court looked at whether the warrant was (i) authorized by statute; (ii) properly

limited in scope; and (iii) properly initiated by the agency. The court found, as a matter of law, that administrative warrants pursuant to Executive Order 11246 and the corresponding regulations are both statutorily authorized and properly limited in scope if "restricted to an inspection solely of business records to test compliance with the affirmative action program." *Miss. Power & Light Co.*, 638 F.2d at 908. *See also Bank of Am. v. Solis*, 2014 U.S. Dist. LEXIS 113038 at *12 (D.D.C. 2014) (finding that administrative warrants pursuant to Executive Order 11246 are both authorized by statute and properly limited in scope as a matter of law).

ii. Administrative Subpoenas

On the other hand, a warrant is not required when the mere production of documents is sought without nonconsensual entry onto a non-public area. Instead, an administrative subpoena is sufficient. *Lone Steer*, 464 U.S. at 414. Courts have found that less rigorous Fourth Amendment protections are warranted for administrative subpoenas because of the less intrusive nature of such inspections. *See, e.g., United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 91 (D.D.C. 2011).

In *United Space Alliance, LLC v. Solis*, the District of Columbia Circuit evaluated OFCCP's request for data under the *Lone Steer* standard because the order, "though not technically an administrative subpoena, is practically identical to one."[10] *United Space Alliance*, 824 F. Supp. 2d 68, 92. The case arose when United Space Alliance refused to give OFCCP additional data requested during a compliance review under Executive Order 11246. *Id.* at 75-76. United Space Alliance had voluntarily given OFCCP data for the initial stage of a desk audit, but refused to provide supporting documentation that OFCCP requested. *Id.* at 80-81. Finding that "the order under review here does not authorize entry onto private areas of United Space property," the Court concluded that the order was properly evaluated as an administrative subpoena, and subject to the *Lone Steer* standard. *Id.* at 92.

The Supreme Court has been consistent in its articulation of the Fourth Amendment protections required for administrative subpoenas. In *Lone Steer*, the Court observed that

> [i]t is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.

Lone Steer, 464 U.S. at 415 (quoting *See v. City of Seattle*, 387 U.S. at 544). The District Court in *United Space Alliance* observed that the "cases hold[] administrative subpoenas to a considerably lower standard than administrative warrants – a standard that notably focuses on the breadth of the subpoena rather than the motivation for its issuance." *United Space Alliance*, 824 F. Supp. 2d at 91. *See also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (finding that, under Lone Steer, an administrative agency may issue an administrative subpoena "merely

[10] Courts routinely evaluate orders from agencies as if they were administrative subpoenas, though they technically are not. *See, e.g., RSM, Inc. v. Buckles*, 254 F.3d 61, 69 (4th Cir. 2001) (evaluating a letter from the Bureau of Alcohol, Tobacco, and Firearms requiring federal firearms licensees to submit record information as an administrative subpoena).

on suspicion that the law is being violated, or even just because it wants assurance that it is not"). In other words, while both an administrative subpoena and an administrative warrant must be properly limited in scope, an agency's procedures to decide to initiate the search are only relevant to an administrative warrant. Additionally, *Lone Steer* requires that an administrative subpoena be subject to judicial review. The party subject to the subpoena must be able to challenge it in court before any penalties can be assessed for failure to comply with it. *Lone Steer*, 464 U.S. at 415.

The standards for evaluating the scope of administrative warrants, discussed above, and administrative subpoenas are virtually indistinguishable. Courts find that administrative subpoenas that both (i) seek information relevant to an agency's authorized investigation or enforcement directives, and (ii) describe the information sought in detail, are sufficiently limited in scope, relevant in purpose, and specific in directive. *See Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 209 (1946) (finding an administrative subpoena was properly limited in scope where "specification of the documents to be produced [is] adequate, but not excessive, for the purposes of the relevant inquiry"); *Morton Salt Co.*, 338 U.S. at 652-53 (finding properly limited scope where the request in the administrative subpoena was "within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant"); *RSM, Inc. v. Buckles*, 254 F.3d 61, 69 (4th Cir. 2001) (finding an order for the ongoing provision of information, evaluated as an administrative subpoena, to be sufficiently limited in scope, relevant in purpose, and specific in directive because (i) there was statutory authorization to issue the order; (ii) the order detailed the specific information required; and (iii) the obligation to provide information would expire once the agency was "assured . . . of future compliance"); *cf. United States v. Miss. Power & Light Co.*, 638 F.2d 899, 908 (5th Cir. 1981) (finding that, as a matter of law, administrative warrants pursuant to Executive Order 11246 and the corresponding regulations are both statutorily authorized and properly limited in scope if "restricted to an inspection solely of business records to test compliance with the affirmative action program"); *Bank of Am. v. Solis*, 2014 U.S. Dist. LEXIS 113038 at *12 (D.D.C. 2014) (finding that administrative warrants pursuant to Executive Order 11246 are both authorized by statute and properly limited in scope as a matter of law).

B. <u>Uncontested Facts</u>

In this case, Plaintiff's *Statement of Uncontested Facts* mirrors much of what it included in its Administrative Complaints: Respondent is a publicly traded corporation with its headquarters in Cincinnati "that provides a variety of customer services for its clients … in many industries." (*Statement of Uncontested Facts* ("Statement") ¶ 1.) Respondent employs "50 or more employees" and has held at least one federal government contract of $100,000.00 or more, such that "it has been a Government contractor within the meaning of the Executive Order, the Rehabilitation Act and VEVRAA." (Statement ¶¶ 2-3.) Plaintiff details the dates on which Respondent's establishments received scheduling letters, approved by the Office of Management and Budget (OMB), for compliance reviews. (*See* Statement ¶¶ 4-8.) The scheduling letters included a request to "submit copies of its AAPs and supporting data … needed to conduct the desk audit phase of its compliance review." (Statement ¶ 10.) "Convergys refused to submit the AAPs and supporting data in response to the scheduling letters." (Statement ¶ 11.) Thereafter, Plaintiff sent Notices to Show Cause to Respondent, which were received "[o]n or about" February 10 and 14, 2014. (Statement ¶¶ 12-13.)

C. **Respondent's Arguments**

Respondent argues that there remain material disputed facts that cannot be resolved based on the pleadings in this matter. Respondent directs the court to two issues that it contends are factually disputed: (i) whether the OFFCP had a proper basis for selecting Respondent under the Fourth Amendment; and (ii) whether the document requests were sufficiently limited in scope to satisfy the Fourth Amendment. Respondent also contends that, as a matter of law, OFCCP does not have the authority to issue a subpoena.

First, Respondent contends that a factual dispute persists over whether the number of compliance reviews Plaintiff seeks to conduct are justified under the Fourth Amendment. Respondent asserts that "[Plaintiff] disproportionately selected/targeted [Respondent] for a large number of compliance reviews not justified by a neutral selection process or reasonable cause to suspect violations." (Resp. Response at 4.) Respondent argues that "consideration of all of OFCCP's document requests" is necessary to determine whether OFCCP had the authority to request documents from Respondent. (Resp. Response at 5.) Respondent asks the court to determine whether Respondent was properly selected pursuant to a neutral plan. (Resp. Response at 5-6.)

Respondent also argues that a factual dispute exists over whether the document requests are sufficiently limited in scope to satisfy the Fourth Amendment under the *Lone Steer* standard.[11] Respondent alleges that "[t]he number of [Respondent's] facilities scheduled for desk audit is unprecedented," and "[t]he broad scope of the request is why [Respondent] did not consent to the desk audits." (Resp. Response at 13.) Respondent asserts that "[i]t is unreasonable for OFCCP to subject [Respondent] to an overly burdensome and unprecedented number of compliance reviews, wasting both private and public resources," and that Plaintiff's reliance on OMB approval for collection of information does not satisfy constitutional standards. (Resp. Response at 13-14.) Respondent continues:

> OFCCP believes it can justify onsite visits and unlimited additional document requests based upon the Scheduling Letter requests means that OFCCP is really seeking unrestricted, unreviewed, and unreviewable access to private documents.[12] This Court should reject OFCCP's attempt to conduct such a broad request for documents . . . .

Id.

Respondent asserts that OFCCP does not have the authority to issue a subpoena in this case. Respondent states that federal agencies requesting private documents must issue a subpoena to receive those documents and also must have the statutory authorization to issue subpoenas. (Resp. Response at 6-7.) Respondent contends that it did not contract away these rights, as Respondent contends that it is only required to submit AAPs insofar as the request is

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[11] As discussed in the next paragraph, Respondent contends that it would be incorrect to apply the *Lone Steer* standard in this situation.

[12] In another section of its brief, Respondent cites *Bank of America v. Solis*, 2014 U.S. Dist. LEXIS 113038 at *12 (D.D.C. 2014), for the proposition that the records in the desk audit "can be used to justify a physical premises search." (Resp. Response at 7.)

reasonable under the Fourth Amendment. (Resp. Response at 15.) Finally, Respondent avers that granting Plaintiff's Motion would deny Respondent's right to judicial review, and that it is entitled to a hearing before an ALJ. (Resp. Response at 10-12, 16.)

D. Plaintiff's Arguments

Plaintiff argues that this Office should order Respondent to produce its AAPs and supporting data on the grounds that Plaintiff's Administrative Complaints and Respondent's Answers establish that there is no material issue of fact in dispute. Plaintiff asserts that the relevant question is not one of discovery, but instead, whether Respondent unlawfully denied OFCCP access to records that Respondent is required to produce upon request and that OFCCP requested in compliance with the Fourth Amendment. (Motion for Decision on the Pleadings at 1.)

Plaintiff further argues that Respondent's reliance on *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), is not appropriate, as the standard established under *Barlow's* applies when OFCCP requests an onsite review to enter a contractor's premises. (Motion for Decision on the Pleadings at 8–10.) Plaintiff explains that OFCCP has not requested to enter any of Respondent's premises for purposes of conducting an onsite review, and has instead only requested the production of documents and data for purposes of conducting an offsite desk audit. *Id*. Plaintiff argues that these requests constitute administrative subpoenas for Fourth Amendment purposes, and the controlling standard for requests for documents pursuant to an administrative subpoena is the lower standard set forth in *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1983). *Id*. Under *Lone Steer*, OFCCP need only meet the minimal threshold that the record requests be "limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *Id*.; s*ee Lone Steer*, 464 U.S. at 415. Plaintiff therefore asserts that Respondent's request for discovery relating to the OFCCP's selection methodology is irrelevant to *Lone Steer* review. *Id*. Respondent's contentions that OFCCP must demonstrate that Respondent was selected for compliance reviews pursuant to a neutral administrative plan would only be relevant under the *Barlow's* standard, which does not apply here as OFCCP is not seeking to enter commercial premises for a nonconsensual administrative search in this case. *Id*.

Plaintiff argues that its request for Respondent to produce its AAP and supporting data satisfies the *Lone Steer* standard. Plaintiff cites OMB approval as evidence that the data request is not overly burdensome. (Motion for Decision on the Pleadings at 13-14; Plaintiff's Reply at 4). Plaintiff argues that, as a matter of law, OFCCP's requests for AAPs and supporting data are reasonable, within the scope of OFCCP's statutory authority, and satisfy the requirements of the Fourth Amendment. (Motion for Decision on the Pleadings at 13-14.)

E. Analysis

a. The *Lone Steer* Standard is Appropriate in This Case

The requests in this case are not administrative warrants. They are limited to documents for off-site review. There is no contention that OFCCP seeks a nonconsensual entry into a non-public area of Respondent's property. The requests at issue are not administrative subpoenas either; they have not yet reached that status. However, the Department of Labor's issuance of a

final order is akin to an administrative subpoena. Therefore, evaluating the orders under a standard deemed appropriate for administrative subpoenas should provide ample protection of Respondent's Fourth Amendment rights. For those reasons, it is appropriate to evaluate OFCCP's orders under the *Lone Steer* standard, which requires the order to be subject to judicial review and sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.

b. The *Lone Steer* Standard is Satisfied as a Matter of Law

The *Lone Steer* requirements are satisfied by the procedures set forth in the regulations outlined above, and Plaintiff has satisfied its initial burden of establishing the absence of evidence in support of Respondent's contention that there is a dispute of material facts. Therefore, the burden has shifted to Respondent to present affirmative evidence to show that a factual dispute does exist. Respondent has failed to go beyond the pleadings to present affirmative evidence in support of its position that the orders are not sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. Respondent has not presented affirmative evidence to the contrary. Respondent's argument that the orders violate the Fourth Amendment because they are not subject to judicial review also fails.

The orders are sufficiently limited in scope. It is uncontested that Plaintiff's requests (i) seek only information relevant to the compliance evaluations of 41 C.F.R. § 60; and (ii) describe the information sought in detail. The scheduling letters request only information that is necessary to conduct desk audits, using documents that Respondents are required by law to maintain and furnish. Respondent relies exclusively upon the number of compliance evaluations at issue to argue that the orders are insufficiently limited in scope. *See* Resp. Response at 13. Whether there is a ceiling above which requests become overly burdensome need not be decided here, because Respondent fails to go beyond the bare assertion that the document requests are "voluminous and burdensome." *See* Resp. Response at 17. Judi Summerlin's Declaration (included in Resp. Response) does not even make that assertion.

Respondent's emphasis on OFCCP's selection process is misplaced. The focus of *Lone Steer* is on the breadth of the orders, and not Plaintiff's motivations for making the requests. Therefore, any alleged lack of neutrality in Plaintiff's selection criteria does not constitute good cause for Respondent's violations, and so need not be evaluated in these proceedings. Respondent's main concern appears to be the possibility that it will be required to produce additional documents for OFCCP based upon information turned over by Respondent pursuant to OFCCP's current orders. Respondent seems to suggest that this court should evaluate the scope of the document request based upon requests that OFCCP may make in the future in order to ensure that the initial requests are subject to judicial review. *See* Resp. Response at 14. However, future requests and the standards with which to evaluate them cannot properly be considered before the requests are made. Additionally, the OFCCP orders are subject to judicial review when they become final.[13]

[13] As discussed in footnote 9, administrative orders are not outside the reach of judicial review merely because they have yet to become reviewable, and future orders are subject to judicial review as well.

PROPOSED FINDINGS AND CONCLUSIONS

I find that there is no genuine issue of material fact and that Plaintiff is entitled to judgment as a matter of law. I find that Respondent violated 41 C.F.R. § 60-1.12(c)(2) by failing to provide its written AAPs and supporting data upon request. I further find that Respondent did not have good cause to excuse the violation.

In light of the above reasons, Summary Decision for Plaintiff is **GRANTED**.

It is hereby **ORDERED** that:

1. Respondent, through its officers, directors, partners, representatives and agents, jointly and individually, provide all program information requested in the Notifications of April and May 2013 to Plaintiff's representatives no later than 4:00 PM on the business day next following the thirtieth calendar day after this Order becomes final under the law.

2. Should Respondent fail to comply with the Order set forth above, Plaintiff is directed to take all administrative steps necessary to terminate all existing Government contracts held by Respondent, jointly and individually, and to debar Respondent from receiving and participating in any future Government contracts for a period of at least three years or until the Respondent complies with the provisions of Executive Order 11246, the Rehabilitation Act, the VEVRAA, and the respective implementing Federal regulations, whichever period is longer.

SO ORDERED.

Digitally signed by STEPHEN R. HENLEY
DN: CN=STEPHEN R. HENLEY, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

STEPHEN R. HENLEY
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 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 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.

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

If filing paper copies, you must file an original and four copies of the Exception with the Board, together with one copy of this decision. If you e-File your Exception, only one copy need be uploaded.

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.