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Office of Administrative Law Judges
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Issue Date: 31 July 2017

Case No.: 2016-OFC-00003

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 JOINT REQUEST FOR A
DECISION ON THE PLEADINGS AND DIRECTING RESPONDENT TO COMPLY
WITH EXISTING LAW UNDER THREAT OF IMPOSED SANCTIONS**

This case arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended by Executive Order 11375 (32 Fed. Reg. 14303), Executive Order 12086 (43 Fed. Reg. 46501), Executive Order 13279 (67 Fed. Reg. 77141); 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, 38 U.S.C. § 4212 ("VEVRAA"); and the rules and regulations pursuant to 41 C.F.R. Chapter 60. Jurisdiction over this action exists under Sections 208 and 209 of Executive Order 11246, 41 C.F.R. § 60-1.26, 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.

Procedural History

On December 11, 2015, the Regional Solicitor, Atlanta Regional Office, U.S. Department of Labor, on behalf of the Office of Federal Contract Compliance Programs (“Plaintiff” or “OFCCP”), filed an Administrative Complaint with the Office of Administrative Law Judges (“OALJ” or “Office”), alleging that Convergys Customer Management Group, Inc. (“Respondent”) violated its contractual obligations with the Federal Government by failing to submit copies of its affirmative action programs and supporting data under the above-listed Executive Orders, the Rehabilitation Act, and VEVRAA. Plaintiff also requested expedited hearing procedures pursuant to 41 C.F.R. § 60-30.31.

On December 28, 2015, I issued a *Notice of Docketing and Order to Stay Proceedings*, noting that this matter is related to an appeal pending before the Administrative Review Board (“ARB”) of a *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* (“Recommended Decision and Order”) issued in consolidated cases involving the same parties and same issue.¹ Accordingly, I denied Plaintiff’s request for an expedited hearing and stayed the instant proceedings pending resolution of the action before the ARB.²

On January 5, 2016, Respondent filed an *Answer to Plaintiff’s Administrative Complaint, Motion for Joinder of Claims, Counterclaim, and Request for Hearing* requesting that ten of Respondent’s facilities, which received a Show Cause Notice from OFCCP but are not the subject of an Administrative Complaint, be joined in this case and pleading a counterclaim for declaratory judgement and permanent injunctive relief. Respondent also requested a hearing on all issues raised in its filing. On February 11, 2016, I issued an *Order Denying Motion for Joinder of Claims, Counterclaim and Request for Hearing* denying Respondent’s motion in its entirety due to lack of jurisdiction.

On February 7, 2017, Plaintiff filed an *Unopposed Motion for Leave to File Amended Complaint, Amended Administrative Complaint, and Exhibits A and B*. In its filings, Plaintiff explained that since it filed the Administrative Complaint, three more of Respondent’s facilities have been selected for compliance review and Respondent has not submitted affirmative action programs for those facilities. By order issued March 6, 2017, I granted Plaintiff’s motion and ordered that the submitted amendments be incorporated into the Administrative File. On May 23, 2017,³ Respondent filed an *Answer to the Amended Administrative Complaint and Request for Hearing*, with supporting exhibits.

¹ *OFCCP v. Convergys Customer Management Group, Inc.*, ARB No. 16-013, OALJ Nos. 2015-OFC-002, -003, -004, -005, -006, -007, and -008.

² The December 28, 2015 *Notice of Docketing and Order to Stay Proceedings* directed the parties to provide the undersigned a status update every 90 days and to notify the Court within 30 days of the resolution of the action before the ARB or a settlement between the parties, whichever is sooner.

³ Although the regulations provide that “[a]n amended complaint shall be answered within 14 days of its service, or within the time for filing an answer to the original complaint, whichever period is longer,” the March 6, 2017 *Order*

On June 28, 2017, Respondent filed a *Status Report* advising that it had filed a motion with the ARB to consolidate the instant matter, OALJ Case No. 2016-OFC-00003, with the appealed cases and stay the ARB proceeding, which was granted in part by the ARB. Specifically, on June 20, 2017, the ARB issued an *Order Staying Proceedings* denying without prejudice Respondent's request to consolidate because it lacked jurisdiction over OALJ Case No. 2016-OFC-00003 as no recommended decision and order had been made. As such, the ARB stayed the appeal action pending issuance of a recommended decision and order on OALJ Case No. 2016-OFC-00003. On July 25, 2017, Plaintiff submitted a supplemental *Status Report* advising that it had filed a motion requesting that the ARB reconsider its *Order Staying Proceedings*, which was opposed by Respondent.

On July 25, 2017, I held a conference call with the attorneys for both parties. During that conference, the parties jointly requested that I lift the stay of proceedings and render a determination in this matter based on the pleadings currently in the record, notwithstanding Plaintiff's pending request for reconsideration of the ARB's *Order Staying Proceedings*.

Factual Background and Positions of the Parties

Respondent is a publicly traded corporation headquartered in Cincinnati, Ohio, "that provides a variety of customer services for its clients ... in many industries." (Am. Comp. ¶ 4; Am. Answer Defenses ¶ 4). At all relevant times, Respondent has employed 50 or more employees and has held at least one federal government contract of \$100,000.00 or more, such that it is a government contractor within the meaning of the Executive Order, the Rehabilitation Act and VEVRAA. (Am. Compl. ¶ 5-6; Am. Answer Defenses ¶ 5-6).

Plaintiff

According to the Administrative Complaint, as amended, during the period of April 2013 through July 2016, Plaintiff sent Respondent Scheduling Letters stating that it had selected nine of Respondent's facilities for a compliance review and requiring Respondent to submit its affirmative action program and supporting documentation within 30 days.⁴ (Am. Compl. ¶ 9-15). During the period of August 2013 through August 2016, Plaintiff sent Respondent Show Cause Notices requiring Respondent to show cause within 30 days why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted against the selected facilities.⁵ (Am. Compl. ¶ 16-19). For all nine facilities at issue, Respondent "has refused to submit written affirmative action programs and supporting documents within 30 days

Granting Leave to Amend Complaint provided that Respondent's Answer to the Amended Complaint would not be due until 14 days after the stay in these proceedings is lifted.

⁴ Specifically, Scheduling Letters were sent to the at-issue facilities at the following locations on or about the following dates: April 29, 2013 to Jacksonville, FL and Valdosta, GA; June 19, 2013 to Tamarac, FL; September 11, 2013 to Chattanooga, TN; October 29, 2013 to Clarksville, TN; March 5, 2015 to Charlotte, NC; May 24, 2016 to Jacksonville, NC and Greenville, NC; July 12, 2016 to Hickory, NC.

⁵ Show Cause Notices were sent to the at-issue facilities at the following locations on or about the following dates: August 13, 2013 to Tamarac, FL; February 10, 2014 to Jacksonville, FL, Valdosta, GA, Chattanooga, TN, and Clarksville, TN; May 11, 2015 to Charlotte, NC; August 24, 2016 to Jacksonville, NC, and Greenville, NC.

of their receipt OFCCP's compliance evaluation scheduling letters or within 30 days of their receipt of OFCCP's Show Cause Notices." (Am. Compl. ¶ 19).

Plaintiff submits that Respondent's refusals "violate the Executive Order, the Rehabilitation Act, the VEVRAA, and their implementing regulations, and therefore violate [Respondent's] contractual obligations to the Federal Government." (Am. Compl. ¶ 20). Plaintiff avers that it has met all procedural requirements prior to filing the Administrative Complaint, as amended, and has "attempted to secure voluntary compliance through means of conciliation and persuasion," but its "efforts were unsuccessful." (Am. Compl. ¶ 21). As such, Plaintiff posits, "Unless restrained by an administrative order, [Respondent] will continue to violate the obligations imposed on it by the Executive Order, the Rehabilitation Act, the VEVRAA, and the regulations issued pursuant thereto." (Am. Compl. ¶ 22). Plaintiff requests issuance of an order permanently enjoining Respondent from failing or refusing to comply with the requirements of these laws and directing Respondent to permit OFCCP to conduct and complete its compliance review.

Respondent

According to Respondent's answer, as amended, in 2013, Plaintiff "decided to subject Convergys to an unprecedented and disproportionate number of audits not justified by a neutral selection process or reasonable cause to suspect violations of applicable statutes of regulations." (Am. Answer ¶ 1). Specifically, on or about March 27, 2013, Plaintiff issued 26 Corporate Scheduling Announcement Letters indicating that it had selected 26 Convergys facilities for audit. (Am. Answer ¶ 1). Soon after, Respondent's facilities began receiving numerous Scheduling Letters and, in response, Respondent requested evidence that Plaintiff properly selected the facility at issue for a desk audit. (Am. Answer ¶ 2, 5). According to Respondent, Plaintiff, "replied with conclusory assurances that the Company was neutrally selected, but refused to substantiate such generalized assurances." (Am. Answer ¶ 5).

In 2014, 2015, and 2016, Respondent continued to receive Scheduling Letters at facilities subject to the 2013 Corporate Scheduling Announcement Letters. (Am. Answer ¶ 6). Despite Respondent's "repeated offers to discuss the situation," Plaintiff contacted Respondent only once, in January 2014, in which Plaintiff indicated that 17 of Respondent's facilities were under audit. Plaintiff refused to provide Respondent with a list of these facilities and subsequently issued Notices to Show Cause in approximately 20 at-issue audits on or about February 5, 2014. (Am. Answer ¶ 7). Additionally, Plaintiff has refused Respondent's attempts to informally settle or supply a subpoena. (Am. Answer ¶ 8). Further, Plaintiff "has repeatedly refused to advise Convergys of exactly how [it] decided to select Convergys for potential and actual audits." (Am. Answer ¶ 9).

Respondent indicates that it has not supplied Plaintiff with the affirmative action programs and supporting documentation requested in the Scheduling Letters and Notices to Show Cause because "a contractor, suspecting that OFCCP has violated its Fourth Amendment rights and wishing to contest the violation of its rights, must resist OFCCP's audit and Scheduling Letter by refusing to supply OFCCP with the documents demanded." Such a contractor "must also refuse to permit OFCCP to come onsite to commence its investigation." (Am. Answer ¶ 9). Respondent submits that "OFCCP carries the burden to demonstrate that it

had constitutionally sufficient cause to conduct a search of Convergys or seize its business documents and that the Agency initiated its search and seizure in the proper manner.” (Am. Answer ¶ 14).

In its defense, Respondent denies that it has violated its obligations under the Executive Order, the Rehabilitation Act, the VEVRAA, and their implementing regulations. (Am. Answer Defenses ¶ 1). It also posits that the relief sought in the Administrative Complaint, as amended, violates its Fourth Amendment rights. (Am. Answer Defenses ¶ 24). Respondent seeks issuance of a recommended decision and order finding that Plaintiff “violated its Fourth Amendment right against unreasonable search and seizures as to each of the audit locations which Plaintiff has scheduled or threatened to schedule for audit, and that [Respondent] has no duty to consent to the requested searches.” Additionally, it requests that Plaintiff be permanently enjoined from investigating Respondent’s facilities absent “constitutionally sufficient cause,” and be directed to administratively close the audits and select Respondent’s facilities for compliance review “only upon use of a neutral selection system or a proper finding of cause consistent with the Fourth Amendment.” (Am. Answer Req. for Hr’g ¶ 1-5).

Applicable Law

I. Legal Standard for Decision 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. 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.

A motion for judgment on the pleadings pursuant to Rule 12(c) is subject to a similar standard as a motion for summary judgment, except that the court may only consider the contents of the pleadings. *E.g.*, *Gutierrez v. City of San Antonio*, 139 F.3d 441, 444 n.1 (5th Cir. 1998); *Alexander v. City of Chi.*, 994 F.2d 333, 336 (7th Cir. 1993); *Corbett v. Printers & Publishers Corp.*, 127 F.2d 195, 196 (9th Cir. 1942). A motion for judgement on the pleadings should be granted if “taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law.” *Honey v. Distelrath*, 195 F.3d 531, 532 (9th Cir. 1999); *see also Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002); *Inst. for Scientific Info v. Gordon & Breach Sci. Publishers, Inc.*, 931 F.2d 1002, 1005 (3rd Cir. 1991); *U.S. Fid. & Guar. Co. v. Tierney Assocs., Inc.*, 213 F. Supp. 2d 468, 469-70 (M.D. Pa. 2002). In other words, judgement on the pleadings is proper if “the sole issue [is] one of law.” *Nat’l Sav. & Trust Co. v. Bailey*, 41 F. Supp. 871, 872 (D.D.C. 1941).

II. 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." *Id.* § 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." *Id.* § 60-30.15(l). The ALJ's recommended decision and the record are certified to the ARB. It is the ARB that issues a final administrative order,⁶ unless the ARB does not file an order within 30 days after the expiration of the time for filing exceptions. *See id.* § 60-30.27, -30.30, -30.37. In that case, the ALJ's recommended decision becomes the final administrative order.⁷ *Id.* § 60-30.37.

III. Legal Obligations of Public Contractors

The regulations at 41 C.F.R. Chapter 60 require contractors to produce certain documents and authorize OFCCP to conduct compliance evaluations. 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 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). Thus, the regulations at 41 C.F.R. Chapter 60 have the force of law.

⁶ "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." 41 C.F.R. § 60-30.30.

⁷ 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. 41 C.F.R. § 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).

As detailed below, the regulations at 41 C.F.R. Chapter 60 provide, *inter alia*, that: (i) contractors must maintain written affirmative action plans (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 efforts, and to preserve its AAP and documentation of good faith efforts 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).

IV. Protection Afforded by the Fourth Amendment of the United States Constitution

The degree of protection afforded by the Fourth Amendment is dependent on the type of investigation at issue. 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 level of protection is required for more intrusive inspections. *See, e.g., Camara v. Mun. Ct.*, 387 U.S. 523, 530-31 (1967). Thus, the type of compliance evaluation that OFCCP seeks under §60-1.20(a) will determine the Fourth Amendment protection that a business is afforded.

a. Administrative Warrants

OFCCP’s orders may be evaluated under the Fourth Amendment 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 (1984).

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 held 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 in the case *United States v. Miss. Power & Light Co.*, 638 F.2d 899 (5th Cir. 1981). Interpreting the general guidelines of *Barlow’s, Inc.* to require consideration of several factors in light of the context of the underlying case, the Fifth Circuit examined 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.” *Id.* at 908; *see 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. Administrative Subpoenas

In contrast, 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 U.S. District Court for the District of Columbia 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.”⁸ *Id.* at 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 thus 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 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 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

⁸ 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).

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).

Analysis

I. The *Loan 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 these 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.

II. The *Loan Steer* standard is satisfied as a matter of law.

As indicated during the July 25, 2017 conference call, the parties agree that the issues presented in this case are essentially the same as the issues on which I rendered the

Recommended Decision and Order currently before the ARB.⁹ Based on the proposed findings therein, for the purpose of the parties joint request for a judgement on the pleadings, the Amended Complaint and Amended Answer raise no disputed factual issues.

As detailed more fully in the *Recommended Decision and Order*, as a matter of law, the orders at issue are sufficiently limited in scope, relevant in purpose, and specific in directive such that compliance will not be unreasonably burdensome. 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 Respondent is required by law to maintain and furnish.

Respondent suggests in the Amended Answer, and previously argued in the related cases now before the ARB, that the orders are insufficiently limited in scope due to the number of compliance evaluations initiated against it by OFCCP. Whether there is a ceiling above which requests become overly burdensome need not be decided here, because Respondent has failed to provide any support for this conclusion beyond the mere assertion that the document requests are voluminous and burdensome. Moreover, 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.

Proposed Findings and Conclusions

Based on the parties' pleadings, I find 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. Judgement on the pleadings in favor of 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

⁹ During the July 25, 2017 conference call, Respondent acknowledged that its Amended Answer also asserts the following defenses: the relief sought in the Administrative Complaint, as amended, is barred by the equitable doctrines of waiver, release, estoppel, or laches; Plaintiff failed to engage in the conciliation efforts required as a jurisdictional prerequisite to initiating an action; and relief from this Court is barred under Article II, Section 2, Clause 2 of the United States Constitution. (Am. Answer Defenses ¶ 25-27). The parties indicated that these defenses need not be substantively addressed in ruling on their request for judgement on the pleadings. However, I note that Respondent maintains these defenses, such that the merits of these defenses may be preserved for appeal.

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:

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.