

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 26 August 2019

CASE NO.: 2017-OFC-00006

In the Matter of

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

v.

ORACLE AMERICA, INC.,
Defendant.

**ORDER REGARDING JOINT STATUS REPORT
ON POTENTIAL CORRECTIVE NOTICE**

This matter arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended, ("EO 11246") and associated regulations at 41 C.F.R. Chapter 60. It has been pending at the Office of Administrative Law Judges ("OALJ") since January 17, 2017, and involves Plaintiff Office of Federal Contract Compliance Programs ("OFCCP") and Defendant Oracle America, Inc. ("Oracle"). Hearing is set to begin on December 5, 2019.

On April 4, 2019, OFCCP dispatched a letter to current and former Oracle employees, providing some information about this case and soliciting their assistance. Oracle found the letter objectionable and sought correction. This was unsuccessful, resulting in a May 17, 2019, motion to compel OFCCP to correct its communication. OFCCP opposed the motion and filed a counter-motion concerning Oracle's communications with its employees. These motions were addressed in a June 26, 2019, Order Regarding Communications with Oracle Employees ("OCOE"). The OCOE declined to order any corrective notice, but because the parties both appeared interested in some corrective notice, I ordered them to meet and confer given the guidance in the OCOE and to file a status report. As directed, the parties filed status reports on July 10, 2019, and July 25, 2019, but did not reach agreement on a voluntary corrective notice.

On August 8, 2019, I issued an Order regarding Potential Corrective Notice ("OPCN") giving guidance on three disputes between the parties. As to one of those disputes, the OPCN stated that, "This is a corrective notice, not another solicitation. I see no need to include the contact information for either party. But if OFCCP is intent on including its contact information, both sides should have their information included." The OPCN further explained that, "The time for quarreling is long past. The parties must either agree to something and send it or fail to agree and leave the issues created by the misleading communication remaining for hearing."

The parties filed a third Joint Status Report (“JSR”) on August 22, 2019. Oracle’s position is that no corrective notice should be sent and any evidentiary issues engendered by the April 4, 2019, should be dealt with at hearing. JSR at 3. To explain this change in position, Oracle states that any corrective notice now could not serve its intended purpose given the significant passage of time. *Id.* at 3-4. OFCCP, however, now believes that a corrective notice should be issued so that any concerns created by the original letter can be ameliorated. *Id.* at 2. It attaches a proposed letter “[a]s evidence of its intentions.” *Id.*; *see also* JSR, Ex. A. OFCCP argues that Oracle’s change of position is the only barrier to the correction and that Oracle’s asserted justification is not valid. It contends that there has been no unexpected delay and that if Oracle did not want a corrective notice it should not have filed a motion seeking that relief. JSR at 2. OFCCP avers that Oracle’s real motive is to gain tactical advantage and “attempt to force an evidentiary sanction upon a cooperative party.” *Id.* at 3.

The parties have been attempting to reach a mutually agreeable corrective notice since June 26, 2019, but were under no court order to issue a corrective notice and I decline to order one now. Even though I decline to order a corrective order and direct the parties to conclude this process, there is at least one point in the JSR that bears addressing. OFCCP represented that its proposed corrective notice is consistent with the guidance in the OPCN “regarding recipients, remedies and contact information.” *Id.* at 2. This is incorrect.

OFCCP’s August 22, 2019, proposed corrective notice omits contact information for both parties from the body of the letter. JSR, Ex. A at 2. *However*, OFCCP altered the Department of Labor address at the beginning of the proposed corrective notice to include its desired contact information for this case. *Id.* at 1. Instead of including the normal return address and telephone number for either the San Francisco or Seattle office of the Office of the Solicitor—one of which is found within all of OFCCP’s other filings in this case and was included on the April 4, 2019, solicitation¹—OFCCP removed the physical address and normal phone number and in its place provided the phone number for its “Oracle witness line” and its special dedicated email address for witness contacts in this litigation. *Id.* Not only has the content of the return address been altered to provide the desired case-specific contact information, the formatting takes it out of a standard letterhead so that it is prominently displayed below the official seal and above the greeting. This is not consistent with the guidance in the OPCN “regarding recipients, remedies and contact information.” *Id.* at 2. OFCCP asks that I take its proposed corrective notice as “evidence of its intentions,” JSR at 2, but doing so in light of the above, it is apparent that OFCCP sought to make additional solicitations in the guise of corrections. This is not appropriate.

Setting aside that point, the prior orders regarding any corrective notice were premised on the mutual interest of the parties. In the OCOE, I rejected Oracle’s contentions about the degree to which the April 4, 2019, letter was misleading and I declined to order a corrective notice. That has not changed, even if the parties have now switched positions. The parties were directed to meet and confer because it appeared that some negotiation in light of the guidance provided might yield a mutually agreeable resolution. That has not come to pass, so no corrective notice should be issued.

¹ The OCOE considered Oracle’s complaint that the April 4, 2019, letter was sent on Office of the Solicitor letterhead and agreed with OFCCP that this was proper. Since it was a communication from the Office of the Solicitor, it was appropriate to put it on normal Office of the Solicitor letterhead and include the normal physical address and phone/fax for the office. That is no license to alter a letterhead in substance and formatting in the manner done here.

I have not entered any evidentiary sanctions or determined how the April 4, 2019, letter might bear on any evidentiary considerations at or after the hearing, if at all.² The matter of any corrective notice is concluded. No further action is required from either party.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge

² Hence, OFCCP's speculations about Oracle's change of position are premature and might be presented at a later time, should the issue arise.