



**Issue Date: 29 November 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 FOLLOWING PRE-HEARING CONFERENCE**

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. The hearing is set to begin on December 5, 2019.

On November 21, 2019, the parties filed a Joint Pre-hearing Statement (“PHS”), Joint Witness List, and Joint Exhibit List. The same day, OFCCP filed OFCCP’s Hearing Exhibit List and Oracle filed Oracle America, Inc.’s Exhibit List.<sup>1</sup> On November 26, 2019, I held a previously scheduled telephonic pre-hearing conference call with the parties to expedite the hearing process. The conference was not recorded. Attorneys Laura Bremer, Ian Eliasoph, and Norm Garcia appeared on behalf of Plaintiff Office of Federal Contract Compliance Programs (“OFCCP”). Attorneys Erin Connell, Warrington Parker, III, and Kathryn Mantoan appeared on behalf of Defendant Oracle America, Inc. (“Oracle”). Based upon discussions at the pre-hearing conference, the following order is made:

- A. The hearing shall be held generally from 9:00 a.m. to 5:30 p.m. each day on December 5, 6, 10-13, and 16-19, 2019, at the San Francisco Office of Administrative Law Judges Courtroom, 90 - 7th Street, Suite 4-815, San Francisco, California, 94103. The parties should block December 20, 2019, as an additional hearing day to be used if needed. The daily hearing hours may be expanded if timing becomes problematic and it looks like the matter may take longer than the allotted hearing days.

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<sup>1</sup> On November 26, 2019, while the prehearing conference was occurring, the parties filed an amended joint exhibit list and Oracle filed an amended exhibit list. On November 27, 2019, OFCCP filed an amended exhibit list.

1. In the PHS, both parties asserted that more time was needed for the hearing, which was the same general request made when the matter was originally set for hearing. However, the parties had not raised the number of hearing days again until the request for additional hearing days in the PHS. OFCCP requested that two additional days be added to the hearing schedule. Oracle did not object to adding one additional day, but the parties could not agree upon the date. After argument from counsel, no additional days are added to the hearing. The parties should block December 20, 2019, as an additional hearing day to be used if needed. I am confident the matter can be concluded within the time allotted.
  2. The hearing will take a one hour break for lunch each day. Generally, lunch will be taken around 12:30 p.m.
  3. In order to maintain the tight hearing schedule, and recognizing the time to get through building security, a courtesy room is reserved in the basement for use by Oracle if needed.
  4. Counsel may bring bottles of water or other beverages that have lids to the hearing. No food is permitted in the courtroom.
- B. Proceedings will be governed by the “Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246 contained in part 60-30.” 41 C.F.R. § 60-1.26(b)(2). Where the regulations in 41 C.F.R. §§ 60-30.1 *et seq.* do not provide a rule, the Federal Rules of Civil Procedure apply. 41 C.F.R. § 60-30.1. Where a rule is needed and neither 41 C.F.R. Part 60-30.1 nor the Federal Rules supply one, the Rules of Practice and Procedure for Administrative Hearings Before OALJ in 29 C.F.R. Part 18, subpart A apply. *See* Pre-Hearing Order at 2 n.2. The Office of Administrative Law Judges’ Rules of Evidence found in 29 C.F.R. part 18, subpart B apply to any evidentiary issues. 41 C.F.R. § 60-30.18. These rules generally follow the Federal Rules of Evidence. *See* 29 C.F.R. §§ 18.101 *et seq.*
- C. Issues for Hearing:<sup>2</sup>
1. Whether Oracle breached its federal contracts by engaging in sex and racial discrimination in violation Section 202 of Executive Order and 41 C.F.R. § 60-1.4(a).
  2. Whether Oracle violated Section 202 of Executive Order and 41 C.F.R. § 60-1.4(a) by engaging in compensation discrimination against female, Asian and African American employees at its Redwood Shores headquarters, as follows:
    - a. Whether Oracle engaged in assignment, job classification, position, or steering discrimination at its headquarters facility during the relevant time period against female employees in the Product Development, Information Technology, and Support job functions in violation of 41 C.F.R. § 60-20.4(b).
    - b. Whether Oracle engaged in assignment, job classification, position, or steering discrimination at its headquarters facility during the relevant time period against

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<sup>2</sup> In the PHS, OFCCP requested to make an oral motion to amend the complaint during the prehearing conference. Oracle opposed the motion. The parties provided additional argument during the prehearing conference. I allowed the parties to provide any cases citations supporting their respective positions no later than 12:00 p.m. on November 27, 2019. Both parties submitted cases supporting its position. As explained in a reasoned order issued separately, the request to amend the complaint is denied.

- Asians and African American employees in the Product Development job function in violation of 41 C.F.R. § 60-20.4(b).
- c. Whether Oracle engaged in intentional compensation discrimination (wage-rate, salary, or total compensation) at its headquarters facility during the relevant time period against female employees in the Product Development, Information Technology, and Support job functions in violation of 41 C.F.R. § 60-20.4(b).
  - d. Whether Oracle engaged in intentional compensation discrimination (wage-rate, salary, or total compensation) at its headquarters facility during the relevant time period against Asians and African American employees in the Product Development job functions in violation of 41 C.F.R. § 60-20.4(b)
3. Whether Oracle had a policy or practice at its headquarters facility during the relevant time period of relying on prior pay in salary setting; and whether that policy or practice had an adverse disparate impact on female employees in the Product Development, Information Technology, and Support job functions and against Asians and African American employees in the Product Development job function; and whether that policy is not shown to be job-related and consistent with business necessity.
  4. Whether OFCCP issued its Show Cause Notice (“SCN”) without “reasonable cause” to believe Oracle discriminated against women in its Product Development, Information Technology, or Support job functions, or Asians or African Americans in its Product Development job function, contrary to 41 C.F.R. § 60-1.28.<sup>3</sup>
  5. Whether OFCCP failed to engage in “reasonable efforts” to conciliate as required by 41 C.F.R. § 60-1.20(b).
  6. Whether OFCCP must establish a violation during the 2013-2014 audit period as a prerequisite for attempting to prove a continuing violation.
  7. If OFCCP prevails, it seeks the following relief:
    - a. *Back Pay*: For Oracle to come into compliance by providing make-whole formula back wage relief for victims of Oracle's discriminatory conduct from 2013 to the present date and implementing immediate pay equity adjustments and alterations of its compensation policies to ensure that Oracle ceases engaging in gender and racial compensation discrimination prospectively.<sup>4</sup>
    - b. *Prospective Relief*: OFCCP requests that Oracle be ordered to make corrective prospective relief, including necessary pay adjustments and career level adjustment for all members of the victim class, through objective evidence that eliminate the compensation disparities identified through Dr. Madden's analyses. Oracle should also be ordered to revise its compensation policies and practices to the satisfaction of this Court to ensure there is no re-occurrence of systemic racial and gender disparities in setting compensation.

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<sup>3</sup> The parties are briefing whether Issues 4 and 5 should be dismissed prior to hearing.

<sup>4</sup> Oracle requested that the issue of damages be bifurcated into a separate proceeding, which is subject to a motion in limine. OFCCP stridently opposes the motion. The parties had not resolved the bifurcation issue and provided further argument at hearing. The bifurcation request is granted and will be addressed more fully in a separate ruling.

- c. *Injunctive Relief*: Oracle should be enjoined against further violations of the Executive Order. Oracle should be ordered to provide training subject to OFCCP's advanced approval, and certify that it provided training, to all persons at its Redwood Shores headquarters regarding compensation discrimination. In addition, Oracle should be required to post information about compensation discrimination and notify all employees annually that they have the right to contact OFCCP should they be concerned that they are the victim of compensation discrimination.
  - d. *Reporting*: Oracle should be ordered to report to OFFCP on its progress and all aspects of the relief required for a period of at two years from the date it first comes into compliance by implementing the pay equity adjustments, changes to its compensation policies, and paying the back wages due.
8. If Oracle prevails, it seeks the following relief:
- a. A final administrative order be issued in Oracle's favor on all claims;
  - b. OFCCP's Second Amended Complaint be dismissed with prejudice; and
  - c. Oracle be awarded its costs of suit.
  - d. In the event the Court finds any relief is warranted, any such relief be limited to the remedies sought by OFCCP in its Second Amended Complaint.

D. Exhibits:

1. The parties presented joint exhibits, as well as individual exhibits as listed below. They are continuing to work on resolving issues regarding admissibility of the exhibits and were ordered to provide a status update by 12:00 p.m. on Monday, December 2, 2019. The parties will send a copy of all exhibit lists to Maryanne Ballard in Excel format.
  - a. Joint Exhibits: J-1 to J-165.
  - b. Plaintiff OFCCP Exhibits: P-1 to P-488.
  - c. Defendant Oracle Exhibits: D-1 to D-443.
2. Oracle is highly concerned about the potential use of proprietary and confidential information during the hearing. The parties will continue to meet and confer to resolve the confidentiality issues related to hearing exhibits prior to hearing. During testimony, the parties can request a sidebar if confidentiality is an issue during questioning. Because the parties agreed to give 48 hour notice regarding which witnesses will be called on a particular day, the parties will have time to review what potential exhibits will be used that may have confidentiality concerns. Exhibits will not be published in the proactive FOIA library until the sealing issues have been resolved.
3. The parties should review their respective exhibits and remove any duplicate exhibits and redact any personally identifying information ("PII") from their exhibits.

E. Witnesses:

1. The parties will send a copy of all witness lists to Maryanne Ballard in Excel format. The parties agreed to provide to opposing counsel a list of witnesses that will testify 48 hours before the testimony. On December 3, 2019, OFCCP shall disclose to Oracle the witnesses that will testify on December 5.

2. Oracle requested that it be given equal time to present its case as that given to OFCCP. In light of time limits of the hearing, Oracle arranged its presentation of the evidence to require 29 hours of hearing time. OFCCP did not make a similar time estimate, but asserted that it should be given 60% of the hearing time because it has the burden of proof. Oracle also represented that the parties had agreed upon 4.5 days each to present their respective cases, but OFCCP denied that it had agreed to that constraint. Having reviewed the information and witness lists, and in light of the ruling regarding the number of witnesses, I find that a roughly 50-50 split of the time is reasonable. Neither party is required to use its full allotment of time, but in light of the limited court days and the type of information to be presented, a rough 50-50 split is equitable.
3. Witnesses will be called one time and fully examined by the parties regardless of whether the witness appears on both witness lists. OFCCP intends to call two adverse Oracle witnesses in its case-in-chief, one of whom is also on Oracle's witness list. The parties will meet and confer about how to present the testimony of the one witness on both witness lists. Oracle agreed to work with OFCCP to schedule Oracle witnesses.
4. Oracle made a request to close the hearing during the testimony of the expert witnesses because of concerns that proprietary and confidential information may be used during the examinations. OFCCP opposed the request. The issue was addressed in the PHS and was further argued during the prehearing conference. The request to close the courtroom was denied. The parties should not invite confidential information during questioning and may request a sidebar if confidential information may be called for by a question. If the answer given relates to confidential or proprietary information, the transcript will be marked and the decision to seal will be made once the transcript is received and before it is published to the FOIA library. If the answer does not contain confidential or proprietary information, the answer will be given in open court. In addition, OFCCP's request to have both experts called sequentially was denied.
5. OFCCP intends to call 27 total witnesses: 21 employee witnesses, Dr. Madden, three agency witnesses (including custodian of records), and two adverse witnesses (one is on Oracle witness list) as part of its case in chief. Oracle intends to call 21 total witnesses: 18 manager/director witnesses, 2 employee witnesses, and Dr. Saad.
6. The 21 employee witnesses listed by OFCCP will testify to anecdotal information about the workplace with the intention of bringing life to the statistical information that OFCCP's expert will present. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The finding of discrimination does not depend on the testimony from these witnesses, but instead will rely upon the findings of OFCCP's expert. I find the number of witnesses to be excessive and cumulative regarding the purpose for which they are called. While I am certain each witness may have a different experience in the workplace, and their testimony is represented to be brief, in an effort to expedite the proceeding and avoid repetitious and redundant information, I am limiting the total number of anecdotal witnesses that OFCCP may call to no more than 10 witnesses. I believe that no more than 5 to 7 witnesses are necessary to make the point that OFCCP seeks, but after discussion during the prehearing conference, I was persuaded that additional witnesses are acceptable. I would encourage OFCCP to call less than 10 witnesses.

7. The same holds true for Oracle. Initially, I misunderstood the number of witnesses Oracle intended to call as anecdotal workplace witnesses. Oracle has a total of 21 witnesses on its witness list. During the prehearing conference, Oracle represented that 9 witnesses are management and director level witnesses that will testify about compensation and other processes at Oracle. Eleven witnesses were likely to testify about their experiences in the workplace. The same rationale that applies to OFCCP applies to Oracle. The number of witnesses that will testify about anecdotal workplace information will be excessive, cumulative and repetitious. Some of the director and management witnesses may also offer testimony about their individual workplace experiences. Oracle may call no more than a total of 10 witnesses for anecdotal information, though I firmly believe no more than 5 to 7 are necessary. The total number of anecdotal witnesses includes any management or director level witnesses that will testify about compensation and workplace practices, and also offer their anecdotal workplace experience. Regarding the 9 management witnesses represented to testify about compensation related issues, that number also appears to be excessive and redundant. Oracle argued that each witness offers a different perspective, but I am not persuaded that 9 witnesses are necessary to explain the alleged complexity regarding workplace compensation. In an effort to expedite the hearing and avoid unduly repetitious and cumulative evidence, Oracle may call no more than 6 management or director related witnesses to testify about compensation and workplace practices.
8. Some witness testimony will be presented by deposition. OFCCP had 10 depositions listed on its witness list and Oracle listed testimony from 5 deposition witnesses. The parties agreed to the submission of the deposition transcripts into evidence and continue to work on excerpting the portions of relevant testimony. The use of depositions is acceptable and will be considered as evidence in the case. Video of the deposition is not necessary, but if offered, will be reviewed thoroughly before a decision is issued. No depositions will be read into the record during the hearing. No video of a deposition will be shown during the hearing.
9. No telephonic witness testimony will be presented. OFCCP indicated that one potential anecdotal witness may have medical issues and it may need to present that witness by telephone, but it was not able to name the witness. OFCCP offered to use videoconference equipment available in its office. Oracle objected to any testimony by telephone or otherwise, including taking testimony in opposing counsel's law office. The request to take the testimony by telephone is denied without prejudice to renewing the request once more concrete information is available about the witness's inability to travel and the need for telephone accommodation. The request to use videoconference if testimony is permitted remotely is also denied. Logistics, including the number of lawyers, the public nature of the proceeding, and the need to accommodate a court reporter, make moving the proceeding for one witness untenable and impracticable. Moreover, the prehearing order dictated that telephonic testimony be requested by November 8, 2019, and Oracle only learned of the potential for telephone witnesses when the PHS was prepared, which was after the date in the prehearing order.
10. All witnesses are excluded from the courtroom until they have given their testimony and been excused as a witness. Further, any lay witness may not discuss their

testimony with other witnesses until after their testimony has been given and they are excused as a witness. Representatives for both parties are exempt and may remain in the courtroom for the duration of the proceeding. OFCCP's request that attorneys for the parties be prohibited from describing the testimony of other witnesses in the case to witnesses pending the close of the hearing is denied. Witnesses who are providing testimony via deposition only are also exempt from the exclusion order. The two expert witnesses may be present for the testimony of each other but are otherwise excluded from the hearing.

11. Rebuttal witnesses may be called with permission of the judge and in the event necessary to testify about unexpected information that arose during the case and may need to be explained. Rebuttal testimony will be limited to specific offers of proof about what it is intended to rebut. Neither party should assume that rebuttal witnesses will be called as a matter of course.

#### F. Stipulated Facts:

1. The parties submitted a total of eight agreed-upon stipulated facts, which is marked as ALJX-1 and will be admitted at the hearing. The list of stipulated facts is attached as ATTACHMENT 1. The parties are encouraged to reach additional stipulated facts that will streamline the presentation of the evidence at hearing.
2. OFCCP presented a significant number of "undisputed facts" in the PHS that were taken from the record to date and asked for a judicial determination that the facts were established for all purposes. Oracle opposed the request arguing that the facts were argumentative, taken out of context, and many were irrelevant to the issues. OFCCP renewed its request for a finding that the facts were established and asserted that it will streamline the hearing. The request for a judicial determination of non-stipulated facts is denied. OFCCP is not precluded from arguing in its closing brief that Oracle is committed to the proposed stipulated facts based on the papers filed in the summary judgment briefing, but absent agreement of the parties, I decline to impose stipulations.

#### G. Opening Statements and Closing Argument

1. The parties may make brief opening statements, not to exceed 20 minutes for each side.
2. Oracle requested 90 minutes for an oral closing argument. OFCCP preferred written closing briefs. It was my preference for written closing briefs, but in light of the time constraints on the hearing, I would allow the parties either oral or written briefs. In light of the option presented, the parties agreed to written closing briefs on a schedule previously agreed-upon. The closing briefs will be due no later than 60 days from the date the transcript is received by the judge.

H. Settlement: The parties are encouraged to work towards settlement of this matter in its entirety if possible.

SO ORDERED.

RICHARD M. CLARK  
Administrative Law Judge

ATTACHMENT 1

OFCCP v. Oracle America, Inc.  
OALJ No. 2017-OFC-00006

STIPULATED FACTS (ALJX – 1)

The following facts are stipulated by the parties, require no additional proof, and are established for all purposes:

1. Oracle is headquartered in Redwood Shores, California (at its “HQCA” location).
2. Oracle is a government contractor as defined by Executive Order 11246.
3. At all relevant times, Oracle had 50 or more employees.
4. OFCCP conducted a compliance review of Oracle’s HQCA location that it initiated on September 24, 2014.
5. The audit period for the compliance review of Oracle's HQCA location was January 1, 2013, through June 30, 2014.
6. OFCCP issued a Notice of Violation (“NOV”) to Oracle on March 11, 2016, in relation to the compliance review of HQCA.
7. OFCCP issued a Show Cause Notice (“SCN”) to Oracle on June 8, 2016, in relation to the compliance review of HQCA.
8. OFCCP and Oracle participated in a single in-person meeting following the issuance of the SCN, which took place on October 6, 2016.