

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
BANK OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civ. Action No. 09-2009 (EGS)
)	
HILDA SOLIS, et al.)	
)	
Defendants.)	
_____)	

MEMORANDUM OPINION AND ORDER

Plaintiff, Bank of America, brings this action to challenge the final decision and order of the Administrative Review Board (hereinafter "ARB"), which determined that it had violated Executive Order No. 11246 by denying the Office of Federal Contract Compliance Programs (hereinafter "OFCCP") access to one of its facilities. Once the Administrative Record was filed, Plaintiff filed a petition to Hold Unlawful and Set Aside the Final Order of the Administrative Review Board. Defendants Hilda Solis, Secretary of the Department of Labor; the Department of Labor; Patricia A. Shiu, Director of the Office of Federal Contract Compliance Programs; and the Office of Federal Contract Compliance Programs have filed a Motion for Summary Judgment. Both motions were referred to Magistrate Judge Deborah Robinson for a Report and Recommendation, which was issued on December 13, 2011.

Both parties have timely filed objections to the Magistrate's Report and Recommendation, which are now pending before the Court. Plaintiff objects generally to the Magistrate Judge's recommendations in favor of granting Defendants' Motion for Summary Judgment and denying its own motion to Hold Unlawful and Set Aside. In addition, Plaintiff makes three specific objections to findings in the Report and Recommendation: (1) that the OFCCP desk audit was equivalent to an administrative subpoena; (2) that Bank of America consented to the desk audit; and (3) that there was specific evidence of a violation of Executive Order 11246. Plaintiff's Objections to the Magistrate Judge's Proposed Findings and Recommendations (hereinafter "Pl.'s Obj.") at 1-2.

Defendants have only one objection to the Report and Recommendation. They argue that the Magistrate Judge should not have reached the conclusion that the OFCCP did not provide sufficient evidence that it applied a neutral administrative plan in initially selecting Bank of America for a compliance review. Defendants' Objection to the Magistrate's Report and Recommendation (hereinafter "Defs.' Obj.") at 2. Defendants argue that because the Administrative Review Board (hereinafter "ARB") did not address the conclusion reached by the Administrative Law Judge (hereinafter "ALJ"), the Magistrate Judge exceeded the scope of this Court's review. *Id.*

Upon consideration of the objections, responses and replies thereto, the Report and Recommendation, the entire record, the applicable law, and for the reasons stated below, the Report and Recommendation is adopted in part, Plaintiff's Petition to Hold Unlawful and Set Aside is **DENIED**, and Defendants' Motion for Summary Judgment is **GRANTED**.

I. Background

The Court will not restate the full factual background of this case, which is set forth in the Report and Recommendation. See Report and Recommendation, (hereinafter "R&R") at 2-12. Briefly, however, the OFCCP conducts compliance evaluations to determine whether government contractors are in compliance with the requirements of Executive Order No. 11246, which provides that government contractors "will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin," and requires contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." Executive Order No. 11246 § 202. The applicable regulations require government contractors and subcontractors, who are defined as those entities with 50 or more employees and a covered contract of \$50,000 or more, to develop written affirmative action programs for each of their facilities within

120 days of the commencement of the contract. 41 C.F.R. §§ 60.1.3, 60-2.1(b)(2)(i) and (c). The OFCCP may conduct compliance reviews of covered contractors and subcontractors, which proceed in three stages: (1) a desk audit; (2) an on-site review conducted at the contractor's place of business; and (3) an off-site analysis of the information collected on-site. *Id.* at § 60-1.20(a)(1).

The OFCCP notified Bank of America by letter dated February 27, 2004 that it had selected its facility located at 200 North College Street in Charlotte, North Carolina for a compliance review. R&R at 3-4. In the letter, the OFCCP requested that Plaintiff provide it with copies of its affirmative action program and other related documentation within 30 days as part of the desk audit phase of the compliance review. *Id.* at 4. Plaintiff responded by letter dated March 15, 2004 and requested that the OFCCP confirm, in writing, the process by which its facility was chosen for a compliance review. Plaintiff indicated that it was willing to cooperate once it received information regarding the selection process and requested an extension of time until June 16, 2004 to produce the documents requested. *Id.* The OFCCP responded in a letter dated March 24, 2004 stating that it had selected the 200 North College Street facility pursuant to the selection procedure outlined in the relevant selection order. *Id.* Plaintiff subsequently produced

all of the documentation requested in the OFCCP's February 27 letter. *Id.*

On September 23, 2004, the OFCCP notified Bank of America that it needed further information based on certain information in the initial documents that had been provided. The letter included tables that indicated that Plaintiff paid men more than women and non-minorities more than minorities. *Id.* at 5. Plaintiff produced additional documents on October 20, 2004, November 10, 2004, and January 7, 2005. *Id.*

The OFCCP then requested an on-site review of Plaintiff's 200 North College Street facility in a letter dated March 1, 2005. The OFCCP asked Plaintiff to make the facility and certain categories of documents available on April 19, 2005 for the on-site review. *Id.* The week before the on-site review, on April 11, Plaintiff asked that the OFCCP provide it with more information about how it was initially selected for a compliance review, including the selection order and the random computer list from which it was selected. *Id.* The OFCCP provided this information on April 13. *Id.* at 6. Plaintiff eventually refused to allow the OFCCP to conduct an on-site review after several rounds of discussions and meetings throughout the remainder of 2005 and much of 2006. *Id.* at 6-7.

On August 23, 2006, the OFCCP filed an Administrative Complaint with the Department of Labor, claiming that Bank of

America had violated Executive Order No. 11246 and 41 C.F.R. § 60. *Id.* at 7. The parties conducted discovery at the administrative level, and the OFCCP filed a Motion for Summary Judgment in the Office of Administrative Law Judges on November 27, 2006. *Id.* at 8. Following extensive pre and post hearing briefing, the ALJ ruled in favor of the OFCCP, holding that while Defendant's initial selection of the 200 North College Street facility did not comport with the requirements of the Fourth Amendment, the search was nonetheless valid because Plaintiff had consented to the desk audit. The ALJ also found that there was specific evidence of a violation, based on information provided in response to the desk audit, to justify an on-site review. *Id.* at 10. Plaintiff filed exceptions to the ALJ's order, which were reviewed by the Administrative Review Board. The ARB also found for Defendant, accepting the ALJ's conclusions that Plaintiff had consented to the desk audit and that the results of the desk audit created a reasonable suspicion of a violation sufficient to warrant an on-site review. *Id.* at 10-11. Because it found that Plaintiff consented to the desk audit, the ARB did not decide whether the initial selection met applicable Fourth Amendment standards.

Plaintiff commenced this action on October 26, 2009 seeking review of the ARB's Final Order. After the Administrative Record was filed, Plaintiff filed a Motion to Set Aside the

Final Order of the ARB and Defendants filed a Motion for Summary Judgment. Once ripe, those motions were referred to Magistrate Judge Deborah Robinson for resolution. The Magistrate recommended that Plaintiff's motion be denied and Defendants' motion be granted. Thereafter, the parties filed their objections, which are ripe for review.

II. Legal Standards

A. Administrative Procedure Act

When reviewing an agency action pursuant to the Administrative Procedure Act (hereinafter "APA"), the court must hold unlawful and set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if the action failed to meet statutory, procedural, or constitutional requirements." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) (citing 5 U.S.C. §§ 706(2)(A)-(D)). "This standard of review is a highly deferential one. It presumes agency action to be valid." *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976). "[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). "The entire case on review is a question of law, and only a question of law." *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). When an agency's

findings are at issue, the question of law before the court is "whether [the agency] acted in an arbitrary and capricious manner." *Univ. Med. Ctr. v. Shalala*, 173 F.3d 438, 440 n.3 (D.C. Cir. 1999).

In conducting this analysis, the court applies the substantial evidence standard, under which it is must "determine only whether the agency could fairly and reasonably find the facts as it did." *Robinson v. Nat'l Transp. Safety Bd.*, 28 F.3d 210, 215 (D.C. Cir. 1994) (internal citations and quotation marks omitted). "[I]n the context of the APA, arbitrary and capricious review and the substantial evidence test are one and same insofar as the requisite degree of evidentiary support is concerned." *Am. Radio Relay League, Inc. v. FCC*, 524 F.2d 277, 243 (D.C. Cir. 2008) (internal citations and quotation marks omitted). It is the role of the court to "determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Catholic Health Initiatives v. Sebelius*, 658 F. Supp. 2d 113, 117 (D.D.C. 2009) (internal citations omitted). In making this determination, the court's review is confined to the full administrative record before the ARB at the time the final decision was made. *See Volpe*, 401 U.S. at 420.

B. Magistrate Judge Recommendations

Pursuant to Federal Rule of Civil Procedure 72(b), once a magistrate judge has entered her recommended disposition, a party may file specific written objections. The district court "must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to," and "may accept, reject or modify the recommended disposition." Fed. R. Civ. P. 72(b)(3). Proper objections "shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for objection." Local R. Civ. P. 72.3(b). However, objections that simply rehash arguments presented and considered by the magistrate judge are not properly objected to and thus are not entitled to *de novo* review. See *Morgan v. Astrue*, Case No. 08-2133, 2009 U.S. Dist. LEXIS 101092 at *7-*10 (E.D. Pa. Oct. 30, 2009) (collecting cases). Likewise, the Court need not consider cursory objections made only in a footnote. *Hutchins v. Dist. of Columbia*, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999). Such objections are instead reviewed only for clear error. See *M.O. v. Dist. of Columbia*, 2013 U.S. Dist. LEXIS 140439 at *14 (D.D.C. Sept. 30, 2013) (citing *Alaimo v. Bd. of Educ. Of the Tri-Valley Cent. School Dist.*, 650 F. Supp. 2d 289, 291 (S.D.N.Y. 2009)).

III. Discussion

A. Plaintiff's Objections

Plaintiff objects generally to the conclusion reached by the Magistrate Judge that the Court should deny its Motion to Hold Unlawful and Set Aside and grant Defendants' Motion for Summary Judgment. Pl.'s Obj. at 1-2. In addition, Plaintiff has three objections to specific conclusions reached in the Report and Recommendation. First, Plaintiff argues that the Magistrate Judge incorrectly concluded that the desk audit portion of the OFCCP's compliance review was equivalent to an administrative subpoena. *Id.* at 1, 22-24. Second, Plaintiff argues that the Magistrate Judge erred in finding that it consented to the desk audit phase of the compliance review. *Id.* at 1, 19-21. Finally, Plaintiff argues that the Magistrate Judge erroneously concluded that there was specific evidence of a violation based on the desk audit to justify further review. *Id.* at 2; 12-19.

1. Administrative Subpoena

In the Report and Recommendation, Magistrate Judge Robinson concluded that the OFCCP did not meet the requirements of the Fourth Amendment in selecting Bank of America for a compliance review because the North College Street facility was not selected pursuant to a neutral administrative plan. Magistrate Judge Robinson further concluded, however, that the desk audit

itself is governed by a lower Fourth Amendment standard because it is equivalent to an administrative subpoena, and thus less invasive than a search that provides for a non-consensual entry into areas that are not open to the public. R&R at 29-31. Bank of America argues that the Magistrate Judge erroneously "separates and distinguishes between OFCCP's initial selection of the 200 North College Street facility and its initial request for desk audit materials." Pl.'s Obj. at 30. According to Bank of America, these were contemporaneous events because the OFCCP sends a notice including a request for information -- the so called "desk audit" -- at the same time that it selects a facility for review pursuant to Executive Order 11246. *Id.*

Administrative warrants and subpoenas must both comport with the requirements of the Fourth Amendment, though different standards apply to each. For the purposes of an administrative warrant, the government must either have "specific evidence of an existing violation" or be able to show that "reasonable legislative or administrative standards," such as "a general administrative plan . . . derived from neutral sources," justify the issuance of a warrant. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978) (internal citations and quotation marks omitted). Such a showing will satisfy the probable cause requirement, as "[p]robable cause in the criminal law sense is not required" for an administrative warrant. *Id.* at 320. This

standard applies whenever "government inspectors [attempt] to make nonconsensual entries into areas not open to the public." *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 414 (1984). The *Barlow's* standard has been interpreted to require that the proposed search be: (1) authorized by statute; (2) properly limited in scope, and (3) initiated in a proper manner. *United States v. Mississippi Power & Light Co.*, 638 F.2d 899, 907 (11th Cir. 1981). Searches proposed pursuant to Executive Order 11246 meet these first two requirements as a matter of law. *Id.* Thus, the only question in assessing such a search is whether it was initiated in a proper manner, *i.e.*, whether it is based on: (1) specific evidence of an existing violation; (2) reasonable legislative or administrative standards; or (3) a showing that the search was initiated pursuant to a neutral administrative plan. *Id.*

"[T]he enforceability of [an] administrative subpoena," however, is governed by a different standard, articulated by the Supreme Court in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). See *Lone Steer*, 464 U.S. at 414. Under *Oklahoma Press* and its progeny, "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." *Id.* (quoting

See v. City of Seattle, 387 U.S. at 544). Thus, the standard for an administrative subpoena is considerably lower than that for an administrative warrant. *United Space Alliance v. Solis*, 824 F. Supp. 2d 68, 91 (D.D.C. 2011).

Here, Bank of America challenges two stages of the compliance review process -- its initial selection and the OFCCP's request to conduct an on-site review. Ultimately, both the ARB and Magistrate Judge Robinson determined that whether Bank of America's initial selection complied with the Fourth Amendment was immaterial because it had consented to the desk audit. Magistrate Judge Robinson determined that the desk audit was equivalent to an administrative subpoena as an alternative ground for finding that the desk audit was valid under the Fourth Amendment in the event that this Court found that Bank of America did not consent. Because, for the reasons stated in Section III.A.2 *infra*, the Court adopts the Magistrate Judge's conclusion that Plaintiff did consent to the desk audit, it does not have to reach this question. Therefore, the Court affirms Bank of America's objection in part and will not adopt Magistrate Judge Robinson's alternative conclusion that a desk audit is equivalent to an administrative subpoena.

2. Consent

Bank of America next objects to the Magistrate Judge's conclusion that it consented to the desk audit and that the ALJ

and ARB's conclusion to that effect was not arbitrary and capricious. Pl.'s Obj. at 19. According to Bank of America, it only provided the information requested in the desk audit because the OFCCP represented that the 200 North College Street facility had been selected pursuant to a neutral administrative plan. *Id.* at 20. Because the facility was not selected in that manner, Bank of America argues that its consent was not voluntary. *Id.* at 20-21.

As noted above, an administrative search pursuant to Executive Order 11246 is only appropriate where there is probable cause for the search. However, an administrative search conducted without probable cause is nonetheless valid if conducted pursuant to voluntary, contemporaneous consent. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) ("[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."); *Fraternal Order of Police/Department of Corrections Labor Committee v. Washington*, 394 F. Supp. 2d 7, 14 (D.D.C. 2005). Whether consent was voluntary is a question of fact, one that is to be determined based on the totality of circumstances. *Schneckloth*, 412 U.S. at 227; *United Space Alliance*, 824 F. Supp. 2d at 93. A court reviewing an administrative law judge's finding of consent must affirm that

finding if it is supported by substantial evidence. *Id.*
(internal citations omitted).

The Court concurs with Magistrate Judge Robinson's recommendation that the findings of both the ALJ and ARB regarding Bank of America's voluntary consent were supported by substantial evidence; therefore, Bank of America's objection is overruled. See Administrative Record (hereinafter "Admin. Rec."), ALJ Decision, at 866 ("Based on a review of the totality of the circumstances, I find that [Bank of America] consented to the desk audit There is no evidence demonstrating that defendant's will was overborne such that its subsequent submission of the requested documentation was rendered involuntary."); Admin. Rec., ARB Decision, at 958 ("[W]e cannot find on this record that the scheduling letter precluded the bank from giving voluntary contemporaneous consent."). The OFCCP's initial request for documents was made in its February 27, 2004 scheduling letter notifying Bank of America that the 200 North College Street facility had been selected for a compliance review. Admin. Rec. at 866-67. That letter provides basic information about the stages of a compliance review and cites to relevant statutory authority. *Id.* at 867. These citations to relevant authority in the letter in no way misrepresent the OFCCP's authority to conduct a compliance review. Nor is the letter suffused with threats to induce

compliance. *Id.* Upon receipt of the letter, Bank of America indicated its willingness to provide the requested documents, but asked for a written confirmation of the process by which it was selected. *Id.* In response, OFCCP indicated that the facility had been selected "in order" from a list of eligible contractors compiled on June 17, 2002. *Id.* at 867-68. Apparently satisfied with that response, Bank of America provided the requested documents.

In a hearing before the ALJ, a Bank of America Vice President testified that the scheduling letter was standard, of the type generally used by the OFCCP to schedule compliance reviews. *Id.* at 867. Bank of America is a sophisticated financial institution that is not new to the compliance review process. Nor is it a "novice" when it comes to challenging the OFCCP's efforts to complete compliance reviews. *Id.* (citing actions in which Bank of America has challenged compliance reviews). Upon learning that it was selected from the 2002 list, Bank of America made no further effort to seek more information regarding its initial selection. *Id.* at 868. These facts belie Bank of America's contention that its consent was anything but voluntary.

Moreover, there is no evidence in the record that the language in the scheduling letter or OFCCP's response to Bank of America's request for written confirmation of the selection

process was coercive. The selection letter simply cites to the OFCCP's statutory authority to conduct a compliance review and notes that if Plaintiff refused to comply, it may be subject to enforcement proceedings. R&R at 32. Thus, the Court adopts the Magistrate's finding that Plaintiff consented to the desk audit and Plaintiff's objection is overruled.

3. Specific Evidence

Plaintiff also argues that the Magistrate Judge incorrectly affirmed the ARB's conclusion that there was specific evidence to justify an on-site review on the basis of the desk audit. Pl.'s Obj. at 12-19. The ALJ, ARB, and Magistrate Judge Robinson concluded that the information received by the OFCCP in response to the desk audit was sufficient evidence of an existing violation to satisfy the requirement of probable cause for the on-site review. Bank of America contends that the evidence it provided in response to the desk audit was insufficient to justify an on-site review because the OFCCP analyzed that evidence using a regression analysis that the ALJ concluded was flawed. Because of that conclusion, Bank of America argues that neither the ALJ nor the ARB could have correctly determined that the raw data submitted was sufficient.

As noted above, an administrative search does not require a warrant if the agency has probable cause. One way to establish probable cause is based on a showing of specific evidence of an

existing violation. *Barlow's*, 436 U.S. at 320-21.

Administrative probable cause is tested pursuant to a standard of "reasonableness," requiring a balancing of "the need to search against the invasion in which the search entails." *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 957 (11th Cir. 1982) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967)). Thus, in order to establish specific evidence of an existing violation, the agency need not show a probability of a violation, but must show "that the proposed inspection is based upon a reasonable belief that a violation has been or is being committed." *Id.* at 958. In other words, the agency must show that it has a reasonable suspicion of a violation.

While the ALJ found that Bank of America had consented to the desk audit portion of the compliance review, that consent was withdrawn for the on-site portion of the review. Admin. Rec. at 868. At the administrative level, the OFCCP submitted a regression analysis to support its position that there was specific evidence to justify an on-site review. Based on an unrebutted expert report submitted by Bank of America that highlighted the flaws in the regression analysis, the ALJ concluded that "although the regression analysis appears to reveal a disparity in employee pay between men and women . . . it cannot be relied on to justify an on-site review." *Id.* The ALJ then considered the raw data that was collected during the

desk audit, and found that it revealed a disparity in salary on the basis of gender and minority status sufficient to justify an onsite review. *Id.* at 869. The ARB agreed, stating that there was no evidence to dispute the raw data and concluding that "the OFCCP has established sufficient evidence to justify an on-site review." *Id.* at 959.

Bank of America argues that at the administrative level, the OFCCP relied exclusively on its regression analysis to justify its demand for an on-site review. As a result, it focused its response on rebutting that analysis and retained an expert to expose the flawed methodology therein. Pl.'s Obj. at 13. Nevertheless, according to Bank of America, the ALJ "concluded **on his own initiative** that the raw desk audit data . . . justified the OFCCP's demand for an on-site review." *Id.* at 14 (emphasis in original). Bank of America argues that this was an abuse of discretion for two separate reasons: (1) the ALJ wrongly concluded that Bank of America did not respond to the raw desk audit data; and (2) the ALJ wrongly concluded that the raw data constituted specific evidence. *Id.*

With regard to its lack of response, Bank of America argues that it did, in fact, respond to the OFCCP, but that the OFCCP then abandoned the disparities allegedly revealed by the raw data as the basis for its authority to conduct an on-site review. *Id.* at 14-15. Bank of America's purported response,

however, is irrelevant to this Court's inquiry of whether the raw data submitted in response to the desk audit provided specific evidence of a violation sufficient to justify an on-site visit. Moreover, Bank of America's quarrel with this specific finding is misplaced and overblown -- the ALJ only referenced Bank of America's lack of response in one sentence of a 14 page opinion and the ARB did not mention it at all. That hardly indicates that Bank of America's purported lack of response was the dispositive factor in either decision.

Bank of America also argues that because the OFCCP did not rely on the raw data as the basis for its authority to conduct the on-site review, it had no reason to further respond to that data or develop an additional record regarding the data through discovery or at the hearing before the ALJ. By relying on the raw data then, Bank of America argues that "the ALJ and the ARB denied [it] a fair opportunity to defend itself." *Id.* at 15. However, Bank of America argued before the ARB that the raw data from the desk audit could not possibly justify OFCCP's request for an on-site visit because the OFCCP did not rely on it. The ARB dismissed this argument and concluded that the raw data was specific evidence to justify the on-site review regardless of whether the OFCCP relied on it or not. *Admin. Rec.* at 959.

The raw data provided by Bank of America to the OFCCP showed that the average salary for male employees in certain job

groups was 9.08 to 23.33 percent higher than the average salary for female employees in those groups. *Id.* at 869. The data also showed that the average salaries for non-minority employees in certain job groups were 5.18 to 23.15 percent higher than that of minority employees. *Id.* As the ALJ noted in his decision, "there is no requirement that the OFCCP base its decision to seek an on-site review on a regression analysis." *Id.* at 869. Nor does it follow from the fact that the regression analysis was found to lack probative value that the OFCCP lacked a reasonable basis to request an on-site review. Regardless of whether the OFCCP relied on that data or on a flawed regression analysis, the Court finds that the pay disparities identified in the raw data were sufficient to provide the OFCCP with a reasonable suspicion of a violation. The Court thus affirms the portion of Magistrate Judge Robinson's Report and Recommendation finding that there was specific evidence of an existing violation to justify OFCCP's proposed on-site review and overrules Bank of America's objection to that finding.

B. Defendants' Objection

Defendants object to Magistrate Judge Robinson's finding, which the ALJ also made, that the OFCCP did not apply a neutral administrative plan in selecting the North College street facility for a compliance review. Defs.' Obj. at 1. Defendants

argue that this finding is "outside the ambit of the Court's review" because the ARB did not consider it. According to Defendants, if the Court does not adopt the portion of Magistrate Judge Robinson's Report and Recommendation finding that Bank of America consented to the desk audit, the proper course is to remand this action to the agency.

Defendants are correct that the Magistrate Judge made a factual finding that was not considered or addressed by the ARB, which is the final agency action under review in this Court. *Id.* at 5. Because the ARB found that Bank of America consented to the desk audit, it determined that it "need not consider the issue of whether OFCCP selected the bank's North College Street facility for compliance review in accordance with a neutral administrative plan." Admin. Rec. at 959. "Deciding whether the defendant OFCCP used neutral criteria is a factual determination." *Beverly Enterprises*, 130 F. Supp. 2d at 14 (citing *Mississippi Power*, 638 F.2d at 908). Thus, determining whether the OFCCP applied neutral administrative criteria in selecting the North College Street facility for a compliance review was outside the scope of the Magistrate Judge's review and the Court will not affirm that portion of her Report and Recommendation. The Court thus sustains Defendants' objection.

IV. Conclusion

Upon consideration of the parties' objections to the Report and Recommendation, the applicable law, and the entire record, the Court adopts Magistrate Judge Robinson's Report and Recommendation except to the extent that she determined that a desk audit was equivalent an administrative subpoena for the purposes of the Fourth Amendment and that the OFCCP did not apply neutral administrative criteria for selecting Bank of America's North College Street facility for a compliance review. Accordingly, it is hereby

ORDERED that Defendant's Motion for Summary Judgment is **GRANTED** and Plaintiff's Motion to Set Aside Final Order of the Administrative Review Board is hereby **DENIED**.

Signed: Emmet G. Sullivan
United States District Judge
July 2, 2014