U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	**ARB CASE NO. 2022-0020**
	ALJ CASE NOS. 2015-OFC-00002
	2015-OFC-00003
	2015-OFC-00004
PLAINTIFF,	**2015-OFC-00005**
	2015-OFC-00006
	2015-OFC-00007
	2015-OFC-00008
	2016-OFC-00003
v.	**DATE: February 4, 2022**

CONVERGYS CUSTOMER MANAGEMENT GROUP, INC., now known as CONCENTRIX CVG CUSTOMER MANAGEMENT GROUP, INC.,

DEFENDANT.

Appearances:

For the Plaintiff:

Kiesha N. Cockett, Esq.; *Office of the Solicitor, U.S. Department of Labor*; Washington, District of Columbia

For the Defendant:

George E. Yund, Esq.; Jennifer A. Rulon, Esq.; Steven M. Tolbert, Jr., Esq.; *Frost Brown Todd, LCC*; Cincinnati, Ohio

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Stephen M. Godek, *Administrative Appeals Judges*

ORDER OF REMAND

PER CURIAM. This matter arises under the nondiscrimination requirements of Executive Order 11246 (30 Fed. Reg. 12319, as amended), Section 503 of the Rehabilitation Act of 1973 ("Section 503"),[1] and the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA"),[2] and their implementing regulations at 41 C.F.R. Chapter 60. Convergys Customer Management Group, Inc. (Defendant) filed timely exceptions to a Department of Labor Administrative Law Judge's (ALJ) Recommended Decision and Order issued on December 30, 2021.[3] Specifically, Defendant appeals the ALJ's finding that there was no genuine issue as to any material fact, and, therefore, the Office of Federal Contract Compliance Programs (OFCCP) was entitled to summary judgement as a matter of law. Plaintiff OFCCP filed a timely response to Defendant's exceptions. After fully considering the parties' arguments and the record, we vacate the Recommended D. & O. and remand the case to the ALJ for further consideration consistent with this Order of Remand.

BACKGROUND

Defendant is a customer-relationship management company and is a federal contractor with multiple government contracts across various facilities throughout the United States. Beginning in 2013, OFCCP selected more than twenty of Defendant's facilities to undergo compliance reviews in the form of off-site desk audits. OFCCP sent Scheduling Letters to certain facilities, requesting that Defendant submit copies of its written affirmative action programs (AAPs) for each facility and additional supporting documentation. Defendant failed to submit the requested documentation.

On December 15, 2014, OFCCP filed seven administrative complaints (ALJ Case Nos. 2015-OFC-00002 through -00008). In October of 2015, an ALJ issued 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.

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1 29 U.S.C. § 793.

2 38 U.S.C. § 4212(a).

3 41 C.F.R. § 60-30.28 (2013).

On December 10, 2015, OFCCP filed an eighth administrative complaint (ALJ Case No. 2016-OFC-00003). In July of 2017, an ALJ issued a Recommended Decision and Order Granting Joint Request for a Decision on the Pleadings and Directing [Defendant] to Comply with Existing Law Under Threat of Imposed Sanctions.

Defendant filed exceptions to both cases with the Administrative Review Board (ARB or Board). In September of 2017, the Board consolidated ALJ Case Nos. 2015-OFC-00002 through -00008, with 2016-OFC-00003. On January 21, 2019, the Board issued an Order Lifting Stay and Remanding the Case to a New Administrative Law Judge, dismissing Defendant's appeals and remanding the cases back to the Office of Administrative Law Judges pursuant to *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018).

On December 30, 2021, the newly appointed ALJ issued a Recommended Decision and Order on Remand: Granting Plaintiff's Motion for Summary Judgment and Directing Defendant to Comply with Existing Law Under Threat of Imposed Sanctions (Recommended D. & O.). The Board received Defendant's exceptions to the Recommended D. & O. on January 10, 2022. This expedited appeal followed.[4]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority and assigned responsibility to this Board to review decisions by ALJs as provided for or pursuant to Executive Order No. 11246, as amended, and 41 C.F.R. Parts 60-1 and 60-30.[5] In OFCCP cases such as this, the ALJ issues a recommended decision and "[t]he recommendations shall be certified, together with the record, to the Administrative Review Board, . . . for a final Administrative order."[6] For cases arising under EO

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[4] In an expedited appeal, the Board must issue an Administrative Order within 30 days after the time has expired for the parties to file exceptions to an ALJ's recommended decision. 41 C.F.R. § 60-30.37. If the Board fails to do so, the ALJ's recommended decision becomes a final Administrative Order for the Department of Labor. *Id*.

[5] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[6] 41 C.F.R. § 60-30.35.

11246, the Board reviews ALJ decisions *de novo* in accordance with the Administrative Procedure Act.[7] The standard of proof is preponderance of the evidence.[8]

DISCUSSION

1. Regulatory Background

OFCCP is charged with investigating and prosecuting alleged violations of EO 11246.[9] OFCCP may conduct compliance evaluations to determine if a 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.[10]

Compliance evaluations may consist of any one or any combination of four investigative procedures: (1) a compliance review of the hiring and employment practices of the contractor, the written AAP, and the results of the affirmative action efforts undertaken by the contractor; (2) an off-site review of records; (3) a compliance check to determine whether the contractor has maintained records; and/or (4) a focused 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.[11]

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7 *OFCCP v. Bank of Am.*, ARB No. 2013-0099, ALJ No. 1997-OFC-00016, slip op. at 9 (ARB Apr. 21, 2016).

8 *Id.*

9 On appeal, Defendant questions the constitutionality of Executive Order 11246. The Department of Labor is bound by its own regulations, and the Secretary of Labor—and in this case, his designee, the Board—acting in adjudicatory capacity has no authority to review the validity of this regulations. *Id.* ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof . . . ."). Accordingly, the Board declines to address Defendant's challenges to Executive Order 11246 in this proceeding.

10 41 C.F.R. § 60-1.20(a) (2005).

11 41 C.F.R. § 60-1.20(a)(1)-(4). Compliance evaluations under both Section 503 and the VEVRAA are conducted in the same manner, and they are completed simultaneously with OFCCP's review under the Executive Order. *See* 41 C.F.R. § 60-741.60 (Section 503

A compliance review, one of the four investigative procedures, may proceed in three stages. First, OFCCP may conduct a desk audit at its offices of the written AAP and supporting documentation to determine whether all elements required by the regulations in this part are included, whether the AAP meets agency standards of reasonableness, and whether the AAP and supporting documentation satisfy agency standards. Second, OFCCP may conduct an on-site review at the contractor's establishment to: (i) investigate unresolved problems areas identified in the AAP and supporting documentation during the desk audit, (ii) verify that the contractor has implemented the AAP and has complied with those regulatory obligations not required to be in the AAP, and (iii) examine potential instances or issues of discrimination. Third, where necessary, OFCCP may conduct an off-site analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review.[12]

When OFCCP has reasonable cause to believe that a contractor has violated the executive order or its implementing regulations, the agency may refer the matter to the Solicitor of Labor to initiate enforcement proceedings. Enforcement proceedings are held before an ALJ.[13] Although these proceedings usually allow for normal civil discovery, when a contractor "has refused to give access to or to supply records or other information as required by the equal opportunity clause[,] or has refused to allow an on-site compliance review to be conducted," the proceeding may be expedited.[14] An ALJ's expedited hearing process is adequate to protect a contractor's due process rights.[15]

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compliance evaluation regulation); 41 C.F.R. § 60-300.60 (VEVRAA compliance evaluation regulation).

[12] 41 C.F.R. § 60-1.20(a)(1)(i)-(iii).

[13] 41. C.F.R. § 60–1.26(b)(2) (1997).

[14] 41 C.F.R. § 60–30.31. *See also* 41 C.F.R. Part 60-741 (Section 503); 41 C.F.R. Part 60-300 (VEVRAA).

[15] On appeal, Defendant argues that the ALJ denied its rights pursuant to expedited hearing procedures when the ALJ granted OFCCP's motion for summary judgment without a hearing. However, courts have found these expedited procedures protect the due process rights of federal contractors. *See Beverly Enters., Inc. v. Herman*, 130 F.Supp.2d 1, 17-20 (D.D.C. Aug. 24, 2000); *United Space All., LLC*, 824 F.Supp.2d 68, 95-96 (D.D.C. Nov. 14, 2011). Thus, we find unpersuasive Defendant's argument that expedited hearings and any

2. Fourth Amendment Restrictions

The Fourth Amendment's protection against unreasonable searches and seizures applies to administrative inspections, including OFCCP's compliance reviews involving desk audits and on-site and off-site inspections.[16] Employers have some level of privacy interest in corporate records, even records required to be kept by statute or regulation.[17] The elements of such a Fourth Amendment reasonableness inquiry vary with the nature and circumstances of each case.

Administrative warrants (or their equivalent) and administrative subpoenas must both comport with the Fourth Amendment, although different standards apply to each. In a seminal case on the topic, the Supreme Court in *Marshall v. Barlow's, Inc.*, held that Section 8(a) of the Occupational Safety and Health Act of 1970 (OSHA) was unconstitutional "insofar as it purports to authorize inspections without a warrant or its equivalent. . . ."[18] The Fifth Circuit interpreted *Barlow's* "to mean that a formal judicial warrant is not required in all administrative searches if the enforcement procedures contained in the relevant statutes and regulations provide, in both design and practice, safeguards roughly equivalent to those contained in traditional warrants."[19] In *Barlow's*, the Supreme Court discussed the benefits a warrant provided such as ensuring administrative authorization,

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consequent orders granting summary judgement as a matter of law are otherwise unconstitutional. Further, the ARB is bound by the Department's regulations. Secretary's Order No. 01-2020, 85 Fed. Reg. 13186 (Mar. 6, 2020); *OFCCP v. WMS Sols.*, ARB No. 2020-0057, ALJ No. 2015-OFC-00009, slip op. at 13-14 (ARB Nov. 18, 2021).

16 U.S. Const. amend. IV; *Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523, 534 (1967).

17 *McLaughlin v. Kings Island, Div. of Taft Broad. Co.*, 849 F.2d 990, 995 (6th Cir. 1988) (citation omitted) ("[E]mployers have a recognizable privacy interest in the records in question, even though the employer is required by law to keep them.").

18 *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 (1978). Section 8(a) of OSHA authorized agents of the Secretary of Labor to conduct a warrantless inspection of OSHA covered employment facilities for safety hazards and violations of OSHA regulations.

19 *United States v. Miss. Power & Light Co.*, 638 F.2d 899, 907 (5th Cir. 1981).

reducing unbridled discretion, and providing neutral selection criteria.[20] In *Donovan v. Lone Steer, Inc.*, the Court stated 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."[21] Thus, the standard for an administrative subpoena is "considerably lower" than that for an administrative warrant.[22] Courts have held that an administrative subpoena, unlike a warrant, does not need to be supported by probable cause.[23]

As noted above, the compliance review may consist of a desk audit, an on-site review, as well as an off-site review.[24] An OFCCP desk audit is "practically identical" to an administrative subpoena.[25] An OFCCP on-site review, however, triggers the standard for a warrant or its equivalent. The ALJ found that "[t]here is no such requirement for a neutral selection process" for a desk audit because it is the equivalent of a subpoena based on *Lone Steer* criteria and that "any alleged lack of neutrality in [OFCCP's] selection criteria does not excuse Defendant's failure to provide the requested documents."[26] For the following reasons, we disagree.

Though courts have drawn distinctions between the two standards, there is also overlap in the reasonableness requirements under both. In a case also involving a request for corporate documents, the Supreme Court stated that an agency's request for documents is permissible so long as it "is within the authority

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20 *Barlow's, Inc.*, 436 U.S. at 322-23.

21 *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) (quoting *See v. City of Seattle*, 387 U.S. 541, 544 (1967)).

22 *United Space All., LLC*, 824 F.Supp.2d at 91.

23 *Doe v. United States*, 253 F.3d 256, 263-64 (6th Cir. 2001); *United States v. Whispering Oaks Residential Care Facility, LLC*, 673 F.3d 813, 817 (8th Cir. 2012) (administrative subpoena is analyzed under the Fourth Amendment's general reasonableness standard).

24 *See* 41 C.F.R. § 60-1.20(a)(1)(i)-(iii).

25 *United Space All., LLC*, 824 F.Supp.2d at 92.

26 Recommended D. & O. at 14.

of the agency, the demand is not too indefinite and the information sought is reasonably relevant."[27]

A compliance review consisting initially of a desk audit may progress into an on-site review.[28] Courts have held that the compliance review itself is subject to Fourth Amendment requirements, including a neutrality requirement.[29] The

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[27] *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). Previously, the Supreme Court held:

> The requirement of 'probable cause, supported by oath or affirmation' literally applicable in the case of a warrant is satisfied, in that of an order for production, by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, including particularity in 'describing the place to be searched, and the persons or things to be seized,' also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.

Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 209 (1946).

[28] *United Space All., LLC*, 824 F.Supp.2d at 92 (observing that OFCCP argued the *Barlow's* standard before the ALJ but that this did not waive its "subpoena" standard argument on appeal because the OFCCP's comprehensive compliance review incorporates both types of inspection and OFCCP was defending its position on the entirety of its compliance review).

[29] *Beverly Enters., Inc.*, 130 F.Supp.2d at 14 (citing to *Miss. Power & Light Co.*, 638 F.2d at 907 (a search may be reasonable if there is "a showing that the search is 'pursuant to administrative plan containing specific neutral criteria"') (quoting *Barlow's*, 436 U.S. at 323)). The magistrate judge in *Bank of America v. Solis* held the OFCCP's initial selection of a contractor for compliance review was subject to a neutrality requirement. *Bank of Am. v. Solis*, 2011 WL 7394512, at *15-17 (D.D.C. Dec. 13, 2011) (Magistrate's recommended opinion), *aff'd in part Bank of Am. v. Solis*, No. 09–2009, available at 2014 WL 4661287 (D.D.C. July 2, 2014).

neutrality requirement is attributed to the factor "initiated in a proper manner" from the Supreme Court's discussion of "administrative warrant or equivalent" in *Barlow's*.[30] The Fifth Circuit interpreted *Barlow's* to require that the proposed search be authorized by warrant or by equivalent factors such as: (1) authorized by statute; (2) properly limited in scope, and (3) initiated in a proper manner. For factor (3), "initiated in a proper manner," courts have applied the following three subfactors: (1) search following specific evidence of an existing violation, (2) search according to reasonable legislative or administrative standards, or (3) a showing that the search is "pursuant to an administrative plan containing specific neutral criteria."[31] The *Lone Steer* reasonableness criteria applicable to the desk audit (limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome) overlap with administrative warrant criteria, namely "limited in scope" and "initiated in a proper manner," and we see no reason to exclude these considerations so that an agency's compliance review involving a desk audit may proceed in an improper manner.[32] A central tenant of administrative law is that the agency is bound by its own regulations.[33] For a search, including a desk audit, to be reasonable, the agency must, among other things, follow its own procedures.[34] An agency cannot, with unbridled discretion,

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[30] *Miss. Power & Light Co.*, 638 F.2d at 907. Courts follow *Mississippi Power & Light Co.* as a proper interpretation of *Barlow's*.

[31] *Id.* at 907-08.

[32] *See Morton Salt Co.*, 338 U.S. at 652-53 (agency's request for documents is permissible so long as it "is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."). *United Space Alliance* emphasized the difference between *Barlow's* and *Lone Steer* as to requirements for the subject matter of the desk audit, but the Court did not apply this emphasis to the initial selection of the company for a comprehensive compliance review as the company consented to the initial document request. *United Space All.*, 824 F.Supp.2d at 93. The additional requirement that a company be selected according to neutral selection criteria does not undermine other differences between the Fourth Amendment standards applicable to the administrative subpoena and administrative warrant.

[33] *Rabbers v. Comm'r Soc. Sec. Admin.*, 582 F.3d 647, 662 (6th Cir. 2018) ("It is an elemental principle of administrative law that agencies are bound to follow their own regulations.") (quoting *Wilson v. Comm'r of Social Sec.*, 378 F.3d 541, 545 (6th Cir. 2004)); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.").

[34] *United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1113 (9th Cir. 2012) (for administrative subpoenas, "'[t]he critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and

impose the burdens of compliance for improper purposes.[35] By imposing a neutral selection requirement and requiring agencies follow their own regulations and procedures, such a risk is minimized.

Accordingly, we conclude OFCCP must apply neutral criteria when selecting a federal contractor's facility (or in this case, multiple facilities) to undergo a compliance review including a desk audit. Whether a compliance review was based on an administrative plan containing specific neutral criteria is a "factual determination."[36] Further, for OFCCP's "selection to be valid, [the] agency actually must apply the neutral criteria in making the specific contested selection."[37] The ALJ failed to determine whether OFCCP selected Defendant's facilities for a compliance review based on a neutral administrative plan. The administrative record does not provide us with enough information to reach a decision.[38] Accordingly, we remand this case back to the ALJ to determine whether OFCCP applied specific, neutral criteria in selecting Defendant's facilities for a compliance review.

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(3) whether the evidence is relevant and material to the investigation.'") (quoting *E.E.O.C. v. Children's Hosp. Med. Ctr. of N. Ca.*, 719 F.2d 1426, 1428 (9th Cir. 1983)); *United States v. Powell*, 379 U.S. 48, 57-58 (1964) (refusing to apply "probable cause" requirements but noting that an administrative summons requires a legitimate purpose and that the required administrative steps have been followed).

35 *Hopkins Cnty. Coal, LLC v. Acosta*, 875 F.3d 279, 294-95 (6th Cir. 2017) ("unbridled discretion" of agents in the field); *Kings Island, Div. of Taft Broad. Co.*, 849 F.2d at 995.

36 *Miss. Power and Light Co.*, 638 F.3d at 908.

37 *Beverly Enters., Inc.*, 130 F.Supp.2d at 14. *See also Nat'l Eng'g & Cont. Co. v. OSHA*, 45 F.3d 476, 480 (D.D.C. Feb. 3, 1995) (OSHA had to demonstrate its routine inspection program was neutral, and that it applied that neutral criteria in selecting the general contractor for inspection); *Bank of Am.*, 2011 WL 7394512, at *15-17 (D.D.C. Dec. 13, 2011) ("Defendant OFCCP carries the burden of demonstrating that not only that there was a neutral administrative plan, but that said plan was applied.").

38 Defendant asserts that in response to each of the Scheduling Letters it received, Defendant requested documentation from OFCCP showing that the facility at issue had been selected for a compliance evaluation pursuant to a neutral administrative plan. Defendant also maintains that on each occasion, OFCCP refused its request for clarification and merely provided a conclusory assurance that each facility had been neutrally selected. OFCCP does not dispute these assertions.

CONCLUSION

We conclude the ALJ applied the incorrect legal standard and, therefore, erred in determining that OFCCP was entitled to summary judgement as a matter of law. Therefore, the ALJ's Recommended Decision and Order is **VACATED**, and this case is **REMANDED** to the ALJ for further proceedings consistent with this Order of Remand.

SO ORDERED.