

Issue Date: July 1, 2022

ARB Case No.: 2022-0020
ALJ Case Nos.: 2015-OFC-00002
2015-OFC-00003
2015-OFC-00004
2015-OFC-00005
2015-OFC-00006
2015-OFC-00007
2015-OFC-00008
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.,
now known as CONCENTRIX CVG
CUSTOMER MANAGEMENT GROUP, INC.,**

Defendant.

BEFORE: MARTIN J. WALSH
Secretary of Labor

FINAL AGENCY DECISION AND ORDER

On February 4, 2022, the Administrative Review Board (ARB or Board) issued an Order of Remand (OR). Pursuant to Section 6(b)(2) of Secretary's Order 01-2020, 85 Fed. Reg. 13186 (Mar. 6, 2020), the Secretary may "[a]t any point during the first 28 calendar days after the date on which a decision was issued . . . in his or her sole discretion, direct the Board to refer such decision to the Secretary for review."¹ The legal matter at issue in this case is one of exceptional

¹ This provision is not limited to final decisions of the Board and may include review of interlocutory decisions. Section 6(b)(2) authorizes Secretary review of "a decision" within the 28-day window after a decision. No part of Section 6(b)(2) and no other Section in Secretary's Order 01-2020 excludes from Secretarial review decisions by the Board to remand a case, nor does the Secretary's Order in any way limit that review to the Board's dispositive

importance to the Department's operations.² On February 10, 2022, I exercised my discretionary authority to undertake further review of the OR pursuant to Sections 6(b)(2) and 6(c)(1) of Secretary's Order 01-2020. The ARB thereafter promptly provided the administrative record in accordance with Section 6(c)(1) of Secretary's Order 01-2020.

After a *de novo* review of the record, I now issue this Final Agency Decision and Order reversing the ARB's February 4, 2022 OR and adopting the Administrative Law Judge (ALJ)'s December 30, 2021 Recommended Decision and Order on Remand (RDO) that granted summary judgment to Plaintiff and directed Defendant to comply with its obligations to submit the requested documents.

I. Background

These consolidated cases arise under the laws enforced by the Office of Federal Contract Compliance Programs (OFCCP or Plaintiff): Executive Order (EO) 11246, 30 Fed. Reg. 12319, as amended; the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), 38 U.S.C. § 4212; Section 503 of the Rehabilitation Act, 29 U.S.C. § 793; and the implementing regulations at 41 C.F.R. Chapter 60. Pursuant to these laws, federal contractors are prohibited from discriminating against employees and applicants on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, status as a protected veteran, and disability, or because they inquired about, discussed, or disclosed their compensation or that of others. Federal contractors are also required to take affirmative action to provide equal employment opportunity. 41 C.F.R. §§ 60-1.4(a)(1), (3), 60-300.5(a)(1), 60-741.5(a)(1).

Regulatory Background

Executive Order 11246 requires that each covered contractor "furnish all information and reports required by [the executive order] and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders." § 202(6); *see also* 41 C.F.R. §§ 60-1.4(a)(6), 60-1.12(c)(2), 60-1.20(a)(1)(i), 60-1.43, 60-300.81, 60-741.81. Contractors are required to maintain personnel and employment records for two years and must supply such information to OFCCP upon request. 41 C.F.R. §§ 60-1.12(a), (c), 60-300.80, 60-300.81, 60-

decisions, such as decisions granting or denying summary judgment. This reading is consistent with the language in Section 5 of the Secretary's Order stating that the Board acts "*for*" the Secretary. Secretary's Order 01-2020, Section 5 (providing that the ARB "is hereby delegated authority and assigned responsibility to act *for* the Secretary of Labor in review or on appeal" of the wide range of matters listed in the Order) (emphasis added).

² Section 6(b)(1) of Secretary's Order 01-2020 provides that the ARB shall, upon petition by the parties, refer a matter to the Secretary "if a majority of the Board determines that the petition presents a question of law that is of exceptional importance and warrants review by the Secretary . . ." No such standard is present in Section 6(b)(2), which governs the Secretary's authority, at his discretion, to direct the ARB to refer a decision for Secretarial review. While it is thus unnecessary for the Secretary to demonstrate that a question of law is of "exceptional importance," I note that this is a matter of exceptional importance.

741.80, 60-741.81. Further, federal contractors that meet specific jurisdictional thresholds are required to develop written Affirmative Action Programs (AAPs) under each of OFCCP's laws and to provide OFCCP documentation of their compliance with these AAP requirements. 41 C.F.R. §§ 60-2.1(b) and (c), 60-2.10(c), 60-300.40, 60-741.40.

OFCCP enforces these requirements by scheduling federal contractors for compliance reviews. 41 C.F.R. §§ 60-1.20, 60-300.60, 60-741.60. Compliance reviews may proceed in three stages: (i) a desk audit of the written AAP and supporting documentation, which is typically conducted at OFCCP offices; (ii) an on-site review conducted at the contractor's establishment to resolve problem areas identified during the desk audit; and (iii) where necessary, an off-site review of records. 41 C.F.R. §§ 60-1.20(a), 60-300.60(a), 60-741.60(a). If a contractor fails to comply with the laws enforced by OFCCP, the agency may direct contracting agencies to cancel, terminate, or suspend contracts with that contractor, or debar the contractor from future contracts until the contractor comes into compliance. EO 11246 §§ 209(5), (6); 41 C.F.R. §§ 60-1.27, 60-741.66, 60-300.66.

Factual Background and Procedural History

It is undisputed that Convergys³ (Convergys or Defendant) is a covered federal contractor. 2015 Complaints at 2; 2016 Am. Complaint at 2; 2015 Answers at 3–4; 2016 Am. Answer at 5. Between 2013 and 2016, OFCCP sent Scheduling Letters to several of Defendant's facilities, notifying them that they had been selected to undergo compliance reviews. 2015 Complaints at 3; 2016 Am. Complaint at 3–5; 2015 Answers at 4; 2016 Am. Answer at 5–7. The Scheduling Letters requested that, for the desk audit portion of the review, Defendant submit copies of its written AAPs for each facility and additional supporting documentation that was specified in the attached Itemized Listing. 2016 Am. Complaint, Exhibit A. The Scheduling Letters did not, however, indicate that OFCCP was yet planning an on-site review of Defendant's premises. *Id.* In response to the Scheduling Letters, Defendant requested evidence as to how OFCCP had selected each facility for the desk audit but failed to submit the requested documentation. 2015 Complaints at 3; 2016 Am. Complaint at 6; 2015 Answers at 2, 4; 2016 Am. Answer at 2, 8, Exhibit A.

On December 15, 2014, OFCCP filed seven administrative complaints (ALJ Case Nos. 2015-OFC-00002 through -00008) under OFCCP's expedited procedures seeking to have seven facilities submit the requested documentation. On October 23, 2015, Chief Administrative Law Judge Stephen R. Henley granted summary decision in favor of Plaintiff. *See 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*, ALJ No. 2015-OFC-00002–2015-OFC-00008 (Oct. 23, 2015).

³ Now known as Concentrix CVG Customer Management Group, Inc.

On December 10, 2015, OFCCP filed an eighth administrative complaint (ALJ Case No. 2016-OFC-00003), alleging that six additional facilities owned by Defendant were refusing to comply with the Scheduling Letters' requests for documents. Plaintiff filed an amended complaint on February 7, 2017, to include three additional facilities in the enforcement action.⁴ On July 31, 2017, Chief Judge Henley granted judgment on the pleadings to Plaintiff. *See 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*, ALJ No. 2016-OFC-00003 (July 31, 2017).

Defendant filed exceptions to these recommended decisions and the Board consolidated the matters. *See Order to Consolidate Cases and Grant Withdrawal of Request for Reconsideration*, ARB No. 16-013 (Sept. 14, 2017). By order dated January 31, 2019, the Board remanded the case to the Office of Administrative Law Judges (OALJ) pursuant to *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018). *See Order Lifting Stay and Remanding the Case to a New Administrative Law Judge*, ARB No. 16-013 (Jan. 31, 2019).

II. Decisions Below

After a *de novo* review of the entire record in the consolidated cases, on December 30, 2021, newly appointed ALJ Theodore Annos 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 (RDO). Before ALJ Annos, Defendant had claimed that it was not obligated to produce the documents because OFCCP's requests were unconstitutional, as Plaintiff failed to demonstrate that it selected Defendant's establishments pursuant to a neutral administrative plan in violation of the Fourth Amendment. RDO at 7. Defendant further claimed that the document requests were unreasonably burdensome and that there were disputed issues of fact regarding the scope of the request; that Plaintiff had not proceeded here in accordance with its publicly stated transparency standards for compliance reviews, which required that contractors be selected neutrally; and that Defendant was entitled to a hearing before the ALJ as part of its due process rights under the Fifth Amendment. *Id.* at 7–8. Finally, Defendant sought to plead a counterclaim seeking declaratory and injunctive relief against Plaintiff.⁵ *Id.* at 8.

ALJ Annos held that Plaintiff's request to review Defendant's documents off-site was reviewable under the standard for administrative subpoenas set forth in *Donovan v. Lone Steer*, which requires that a request be "limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." RDO at 12 (citing *Lone Steer*, 464 U.S. 408, 415 (1984)). The *Lone Steer* standard is lower than the standard for assessing administrative

⁴ Thus, across both actions, OFCCP sought to enforce compliance at a total of sixteen establishments.

⁵ As Defendant did not raise the issue of its counterclaim in its Exceptions before the ARB, this claim is deemed waived and will not be considered here. *See OFCCP v. O'Melveny & Myers LLP*, ARB No. 12-014, slip op at 7 n.13 (Aug. 30, 2013) (deeming an argument waived when not addressed on appeal).

warrants' compliance with the Fourth Amendment established in *Marshall v. Barlow's*, 436 U.S. 307 (1978)—the standard that Defendant argued should apply. RDO at 12; Exceptions at 30. The ALJ further held that Plaintiff's requests satisfied the *Lone Steer* standard because the Scheduling Letters were "specifically limited to Defendant's AAPs and supporting data" and were "directly related and relevant to Plaintiff's compliance responsibilities and authority." RDO at 13. The ALJ found that there would be no undue burden presented by the requests for documents because the Scheduling Letters simply requested documents that Defendant, as a federal contractor, was already required to maintain. *Id.*

Additionally, the ALJ found that Defendant's due process rights were fully protected by the fact that the agency's final administrative order requiring Defendant to submit the requested documents would be reviewable under the Administrative Procedure Act; and, further, that the award of summary decision prior to a hearing did not deprive the Defendant of due process. *Id.* at 14–15. Finally, the ALJ held that Defendant was not authorized to file a counterclaim before the OALJ. *Id.* at 15. Accordingly, the ALJ found that summary judgment for Plaintiff was appropriate as a matter of law and ordered Defendant to provide the requested documents upon threat of cancellation of contracts and debarment. *Id.* at 15–16.

After Defendant filed Exceptions, the Board issued its OR on February 4, 2022, vacating the RDO and remanding the matter consistent with the Board's holding. The Board acknowledged in its decision that "[a]n OFCCP desk audit is 'practically identical' to an administrative subpoena," whereas an "on-site review . . . triggers the standard for a warrant or its equivalent," and it recognized that "[c]ourts have held that an administrative subpoena, unlike a warrant, does not need to be supported by probable cause." OR at 7. Nonetheless, the Board then held that the Fourth Amendment requirements that apply to OFCCP desk audits "overlap with administrative warrant criteria, namely 'limited in scope' and 'initiated in a proper manner[.]'" *Id.* at 9. The Board also held that the agency was required to follow its own procedures but did not specify how the agency had failed to do so. *Id.* at 9–10. It concluded that "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" and remanded the matter to the ALJ to determine whether Plaintiff had selected Defendant's facilities using neutral criteria. *Id.* at 10.

III. Analysis

Although the ARB ordered a remand of this matter to the ALJ, in the interest of judicial economy and a desire to ensure compliance with EO 11246, VEVRAA, and Section 503 as swiftly as possible, I will review the Board's decision as well as all findings by the ALJ at this juncture to ensure the proper legal standard is applied. As described below, I determine that the Board applied the incorrect standard to determine whether Plaintiff's document requests complied with the Fourth Amendment and that the ALJ applied the correct standard. I also agree with the ALJ's findings on the application of that Fourth Amendment standard, as well as his

conclusions with respect to Defendant's other objections.⁶ Accordingly, summary judgment in favor of Plaintiff is warranted.

Fourth Amendment

The ARB's interpretation of the Fourth Amendment standard that applies to Plaintiff's document requests is inconsistent with the standard that federal courts apply to the type of document requests at issue and warrants correction. As the ALJ concluded, the *Lone Steer* standard applies and requires that Plaintiff's document requests be limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. In addition, I concur with the ALJ's conclusion that Plaintiff's document requests satisfy this *Lone Steer* standard and thus do not violate Defendant's Fourth Amendment rights.

a) Standard Applicable to Plaintiff's Document Requests

OFCCP initiated its compliance reviews of Convergys' facilities pursuant to its authority under EO 11246,⁷ VEVRAA, and Section 503 of the Rehabilitation Act. As stated above, compliance reviews may proceed in three stages: (i) a desk audit of the written AAP and supporting documentation, which is typically conducted at OFCCP offices; (ii) an on-site review conducted at the contractor's establishment to resolve problem areas identified during the desk audit; and (iii) where necessary, an off-site review of records. 41 C.F.R. §§ 60-1.20(a), 60-300.60(a), 60-741.60(a). The document requests at issue requested a copy of Defendant's written AAPs and additional supporting documentation; the requests did not involve an on-site search or review of documents.

The ARB held that OFCCP must "apply neutral criteria when selecting a federal contractor's facility . . . to undergo a compliance review including a desk audit" and thereby incorrectly subjected OFCCP to a requirement that applies to the issuance of administrative warrants tied to on-site searches. OR at 9-10. The Supreme Court explained in *Barlow's*, 436 U.S. at 320, that when it comes to on-site administrative searches, the Fourth Amendment requires probable cause, which "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

⁶ I note here Defendant's contention that the ALJ erred in finding that it had not asserted an appointments clause challenge before the original ALJ. Exceptions at 18; RDO at 5 n.23. I need not address whether Defendant did, in fact, raise such a challenge because the matter was nonetheless remanded to a new ALJ, consistent with *Lucia*, 138 S.Ct. at 2044. The issue is, therefore, moot. See *Lucia v. Am. Airlines, Inc.*, ARB Nos. 10-014, -015, -016, slip op. at 5 (Sept. 16, 2011) ("Allegations become moot when a party 'has already been made whole for damage it claims to have suffered.'" (citation omitted)).

⁷ Defendant questioned whether, based on *Chrysler Corp. v. Brown*, 441 U.S. 281, 287 (1979), EO 11246 and OFCCP's implementing regulations have the force and effect of law. Exceptions at 18-19. This question was answered in the affirmative in *United States v. Miss. Power & Light Co.*, 638 F.2d 899, 905 (5th Cir. 1981) ("*Chrysler* does not undermine our holding that E.O. 11246 is itself firmly rooted in congressionally delegated authority."); see also *Beverly Enters., Inc. v. Herman*, 130 F. Supp. 2d 1, 9 n.4 (D.D.C. 2000) ("Regulations that are promulgated pursuant to an Executive Order have the force and effect of law[.]"); *Legal Aid Soc'y v. Brennan*, 608 F.2d 1319, 1330 n.14 (9th Cir. 1979).

are satisfied with respect to a particular [establishment].” (quoting *Camara v. Mun. Court of City & Cnty. of San Francisco*, 387 U.S. 523, 538 (1967)) (alteration in original). A warrant may meet this standard by showing that a specific business was chosen for a search “on the basis of a general administrative plan for the enforcement of the [law at issue] derived from neutral sources” *Id.*; see also *Miss. Power & Light Co.*, 638 F.2d at 907–08; *Beverly*, 130 F. Supp. 2d at 13. This standard does not apply to off-site reviews like the document requests at issue here.

Administrative subpoenas requesting an off-site review of records, rather than entry onto a defendant’s property, need only be “sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome” to be enforceable. *Lone Steer*, 464 U.S. at 415 (internal quotations and citation omitted). “The Supreme Court has explained that the central distinction between administrative warrants and administrative subpoenas—and therefore between cases in which the Fourth Amendment requires probable cause under *Barlow’s* or mere reasonableness under *Lone Steer*—is that only warrants authorize ‘nonconsensual entries into areas not open to the public.’” *United Space All., LLC v. Solis*, 824 F. Supp. 2d 68, 92 (D.D.C. 2011) (quoting *Lone Steer*, 464 U.S. at 414); see also *United States v. New Orleans Pub. Serv., Inc.*, 734 F.2d 226, 228 (5th Cir. 1984) (per curiam) (“[T]he Supreme Court has drawn a bright line at the point of non-consensual entry onto a company’s protected premises for good reason.”). So long as the administrative subpoena meets these minimal requirements, it is enforceable. See *Martin v. Gard*, 811 F. Supp. 616, 624 (D. Kan. 1993) (“[R]espondents contend the Secretary is in violation for issuing subpoenas without an accompanying explanation of why the statements are necessary. The court has found no authority for the respondents’ contention. So long as the request is not too indefinite or overbroad and is reasonably relevant to the matter under inquiry, the subpoena is enforceable.”).

The Board cited to *Beverly Enterprises* and *Bank of America v. Solis* for the proposition that “[c]ourts have held that the compliance review itself is subject to Fourth Amendment requirements, including a neutrality requirement.” OR at 8 n.29; *Beverly*, 130 F. Supp. 2d at 14; *Bank of Am., N.A. v. Solis*, No. CIV.A. 09-2009 EGS, 2011 WL 7394512, at *15–17 (D.D.C. Dec. 13, 2011), *report and recommendation adopted in part, rejected in part sub nom. Bank of Am. v. Solis*, No. CV 09-2009 (EGS), 2014 WL 4661287 (D.D.C. July 2, 2014). However, neither case suggests that a request for documents involving only an off-site inspection or the selection of a target for such a request requires the agency to establish a neutral selection process. While it is correct that the Fourth Amendment applies to both the desk audit and on-site portions of the compliance review, the Board ignored the distinction between the specific Fourth Amendment standards that apply at different stages of a compliance review. See *United Space All.*, 824 F. Supp. 2d at 91 (“Administrative warrants and subpoenas must both comport with the Fourth Amendment, although different standards apply to each.”).

Beverly Enterprises involved a Corporate Management Review whereby OFCCP sought to go on-site to inspect the plaintiff’s files and headquarters. Given the on-site nature of the inspection at issue, the court properly held that OFCCP must meet the requirements for an administrative search under *Barlow’s*, and it therefore evaluated defendants’ argument that the selection for the

search at issue was made pursuant to neutral criteria. *Beverly*, 130 F.Supp.2d at 4. The decision does not address the Fourth Amendment standard that applies to the type of off-site document requests at issue in this case. See *United Space All.*, 824 F. Supp. 2d at 93 (distinguishing *Beverly Enterprises* on these grounds).

The Board's reliance on *Bank of America* was also misplaced. The Board cited in its OR to the report and recommendation of the magistrate judge in that case, stating that the magistrate had "held the OFCCP's initial selection of a contractor for compliance review was subject to a neutrality requirement." OR at 8 n.29. Notably, the district court reviewing the magistrate judge's decision did not adopt or even reach the portion of the magistrate's recommendation regarding the Fourth Amendment standards applicable to a desk audit because it found that the employer had consented to the desk audit. *Bank of Am.*, 2014 WL 4661287, at *4.⁸ Thus, the magistrate's findings on that issue are irrelevant to both this matter and the holding in *Bank of America*.

The more appropriate authority governing when a request for documents that does not involve on-site review complies with the Fourth Amendment is *United Space Alliance*. *United Space All.*, 824 F. Supp. 2d at 92. In that case, OFCCP had requested follow-up data from United Space due to a discrepancy discovered during the agency's desk audit. *Id.* at 76. The district court held that because the ARB's order requiring the production of documents did not "authorize entry onto private areas of United Space property," it was "properly tested under *Lone Steer*." *Id.* at 92. Although OFCCP had originally sought an order to proceed with an on-site review at United Space premises, which would have needed to satisfy the higher *Barlow's* standard, the district court held that, once the ARB limited the order to only a production of documents, the order should be treated as an administrative subpoena. *Id.*

The Board here acknowledged the holding in *United Space Alliance*. However, the Board justified adding a neutrality requirement to the selection of a company for document requests by noting that *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." OR at 9 n.32. (citing *United Space All.*, 824 F.Supp.2d at 93). As the Board stated, the *United Space Alliance* court found that the company had consented to OFCCP's initial document request; but in reviewing United Space's objections to the follow-up document request—after its consent had been withdrawn—the court explicitly rejected the application of *Barlow's*, holding that it was subject to review under the *Lone Steer* standard. *Id.* at 92–93. The Board's attempt to restrict *Lone Steer's* application to the "subject

⁸ The magistrate judge appropriately applied the standard in *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186 (1946), which *Lone Steer* reaffirmed, *Lone Steer*, 464 U.S. at 415, to the request for records for the desk audit at issue. *Bank of Am., N.A.*, 2011 WL 7394512, at *15. To the extent the magistrate judge assessed whether a neutral administrative plan formed the basis of the initial search selection, the district court did not adopt that portion of the magistrate's recommendation, finding that the company at issue had consented to the desk audit.

matter of the desk audit” is not grounded in the *United Space Alliance* court’s decision and is rejected here.

The Board’s OR improperly collapsed the standards for administrative subpoenas and administrative warrants, and the Board’s new proposed standard contravenes the governing case law on administrative subpoenas.⁹ The Board found that the neutrality requirement associated with compliance reviews is “attributed to the factor ‘initiated in a proper manner’ from the Supreme Court’s discussion of ‘administrative warrant or equivalent’ in *Barlow’s*.” OR at 8–9. Thus, for an on-site inspection, the Board would require OFCCP to initiate the on-site search in accordance with the administrative warrant standard, which may be satisfied through neutral selection criteria. But for a desk audit—which, again, the Board found to be equivalent to an administrative subpoena—the requirements are simply that the request “be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.”¹⁰ *Lone Steer*, 464 U.S. at 415 (internal quotations and citation omitted). This standard contains no requirement that the request be “initiated in a proper manner.” The “initiated in a proper manner” requirement is necessary to establish probable cause, which goes to the motive behind a search and which an agency is not required to demonstrate absent entrance into an employer’s premises. *See, e.g., United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (“Even if one were to regard the request for information . . . as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest. . . . [I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.”); *United Space All.*, 824 F. Supp. 2d at 91 (noting that the administrative subpoena standard “focuses on the breadth of the

⁹ To the extent that the Board’s decision also rests on a conclusion that OFCCP did not “follow its own procedures,” OR at 9, I reject this finding as unsupported. The Board did not clarify which procedures it was referencing or how Plaintiff would have violated those procedures. Assuming the Board was referencing the 2018 transparency policies that Defendant lists in its Exceptions Brief, *see* Exceptions at 12–15, I note that those policies were not in place at the time when the facilities covered in this matter were scheduled for review. Accordingly, Plaintiff’s issuance of the records requests here could not have violated those policies. *See* Office of Fed. Contract Compliance Programs, *What Federal Contractors Can Expect* (April 2018), <https://www.dol.gov/sites/dolgov/files/ofccp/CAGuides/files/WhatFederalContractorsCanExpect-CONTR508c.pdf>; Office of Fed. Contract Compliance Programs, *Directive (DIR) 2018-08: Transparency in OFCCP Compliance Activities* (Sept. 19, 2018), <https://www.dol.gov/agencies/ofccp/directives/2018-08> [<https://web.archive.org/web/20220307234024/https://www.dol.gov/agencies/ofccp/directives/2018-08>]; Office of Fed. Contract Compliance Programs, *Directive (DIR) 2019-02: Early Resolution Procedures* (Nov. 30, 2018), <https://www.dol.gov/agencies/ofccp/directives/2019-02>; Office of Fed. Contract Compliance Programs, *Methodology for Developing the Supply & Service Scheduling List FY 2020 Release – 1* (Sept. 11, 2020), https://www.dol.gov/sites/dolgov/files/ofccp/scheduling/files/SL20R1_SupplyService_Methodology_FinalFEDQAS08c.pdf. Furthermore, the Board made no affirmative findings as to how OFCCP’s actions here would have, in fact, conflicted with those policies or how any conflict with those policies would contravene Fourth Amendment requirements associated with administrative subpoenas. OR at 9.

¹⁰ Defendant also argued in its Exceptions that the *Lone Steer* standard could not be proper because OFCCP lacks formal subpoena power. Exceptions at 19–20. This argument was considered and rejected in *United Space Alliance*. 824 F. Supp. 2d at 92 (“United Space argues that this administrative order for the production of documents cannot be treated as a subpoena because OFCCP lacks subpoena authority and because the order cannot be immediately challenged in an Article III court. . . . To say that this order cannot be a subpoena because the agency lacks subpoena authority does not suggest, as United Space argues, that the order is therefore a warrant.”).

subpoena rather than the motivation for its issuance”). Ultimately, the appropriate guiding principle for administrative subpoenas is reasonableness, not probable cause and related questions of motive or neutrality. *Lone Steer*, 464 U.S. at 415; *Morton Salt Co.*, 338 U.S. at 652–53.¹¹

In justifying its new Fourth Amendment standard for off-site document requests, the Board stated that “[t]he additional requirement that a company be selected according to neutral selection criteria [at the desk audit stage] does not undermine other differences between the Fourth Amendment standards applicable to the administrative subpoena and administrative warrant.” OR at 9 n.32. But courts have regularly distinguished between these standards and imposed a higher burden on agencies seeking to enter an employer’s premises, precisely because requests for records pose a lesser intrusion into respected privacy rights. *See, e.g., Morton Salt Co.*, 338 U.S. at 652. None of the authorities relied on by the Board support its holding that an agency must possess probable cause that would support an administrative warrant in order to proceed with an off-site review of documents. Established law, outlined above, makes clear that a request for documents not involving on-site inspection need not be issued pursuant to a neutral administrative plan.

In addition, contrary to Defendant’s claim, the lower *Lone Steer* standard does not preclude contractors from contesting the constitutionality of OFCCP’s document requests, as demonstrated by the fact that Defendant is objecting to such a request in these proceedings. *See United Space All.*, 824 F. Supp. 2d at 91–92 (holding that this standard “provide[s] protection for a subpoenaed employer by allowing him to question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court”) (internal quotations and citation omitted). As noted by the ALJ, the Department’s Final Agency Decision requiring Defendant to comply with the desk audit request is also subject to judicial review under the Administrative Procedure Act. RDO at 14.

Finally, a request for documents at the desk audit stage is not converted to an administrative search simply because, at some future point, OFCCP may seek to go on-site. Contrary to Defendant’s claim that a bifurcated analysis of the various phases of a compliance review will result in contractors’ losing their ability to assert their Fourth Amendment rights, OFCCP will be required to satisfy the *Barlow*’s standard if and when it seeks to proceed with an on-site review. *Barlow*’s, 436 U.S. at 320–21 (holding that probable cause justifying a warrant may be based

¹¹ Basing a company’s selection for review on an “administrative plan containing specific neutral criteria” is, however, still just one way by which an agency can establish probable cause to satisfy an administrative warrant. *See, e.g., Miss. Power & Light Co.*, 638 F.2d at 907 (explaining that an on-site search will be reasonable if based on 1) “specific evidence of an existing violation”; 2) a “showing that reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular (establishment)”; or 3) a “showing that the search is pursuant to an administrative plan containing specific neutral criteria”) (internal quotations and citations omitted) (emphasis added); *Beverly*, 130 F. Supp. 2d at 14 (explaining that when a court evaluates whether a search was initiated in a proper manner, “[a]n administrative search violates the Fourth Amendment unless the agency shows the company’s selection for the search is based on: (1) specific evidence of an existing violation, (2) reasonable legislative or administrative standards that have been met with respect to that particular contractor or (3) an administrative plan containing specific neutral criteria”) (emphasis added).

“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]’”) (citation omitted) (alteration in original). The ALJ’s RDO and the Order I issue here simply require Defendant to provide the information requested by OFCCP in its Scheduling Letters. It does not authorize an on-site inspection at this time.

b) Plaintiff’s Document Requests Satisfy the *Lone Steer* Standard

The Board did not reach the question of whether the document requests at issue here meet the *Lone Steer* standard. I agree with both the ALJ’s application of the *Lone Steer* standard in this case and the conclusion that OFCCP’s requests for documents satisfy the standard. RDO at 13.

As stated above, under *Lone Steer*, OFCCP’s request must “‘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. 541, 544 (1967)). The ALJ found that the Scheduling Letters were sufficiently limited in scope, as they asked only for “Defendant’s AAPs and supporting data,” and he concluded that the Scheduling Letters were directly relevant to OFCCP’s “compliance responsibilities and authority under 41 C.F.R. Chapter 60.” RDO at 13. He also held that because Defendant was required to maintain these documents at each facility as a condition of holding a federal contract, their production would not be unreasonably burdensome. *Id.*

Once the agency has made its threshold showing that the *Lone Steer* factors have been satisfied, “then the court is to enforce the subpoena unless the respondent proves that the subpoena is overly broad or burdensome[.]” *Martin*, 811 F. Supp. at 620. The only argument that Defendant raised in support of its claim that the request was overly broad in scope and unduly burdensome was that, by scheduling sixteen¹² of its facilities for review, Plaintiff had subjected it to an “unprecedented” number of reviews. Exceptions at 26.¹³ The Defendant bears the burden of showing that Plaintiff’s subpoena was unduly burdensome. *See F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (“The burden of showing that the request is unreasonable is on the subpoenaed party.”). Where the agency’s request is made pursuant to a “lawful purpose” and “the requested documents are relevant to that purpose,” the “burden is not easily met.” *Id.* “The

¹² Defendant claimed that it had raised a material dispute of fact regarding the number of its establishments that were selected by OFCCP for review. Exceptions at 16. As the ALJ found, however, there is no dispute that only sixteen establishments are subject to this enforcement action. RDO at 11 n.47. Therefore, any disputes about additional facilities are not material to this determination. In any event, as explained further *infra*, Defendant presented no information indicating how the additional requests affected the burden placed upon its operations.

¹³ Defendant also claimed that because the requests sought documents that are now nearly a decade old, their production would also be unduly burdensome. Exceptions at 28. This argument is rejected. *See Nat’l Eng’g & Contracting Co. v. U.S. Dep’t of Lab. Occupational Safety & Health Admin.*, 721 F. Supp. 933, 936 (S.D. Ohio 1989) (“This Court will not permit National, nor is it entitled to receive, an exemption from disclosing its form 200s, which are required to be kept and preserved by the Act, merely because of the numerous delays caused by litigation it has initiated during this investigation.”). Permitting contractors to avoid entirely their legal obligation to produce required documents due to the passage of time once an order is finally awarded in OFCCP’s favor would render meaningless the agency’s enforcement mandate.

party subject to the subpoena must show that producing the documents would seriously disrupt its normal business operations.” *E.E.O.C. v. Randstad*, 685 F.3d 433, 451–52 (4th Cir. 2012) (quoting *E.E.O.C. v. Md. Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986)) (holding that an employer’s affidavit asserting “only that compiling the requested information would require three employees to spend 40 hours each, at a total cost \$14,000 to \$19,000” but without providing any evidence of its “normal operating costs,” or “that gathering the requested information would ‘threaten’ or ‘seriously disrupt’” its business was insufficient as a matter of law.)

I find that Defendant here failed to meet the burden of showing that the document requests at issue were unduly burdensome. As the ALJ noted, the documents requested by OFCCP are ones that Defendant is required by law to maintain, making their production reasonable. RDO at 13; see *Donovan v. Union Packing Co. of Omaha*, 714 F.2d 838, 842 (8th Cir. 1983) (“Disclosure of forms required by [the OSH Act] and of several other standard records through the enforcement of the Secretary’s subpoena power is hardly unreasonable.”). The Scheduling Letters also list particularly what documents contractors are required to produce and are therefore “specific enough that it will not be unreasonably burdensome” for Defendant to comply. *Big Ridge, Inc. v. Fed. Mine Safety & Health Rev. Comm’n*, 715 F.3d 631, 647 (7th Cir. 2013) (finding that where “letters MSHA sent to mine operators specifically listed the documents to be reviewed (e.g., ‘All payroll records and time sheets for all individuals working at your mine for the covered time period,’ . . .), and listed specific examples of the types of documents included in the demand,” the request was not unreasonably burdensome). Furthermore, as the ALJ noted, Defendant was prepared to produce the requested documents under certain conditions,¹⁴ indicating that it was fully capable of responding without significant burden. RDO at 13.

Additionally, the geographic scope of the request is not facially unreasonable. See, e.g., *Randstad*, 685 F.3d at 451 (rejecting employer’s contention that the geographic and temporal scope of an EEOC subpoena was unreasonable when it requested employment information from thirteen offices in one state over a five-year period). Scheduling sixteen facilities is also not unprecedented in the way described by Defendant. See, e.g., *U.S. Sec. Assocs., Inc. v. OFCCP*, 2012-OFC-00004 (Sept. 17, 2012) (noting defendant sought to file a declaratory action seeking “relief from 21 compliance review searches formally scheduled by” OFCCP). “The mere statement of the breadth of the request does nothing to explain why such breadth makes the request unreasonable.” *Sec’y of Labor v. Warrior Coal, LLC*, 38 FMSHRC 913, 920, Docket Nos. KENT 2011-1259-R, KENT 2011-1260-R, KENT 2012-705, (May 17, 2016) (holding that the mine operator needed to assert “with particularity why inclusion of non-underground miners resulted in overbreadth, created a burden, or otherwise was unreasonable”). Simply because a subpoena imposes some burden does not render the request unreasonable. See *Reich v. Mont.*

¹⁴ Defendant stated in its Exceptions that it “repeatedly offered to submit the requested records on the condition that OFCCP agree it would not assert that the Company’s submissions constituted a waiver of its right to protest the selections, or a waiver of its Fourth Amendment rights and, further, that the Agency would not assert that the selection for the desk audit was justified based upon the contents of any documents submitted.” Exceptions at 6–7 (bolded emphasis omitted).

Sulphur & Chem. Co., 32 F.3d 440, 448 (9th Cir. 1994) (“Unquestionably, OSHA’s request imposed a burden. We do not believe that it did so unreasonably.”). As Defendant failed to show that the request would somehow seriously disrupt its business operations, OFCCP’s document request is valid.

Because the ALJ considered Defendant’s objections under the proper Fourth Amendment standard and the record supports his finding that OFCCP’s request did not violate the *Lone Steer* standard, there is no need for the ARB or the ALJ to consider this matter further.

Fifth Amendment

Finally, Defendant alleged that it was deprived of its Fifth Amendment right to procedural due process when ALJ Annos awarded summary judgment in OFCCP’s favor rather than holding a hearing. Exceptions at 17. This objection is similarly unavailing. As both the ALJ and the ARB noted, OFCCP’s enforcement regulations, including the regulations governing expedited enforcement procedures, have been held to adequately protect a contractor’s Fifth Amendment rights. RDO at 14 (citing *United Space All.*, 824 F. Supp. 2d at 95; *Beverly*, 130 F. Supp. 2d at 20); OR at 5 n.15.

With respect to Defendant’s claim that it was specifically entitled to a hearing, “procedural due process in an administrative hearing does not always require all of the protections afforded a party in a judicial trial.” *Beverly*, 130 F. Supp. 2d at 18. “The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that ‘a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.’” *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring)). Due process does not preclude an award of summary judgment. *Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996) (“Agencies no less than courts can grant summary judgment, and the due process clause does not require a hearing where there is no disputed issue of material fact to resolve.”); *see also Butler v. Oak Creek-Franklin Sch. Dist.*, 172 F. Supp. 2d 1102, 1113 (E.D. Wis. 2001) (“[N]o hearing is necessary if the person does not deny the allegations on which a proposed deprivation is based.”); *CNA Fin. Corp. v. Donovan*, No. 77-0808, 1981 WL 322, at *7 (D.D.C. Oct. 29, 1981) (finding that a paper hearing adequately protected “any due process claim CNA may have by virtue of alleged property interests in its AAP materials” during a reverse FOIA matter, as “the additional safeguards afforded by an oral hearing ‘u[ltimately] would contribute very little to the accuracy and reliability of the [agency’s] determinations’”) (internal citation omitted).

Here, no disputed issues of fact remained to be resolved at a hearing.¹⁵ Thus, ALJ Annos properly rejected this contention in awarding summary judgment to OFCCP.

¹⁵ See note 12, *supra*, for a discussion as to why Defendant’s claim regarding the number of its facilities under review does not raise a material dispute of fact.

IV. Conclusion

For the reasons stated above, I reverse the ARB's Order of Remand and Adopt the Recommended Decision and Order issued by ALJ Annos on December 30, 2021. Accordingly, I award summary judgment in favor of Plaintiff.

ORDER

1. Defendant, through its officers, directors, partners, representatives and agents, jointly and individually, shall provide all information Plaintiff requested in the Scheduling Letters that were identified in the Administrative Complaints filed in these consolidated cases. Defendant shall provide the information 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.
2. Should Defendant 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 Defendant, jointly and individually, and to debar Defendant from receiving and participating in any future Government contracts for a period of at least three years or until Defendant complies with the provisions of EO 11246, VEVRAA, Section 503 of the Rehabilitation Act, and 41 C.F.R. Chapter 60, whichever period is longer.

Signed in Washington, DC, this 1st day of July, 2022,



MARTIN J. WALSH
Secretary of Labor