



In the Matter of:

**OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,**

ARB CASE NO. 00-034

ALJ CASE NO. 97-OFC-1

PLAINTIFF,

DATE: January 31, 2003

v.

BRIDGEPORT HOSPITAL,

DEFENDANT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:

Howard M. Radzely, Acting Solicitor of Labor, Gary M. Buff, Associate Solicitor, Heidi Dalzell-Finger, Counsel for Litigation, *United States Department of Labor, Washington, D.C.*

For the Defendant:

Michael N. LaVelle, Esq., *Pullman & Comley, LLC, Bridgeport, Connecticut*

FINAL DECISION AND ORDER

This case arises under Executive Order 11246 (E.O. 11246), Section 503 of the Rehabilitation Act (RA), and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA).

Executive Order 11246 prohibits Federal contractors and subcontractors from discriminating based on race, color, religion, sex, or national origin. 30 Fed. Reg. 12,319 (Sept. 24, 1965) as amended by Executive Order 11375, 32 Fed. Reg. 14,303 (Oct. 13, 1967) (adding gender to list of protected characteristics), as amended by Executive Order 12086, 43 Fed. Reg. 46,501 (Oct. 5, 1978) (consolidating enforcement function in DOL).

Section 503 of the Rehabilitation Act protects employees of Federal contractors

and subcontractors from discrimination based on disability. 29 U.S.C.A. § 793 (West 1999).

VEVRAA protects employees of Federal contractors and subcontractors from discrimination based on disability and veteran status. 38 U.S.C.A § 4212 (West 2002).

The Office of Federal Contract Compliance Programs (OFCCP) cited Bridgeport Hospital (Bridgeport) for noncompliance with the anti-discrimination provisions based on Bridgeport's failure to have in place an affirmative action program as required by implementing regulations. Bridgeport denied that it was covered by the anti-discrimination provisions and moved for summary judgment on that ground. The ALJ recommends that Bridgeport's motion for summary judgment be granted.

OFCCP timely excepted to the ALJ's recommendation. We have jurisdiction to review the ALJ's recommended Decision and Order and to issue the Department's final decision in this case pursuant to 41 C.F.R. §§ 60-30.28, 60-250.65(b), 60-741.66(b) (1996). Our standard of review is *de novo*. *United States Steel v. M. Dematteo Construction Co.*, 315 F.3d 43 (1st Cir. 2002). For the reasons discussed below, we agree with the ALJ's recommendation to grant summary judgment for Bridgeport and dismiss the complaint.

BACKGROUND

The parties agreed to a joint stipulation of facts and the admission of certain documents. The stipulated record reflects that Bridgeport had an agreement with Blue Cross/Blue Shield of Connecticut, Inc. (Connecticut Blue) governing the terms of payment from Connecticut Blue to Bridgeport for covered services to persons eligible to receive health care benefits under *any* Blue Cross plan or member contract during the applicable period.¹ Connecticut Blue paid Bridgeport a standard payment amount each week and settlement and reconciliation of accounts was made at year's end. A consequence of the agreement between Connecticut Blue and Bridgeport was lower cost of medical treatment to Blue Cross/Blue Shield Association (Blue) members and lower cost to Blue.

Blue contracted with the United States Office of Personnel Management (OPM) on behalf of its member Blue Cross/Blue Shield plans, to provide Federal employees with a fee-for-services health benefits insurance policy for the applicable period. It is uncontested that Blue's contract with OPM made Blue a Federal contractor within the

¹ Bridgeport and Blue first entered into the agreement in 1989. The agreement was renewed annually and was in effect in 1996, when OFCCP issued the citation at issue here.

meaning of the anti-discrimination provisions.

The Blue-OPM contract stated, *inter alia*, that:

While a Member may elect to be hospitalized in any hospital, the Carrier [Blue] does not undertake to guarantee the admission of such member to the hospital, nor the availability of any accommodations or services therein requested by the Member or his physician.

Exhibit F (Blue-OPM contract No: CS 1039) at § 4.2(d).

The OPM-Blue contract also provided for different levels of cost-sharing (copayment or deductible) depending on whether the hospital had an agreement with a participating Blue plan (these hospitals are “preferred” or “member” hospitals) or did not have such an agreement (these hospitals are “non-member” hospitals). *Id.* The absence of a reimbursement agreement between Bridgeport and Blue would not have precluded Blue from being able to offer medical benefit insurance to its enrollee members and would not have precluded Blue from paying insurance benefits to those treated at Bridgeport.

Bridgeport received \$361,340 from Connecticut Blue as payment for the services Bridgeport provided to Federal Employee Health Benefits Plan members, *i.e.*, Federal employees and dependants, for the period July 1, 1994 to June 30, 1995,² and was a member or preferred hospital based on its agreement with Connecticut Blue.

Federal contractors and subcontractors are required to have an affirmative action program under E.O. 11246, Section 503, and VEVRAA implementing regulations. 41 C.F.R. §§ 60-30-23, 60-250.29, and 60-741.65. In October 1996, OFCCP, contending that Bridgeport was a Federal subcontractor, cited Bridgeport for failing to have an affirmative action program.

The implementing regulations identify two circumstances in which a person doing business with a Federal contractor is deemed a Federal subcontractor for purposes of the three anti-discrimination laws. The first circumstance is when the person provides the Federal contractor with services or property “necessary to achievement of” the prime Federal contract. The second circumstance is when a person

² This is the period for which OFCCP initially sought evidence from Bridgeport of compliance with the affirmative action requirements of the three anti-discrimination laws.

“performs part of the Federal contract” on the Federal prime contractor’s behalf.

In OFCCP’s view, by providing services to Blue policyholders at a discounted rate, Bridgeport was providing a service “necessary to” effectuation of Blue’s contract with OPM and/or performing part of that contract on Blue’s behalf. OFCCP argued the Blue-OPM contract committed Blue to provide or ensure that others provide its enrollees with medical care and services.

Bridgeport denied that its payment agreement with Connecticut Blue made the hospital a subcontractor to the Blue-OPM contract. Bridgeport also contested the proposition that Blue had contracted with OPM to provide medical services.

ISSUE ON APPEAL

On appeal, OFCCP excepts to the ALJ’s conclusion that Blue was not obligated by its Federal contract to provide medical care to its policy holders and, therefore, Bridgeport’s provision of medical care to Blue policy holders was neither “necessary to effectuate” nor “performance on behalf of” the Blue-OPM contract.³ "Blue's prime contract with the Government obligates Blue to provide medical services." OFCCP Br. 13. "Blue's prime contract with OPM is not solely for ‘medical insurance,’ as contended by the ALJ." *Id.* at 17:

The heart of Blue’s contract with OPM is that it agrees to provide Federal employees who enroll with a list of medical services, which are to be performed by health care facilities .

³ OFCCP’s Table of Contents lists three points of exception:

Exception 1. The ALJ Erred in Characterizing Bridgeport’s Agreement with Blue as a Reimbursement Agreement rather than a Contract.

Exception 2. Bridgeport is a Federal Subcontractor under 41 C.F.R. § 60-1.3 Because it Furnishes Medical Services that are Necessary to Perform Blue’s Government Contract with OPM.

Exception 3. Bridgeport is a Federal Subcontractor Under 41 C.F.R. § 60-1.3 Because it Performs, Undertakes or Assumes a Portion of Blue’s Obligation to Provide Medical Services Under its Government Contract with OPM.

. . . The periodic payments to Blue (made by Federal enrollees and the Government) to maintain access to these medical services and benefits would be rendered meaningless if Blue could not deliver a facility that would perform the medical services listed in the brochure.

*Id.*⁴

DISCUSSION

The regulation at issue in this case, 41 C.F.R. § 60-1.3, “Subcontract,” provides as follows:

Subcontract means any agreement or arrangement between a contractor and any person in which the parties do not stand in the relationship of the employer and an employee:

(1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor’s obligation under any one or more contracts is performed, undertaken or assumed.

The ALJ rejected OFCCP's argument that Bridgeport assumed that portion of the OPM-Blue contract that obligated Blue to provide medical services and supplies. "OFCCP's argument is inconsistent with the contract that Blue has with OPM. That contract does not obligate Blue to provide 'medical services and supplies' to government employees." ALJ D. & O. at 9. Rather, the ALJ concluded, the prime contract obligated Blue to provide health insurance. *Id.*

We also note that the OPM contract, which is part of the stipulated record, was replete with references to reimbursement and indemnification for physician, laboratory, hospital, and related charges for care and services. Such terminology is inconsistent with the proposition that Blue promised to provide medical care or assure that providers provide medical or hospital care or services to Blue’s policyholders. And, as

⁴ OFCCP also argues over whether the reimbursement agreement between Blue and Bridgeport was a contract. We fail to see the significance of this point inasmuch as the relevant regulations apply equally to both, using the terms “agreement” and “arrangement” interchangeably.

we noted earlier in this decision, the Blue-OPM contract expressly stated that Blue made no commitment to assure hospital care or services to enrollees:

While a Member may elect to be hospitalized in any hospital, the Carrier [Blue] does not undertake to guarantee the admission of such member to the hospital, nor the availability of any accommodations or services therein requested by the Member or his physician.

Exhibit F (Blue-OPM contract No: CS 1039) at § 4.2(d).⁵

Thus, we agree with the ALJ that Blue did not contract with OPM to provide its policyholders with medical services. Blue contracted with OPM to provide reimbursement to its policyholders for medical care costs.

Unlike the ALJ, however, we do not reach the question whether Blue's non-existent obligation to deliver medical services to Blue enrollees did or did not constitute partial performance by Bridgeport of Blue's contract with OPM or was "necessary to performance" of the prime contract. This is because the first premise of OFCCP's argument fails – Blue has no commitment to OPM to provide its policyholders with medical care. Therefore, questions concerning the terms "necessary to" or "part performance of" do not arise in this appeal.

CONCLUSION

Accordingly, we hereby issue the final order in this case, granting summary judgment to the Respondent, Bridgeport Hospital, and dismissing OFCCP's citation against Bridgeport.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

⁵ OFCCP's argument does not take into account the addendum to the contract, which clarifies the specific obligations that Blue assumed.