U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

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

PLAINTIFF,

v.

BANK OF AMERICA,

DEFENDANT.

ARB CASE NO. 00-079

ALJ CASE NO. 97-OFC-16

DATE: March 31, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:

Gary M. Buff, Associate Solicitor; Beverly Dankowitz, Esq., *U.S. Department of Labor, Washington, D.C.*

For the Defendant:

Richard F. Kane, Esq., Bruce M. Steen, Esq., *McGuire, Woods, Battle and Booth, LLP, Charlotte, North Carolina*

DECISION AND ORDER OF REMAND

The Regional Director of the Office of Federal Contract Compliance Programs (OFCCP) in Atlanta notified the President and Chief Executive Officer of NationsBank[1] in Charlotte, North Carolina on November 24, 1993, that NationsBank's Charlotte facility had been selected for a compliance review under all three contract compliance laws, Executive Order No. 11,246, 3 C.F.R. § 339 (1964-1965), reprinted as amended in 42 U.S.C. § 2000e note (2000), Section 503 of the Rehabilitation Act of 1973, as amended,

[1] NationsBank and Bank of America (BOA) merged after the filing of the complaint in this case. Therefore, this decision refers to the bank as either NationsBank or BOA.

29 U.S.C. § 793 (2002) and Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended, 38 U.S.C. §§ 4211-4212 (2000). Such reviews are conducted periodically to determine whether covered government contractors are in compliance with the affirmative action and nondiscrimination requirements of those laws and their implementing regulations. *See* 41 C.F.R. § 60 (2002). The Regional Director requested that NationsBank submit its affirmative action program and other documentation for review. Exhibit C, Letter of Nov. 24, 1993 from OFCCP Regional Director Carol A. Gaudin to NationsBank President and Chief Executive Officer Hugh L. McColl. NationsBank provided the requested information and OFCCP conducted an on-site review in April 1994. Administrative Law Judge (ALJ) Recommended Order Granting Defendant's Motion for Summary Decision (Recommended Order) at 7. OFCCP notified NationsBank in October 1994 of its finding that the bank had violated Executive Order No. 11,246 by discriminating against minority applicants for hiring in entry level positions.

Soon after informing NationsBank of the alleged violations found in the Charlotte office, OFCCP decided to initiate additional compliance reviews at NationsBank offices in Tampa, Florida and Columbia, South Carolina. NationsBank refused to acquiesce to those reviews. In March 1995, it filed an action in the United States District Court for the Western District of North Carolina, alleging that the selection of its facilities in Tampa and Columbia violated the Fourth Amendment.

In February 1997, NationsBank amended the complaint it had filed in federal district court (contesting OFCCP's selection for review of its Tampa, Florida and Columbia, South Carolina facilities) to allege that OFCCP's selection of the Charlotte facility for review violated the Fourth Amendment. The district court granted NationsBank's request for a preliminary injunction restraining OFCCP from prosecuting an enforcement action against NationsBank for the alleged violations found in the compliance review of the Charlotte facility. But on April 6, 1999, the United States Court of Appeals for the Fourth Circuit granted summary judgment to the Department of Labor and vacated the District Court's entry of the preliminary injunction on the grounds that NationsBank first had to exhaust its administrative remedies.

On July 18, 1997, OFCCP filed the complaint in this proceeding, requesting that NationsBank comply with the Executive Order or be debarred (except for contracts for government deposits or share insurance). Bank of America (BOA) moved for summary decision on the grounds that OFCCP violated the Fourth Amendment when it selected the Charlotte facility for review. A U.S. Department of Labor ALJ granted that motion. He concluded that the selection of the Charlotte facility for review was not based on an administrative plan containing neutral criteria and was arbitrary and unconstitutional. Recommended Order at 15. The record for the summary judgment decision consisted of

selected excerpts from depositions and documents produced in the course of discovery in the federal district court proceeding, the motion for summary judgment, and the parties' briefs and findings of fact. The ALJ held no hearing but issued a Recommended Order based on this record alone.

OFCCP filed exceptions to the ALJ's Recommended Order with this Board. We remand because we determine that genuine issues of material fact exist and therefore summary judgment was improperly granted.

BACKGROUND

In January 1992, OFCCP issued the Equal Employment Data System (EEDS) User's Manual, for use by its regional and district offices in "selecting supply and service contractors for compliance reviews." The EEDS included "specific procedures and criteria for making decisions and a series of reports that provide the data on which selection decisions are to be based." Exhibit D, section titled "Equal Employment Data System." The EEDS provided that "[a]pproximately 1 percent of the selections are made from [a] random sample, 84 percent from the list of flagged establishments, and 15 percent discretionary." *Id.* at 2. The EEDS directed that "[w]hen the district office receives its fiscal year program, it should decide how many supply and service reviews must be scheduled and follow [the listed] steps." *Id*. at 2-3. Among those steps was the following:

> Fifteen Percent Discretionary Selections, District Office Directors may select up to 15 percent of their supply and service compliance reviews from among contractors other than those flagged on the rank listing [and] [w]hen deciding, the Director should consider [five factors, including] [e]xpansion of employment in an industry or at specific locations.

Id. at 5.

In September 1993, the Acting Director of OFCCP transmitted the FY 1994 Operational Plan to all OFCCP Regional Directors. He noted in his transmittal memorandum that "the most significant change this year is that, Corporate Management Reviews are now a planned action." Sept. 13, 1993 memorandum from Leonard J. Biermann, Acting Director of OFCCP to Regional Directors, Exhibit I, Defendant's [OFCCP] Response to NationsBank's First Request for Production of Documents, documents produced in response to Request for Production No. 11.[2] The Plan itself

[2] OFCCP had decided as early as 1991 to conduct corporate management reviews. *See* Deposition of Harold M. Busch, April 15, 1997, Exhibit K at 54.

established four priorities in the enforcement area for FY 1994, the first of which was Corporate Management Reviews. The Plan stated that one of OFCCP's priorities was "[e]liminating the attitudinal and institutional barriers to the advancement of minorities and women in corporate management positions and executive careers (Corporate Management Reviews)." The Plan elaborated that, in the area of "Compliance Actions," specifically "Compliance Reviews," one of the "Special Initiatives" was "Corporate Management Reviews."

To implement the Corporate Management Review (CMR) initiative, OFCCP's Assistant District Director in Charlotte, North Carolina, Paul Deavers, selected "about 3-5" corporations from a list of companies with corporate headquarters in the Charlotte OFCCP district and provided these to his District Director, Jerome Geathers.[3] Exhibit F, Deposition of Paul S. Deavers of Oct. 29, 1996, at 32. Deavers' selections were based on criteria he had received from Geathers, namely that the selected employers have their corporate headquarters in the Charlotte district, that they have at least 5,000 employees, but they have not been the subject of a compliance review in the past 36 months. *Id.* at 30-34.

Geathers testified that the criteria he had been given for selecting potential subjects of a corporate management review were "that the corporate headquarters must be in my district, it must have 5,000 employees, and it must be a multi-establishment facility."[4] Deposition of Jerome Geathers of Sept. 5, 1996, Exhibit H at 102-103. Because of budgetary problems, Geathers narrowed the potential subjects further – to companies in the city of Charlotte and in the Mecklenberg County area. This meant that Geathers, Deavers, and the compliance officer would not have to travel and stay overnight. *Id*. at 103-105. In addition, Geathers wanted to be personally involved in the review, the first CMR to be conducted in his district. Geathers testified that he been instructed to select two companies for review and present one of them at a meeting at regional headquarters in Atlanta, keeping the other as a backup. He selected Duke Power Company and NationsBank, in that order, *id.*, and attended the meeting in Atlanta with the Regional Director in the fall of 1993. *Id*. at 101.

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[3] Deavers did not recall the source of the list (a computer printout of contractors with corporate headquarters in his district) but assumed it was an internal OFCCP document. Exhibit F at 31-32.

[4] Harold Busch, whose position is not identified in this record (but who is identified in *Beverly Enterprises, Inc. v. Herman*, 130 F. Supp. 2d 1, 10 (D.D.C. 2000), as the OFCCP National Office Director of program management), testified in his deposition that companies selected for corporate management reviews had to have at least 4,000 employees and be on the Fortune 1000 list. Exhibit K at 53.

The Regional Director, Carol Ann Gaudin, testified that, at that meeting in Atlanta, she decided not to select Duke Power because another district in the Atlanta region had already selected a utility for review. She selected NationsBank because "it was one of the top five largest corporations in our region and it had not been reviewed as NationsBank as such, the corporate headquarters. We knew we had jurisdiction, and we thought that there would be a lot of opportunities for affirmative action there because it was a growing corporation." Deposition of Carol Gaudin of Dec. 17, 1996, Exhibit M at 74-75. On November 24, 1993, Gaudin sent the letter to NationsBank scheduling the compliance review.

THE ALJ'S DECISION

The ALJ stated that the search of NationsBank's Charlotte headquarters was made pursuant to Executive Order No. 11,246, as amended. He recognized that the contract between NationsBank and the government included a clause providing consent to searches conducted to determine compliance with the Executive Order, citing 41 C.F.R. § 60-1.4(a)(5):

> The contractor will furnish all information and reports required by Executive Order 11246 . . . 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.

He also noted that the Secretary had held, in a case arising under Section 503 of the Rehabilitation Act of 1973, "that the Plaintiff (OFCCP) has the authority under Executive Order 11246" to conduct a search of a defendant's records because the defendant "had consented to be searched by the government for the administration and enforcement of Section 503." *Id.* at 10, citing *OFCCP v. City Pub. Serv. of San Antonio*, 1989 OFC-5 (Sec'y Jan. 18, 1995). The ALJ suggested that, because the search in that case had been initiated in response to a complaint, the Secretary's decision did not stand for the proposition that consent alone was sufficient.

In addition, he stated, "Courts have held that any consent given was consent only to searches that comport with the Fourth Amendment's constitutional standards of reasonableness." Recommended Order at 11. According to the ALJ, "[t]herefore, the reasonableness of the search in this case must be established upon a showing that the search is pursuant to an administrative plan containing neutral criteria." Recommended Order at 10, citing *United States v. New Orleans Pub. Serv., Inc.*, 723 F.2d 422, 426 (5th Cir. 1984) *(also known as NOPSI III*). The ALJ then set about determining whether this requirement had been met.

The ALJ found that at the time the Charlotte facility was chosen, OFCCP's administrative plan for the selection of contractors for compliance reviews was the EEDS. He based this finding, in part, on an April 1995 Policy Alert issued by the then Deputy Assistant Secretary reminding "that the criteria and procedures described in the January 1992 . . . (EEDS) Manual are to be used to select contractors for service and supply compliance reviews." ALJ Recommended Order at 12. Because OFCCP did not specifically dispute the Policy Alert's applicability, he considered this finding undisputed for purposes of summary decision. *Id.*

Further, the ALJ found that there was no genuine issue of material fact with respect to whether OFCCP followed its administrative plan containing specific neutral criteria (EEDS Manual). He stated:

> Plaintiff's description of the procedures used to select Defendant for review clearly do not follow that described in the EEDS Manual. Defendant's assertions of fact numbered 5 through 9 make a powerful case to establish that the Plaintiff did not follow the procedures of the EEDS Manual when it selected Defendant for review. These facts are fully supported by the record submitted in support of the motion for summary decision and are not addressed in Plaintiff's response.

Recommended Order at 12.

BOA's asserted facts were that the EEDS Manual provided for only three types of compliance reviews, "random selections," "selections based on analysis or flagged reviews," and "discretionary reviews," but that OFCCP Charlotte District Director admitted, or OFCCP's own documents showed, that BOA did not fall under any of these categories.

Moreover, he found that the selection process actually used by OFCCP "was not neutral, but was arbitrary to the point of being unconstitutionally unreasonable." *Id.* at 12-13. As support for those findings, the ALJ cited BOA's statements of fact numbered 11 through 21 and its attached exhibits. In particular, he noted the affidavit of Charles J. Cooly (Defendant's Personnel Officer) describing a December 12, 1994 telephone conversation in which Gaudin allegedly said that banks are "notorious" for having the "worst record of affirmative action." *Id.* Based on the affidavit, and his determination that no evidence in the record "exists to rebut the assertion that the 'notoriety' of banks . . . was not [sic] a factor in the selection process," he specifically found that selecting NationsBank's Charlotte office for review "was in part due to Plaintiff's perception that 'banks have notoriously poor affirmative action records.'" *Id.* at 13-15. He also found

that the selection was "because the Defendant happened to be located in Charlotte, North Carolina." *Id.* at 15.

Accepting BOA's assertion that "there were approximately thirty contractors which satisfy the threshold criteria for 'corporate management review' within the Charlotte District," and that "twenty of those are located either within Charlotte's city limits or within a short driving distance," the ALJ stated that OFCCP had not explained or documented "how the list was narrowed to the two candidates selected by Mr. Geathers." *Id.* at 14. He found that "[n]o documentation exists for the process used in the selection of Defendant for compliance review, which was in large part as a result of unreviewable discretion." *Id.* According to the ALJ, "such a selection process cannot be found to be part of an 'administrative plan containing specific neutral criteria.'" *Id.*

After making these findings of fact, the ALJ determined that "no genuine issue of material fact exists with respect to whether the selection of Defendant for compliance review was reasonable" and that the Defendant's motion for summary judgment must be granted. He recommended that OFCCP's complaint be dismissed. *Id.* at 15.

POSITIONS OF THE PARTIES ON APPEAL

1. OFCCP's Position

OFCCP argues that BOA consented to this specific search and thereby made it valid. Therefore, it contends, the Fourth Amendment requirements applied by the ALJ are not relevant.[5] Plaintiff's Exceptions to the Recommended Order (Plaintiff's Exceptions) at 7; see also, *id*. at 8 ("even if OFCCP's selection of the Charlotte facility for review would not otherwise have comported with Fourth Amendment standards, Bank of America's consent has rendered it lawful.").

OFCCP also dismisses as inapposite cases holding that a prior contractual consent to a search constitutes consent only to a reasonable search. OFCCP asserts "Bank of America consented to this particular compliance review by voluntarily permitting OFCCP access to its Charlotte facility." *Id*. at 10.[6] OFCCP argues that "Bank of America can consent to searches which may not meet the Fourth Amendment 'probable cause' standard applicable to administrative searches" and that the ALJ's holding that the Bank may only consent to such reasonable searches should be overruled. *Id.* at 11. OFCCP argues further that the Bank's consent to a search here was freely and voluntarily

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[5] Before the Board, OFCCP did not argue, as it did before the ALJ, that the search was justified because it was conducted pursuant to the plan containing neutral criteria.

[6] OFCCP argues only that BOA gave contemporaneous consent to the search.

given, meeting all the standards for voluntariness established by the Supreme Court and other courts.

2. Bank of America's Position

BOA asserts it did not give its free and voluntary consent to the search of its Charlotte facility, because its consent "was the product of acquiescence to a claim of lawful authority and/or the result of implied coercion." Bank of America's Opposition to Plaintiff's Exceptions to the Recommended Order (BOA Opposition) at 4. BOA contends that the compliance review scheduling letter, Exhibit C, notified it that the Charlotte facility had been selected for review pursuant to law and that this implied OFCCP had the authority to search and seize BOA's documents and property. In other words, this letter asserted the power to conduct a review "under color of badge," *id*. at 5, and BOA's acquiescence to it could not have been voluntary.

Further, BOA argues, the scheduling letter warned that refusal to comply with OFCCP's directions could result in initiation of enforcement proceedings leading to the imposition of significant sanctions, including contract cancellation and debarment. These threats, it contends, left BOA with no choice but to submit to the review. *Id*. at 6. BOA analogizes these circumstances to cases in which "a government official demands entry under color of authority [in which] the occupant has no right to resist the search." It argues courts have held such consent was not voluntarily given. *Id*. at 7.

BOA claims it did not object in 1993 to the scheduling of the review of the Charlotte facility because it did not know, until March 1995, about the suspicious pattern of OFCCP's selection of BOA facilities for review and the Regional Director's "outrageous and unsubstantiated bias" against banks. *Id.* at 7-8.[7] BOA also asserts that prior experience with OFCCP's compliance reviews did not suggest that OFCCP violated the Fourth Amendment in selecting BOA for review. The totality of all these circumstances, BOA submits, demonstrates that it did not voluntarily consent to the compliance review at the Charlotte facility.

Alternatively, BOA argues that any consent it gave was, as the ALJ held, only consent to a reasonable investigation within the Fourth Amendment – that is, one in which BOA had been chosen according to constitutional standards. BOA also urges the Board to reject OFCCP's position that BOA could have refused to consent to the review and litigated its Fourth Amendment claim in the resulting enforcement action. This, it contends, would have put BOA in an "impossible" position: either risk the imposition of

[7] Although Gaudin allegedly made her statement about banks in 1994, Cooley did not execute his affidavit, and BOA did not amend its complaint to challenge the review of the Charlotte office, unti1 1997.

serious sanctions in order to test the constitutionality of the search, or permit the search when BOA had no evidence of a violation of the Fourth Amendment and by doing so relinquish its rights. *Id*. at 1-13.

ISSUES

We consider the following issues:

(1) Whether genuine issues of material fact exist and

(2) Whether BOA was entitled to judgment as a matter of law on the grounds that the compliance review violated the Fourth Amendment because

A) BOA did not voluntarily consent to the compliance review of its Charlotte facility or

B) The Charlotte facility was not selected for review pursuant to an administrative plan containing neutral criteria.

JURISDICTION AND SCOPE OF REVIEW

The ARB has jurisdiction in this matter pursuant to Sections 208 and 209 of Executive Order No. 11,246, and the regulations implementing the contract compliance laws, 41 C.F.R. §§ 60-1.26, 60-250.64, and 60-741.65, and 41 C.F.R. § 60-30 (2002). The ALJ's decision is a recommendation, and the Board has plenary power to determine whether summary judgment should be granted. 41 C.F.R. §§ 60-30.29 and 60-30.30; Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (October 17, 2002).

STANDARDS FOR SUMMARY DECISION

This matter is before the Board on OFCCP's exceptions to the ALJ's Recommended Order Granting Defendant's Motion for Summary Decision.[8] The standards for granting summary judgment under the OFCCP Rules of Practice are that "the judgment sought shall be rendered forthwith if the complaint and answer, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

[8] The ALJ used the terms "summary decision" and "summary judgment" interchangeably; the ALJ Rules of Practice, 29 C.F.R. § 18, use the term "summary decision," but the applicable standard is the same as in the OFCCP Rules of Practice, *compare* 41 C.F.R. § 60-30.23(e) *with* 29 C.F.R. § 18.40(d), and we will use the terms in the OFCCP Rules.

judgment as a matter of law." 41 C.F.R. § 60-30.23. In addition, the record must be viewed in the light most favorable to the non-moving party. *See OFCCP v. CSX Trans., Inc.*, No. 88-OFC-24, slip op. at 12 (Ass't. Sec'y Oct. 13, 1994) ("In ruling on a motion for summary judgment it is not the function of the court to resolve existing factual issues through a trial by affidavits. . . . The court is to determine whether a genuine issue of material fact exists, viewing all evidence and factual inferences in the light most favorable to the party opposing the motion. Ramirez v. National Distillers & Chemical Corp., 586 F.2d 1315, 1318 (9th Cir. 1978) (citations omitted). See U.S. v. Diebold, Inc., 369 U.S. 654 (1962)."(internal quotation marks omitted)). For the reasons discussed below, we conclude that this record presents genuine issues of material fact, and accordingly we remand this matter to the ALJ for further proceedings consistent with this order.

DISCUSSION OF APPLICABLE LAW

1. The Fourth Amendment

We start with the constitutional context in which searches must be examined. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment requires balancing competing interests.

> It is well established that the Fourth Amendment protects a citizen's legitimate expectation of privacy in the "invaded place." *Minnesota v. Olson*, 495 U.S. 91, 95 (1990). It is also well-established that "[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness,' ... [and] [w]hether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interest." *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652-53 (1995).

S.L. v. Whitburn, 67 F.3d 1299, 1307 (7th Cir. 1995).

The history, context and case law under the Fourth Amendment make it clear that

its protection applies to businesses as well as private individuals and their residences, although the strictures on government intrusion into businesses vary significantly from intrusion upon a person or his home. "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See v. City of Seattle*, 387 U.S. 541, 543 (1967).

Indeed, the Fourth Amendment's protection of business owners is firmly rooted in the American experience:

> The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment, and the American colonial experience. An important forerunner of the first 10 Amendments to the United States Constitution, the Virginia Bill of Rights, specifically opposed "general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed." The general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution. The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists. "[T]he Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance . . . [that] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." *United States v. Chadwick*, 433 U.S. 1, 7-8, 97 S.Ct. 2476, 2481, 53 L.Ed.2d 538 (1977). *See also G. M. Leasing Corp. v. United States*, 429 U.S. 338, 355, 97 S.Ct. 619, 630, 50 L.Ed.2d 530 (1977). Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence.

Marshall v. Barlow's Inc., 436 U.S. 307, 311-12 (1978).

2. Application of the Fourth Amendment to Administrative Searches

The Fourth Amendment's requirements clearly apply to a search of a business by an administrative agency. *Barlow's* is one of the leading Supreme Court decisions on the constitutional strictures applicable to administrative searches. There, a provision of the Occupational Safety and Health Act gave OSHA the authority to inspect establishments without a warrant, but the Court held that "the Act is unconstitutional insofar as it

purports to authorize inspections without warrant or its equivalent." *Id.* at 320.

The Court held that inspections of business premises under OSHA may be conducted only where there is probable cause. However, it stated that probable cause for administrative search could be based on "a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'" *Id*. The Court explained that:

> A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.

Id. at 321. (Citations and footnotes omitted).

Later in *Barlow's*, the Court rephrased the purpose of requiring a warrant for OSHA administrative searches: "[a] warrant . . . would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." *Id*. at 323. The Court rejected the government's assertion that the warrantless search provisions in other regulatory statutes would be unconstitutional if warrants were required for OSHA searches, saying "[t]he reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute." *Id.*

3. Administrative Searches Pursuant to Executive Order 11,246

The Supreme Court's interpretation of Fourth Amendment requirements for administrative searches has been specifically applied to investigations under Executive Order No. 11,246. In *United States v. Mississippi Power & Light Co.*, 638 F.2d 899 (5th Cir. Unit A 1981) (*MP&L*) (also called *NOPSI II*),[9] the Fifth Circuit interpreted *Barlow's*

[9] This case consolidated consideration of two cases involving proposed searches of companies doing business with the federal government, New Orleans Public Service, Inc. (NOPSI) and Mississippi Power and Light (MP&L). Unlike the instant case, the companies in *MP&L* did not contractually agree to be subject to investigations of their compliance with the Executive Order. The Fifth Circuit initially considered whether there could be implied consent to waive Fourth Amendment rights, based on the companies' conduct in furnishing services to the government. However, it concluded it did not need to reach that question because it found that the regulatory scheme for the Executive Order inspection process met Fourth Amendment requirements.

as not requiring a warrant for administrative searches in all circumstances, holding 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." 638 F.2d at 907. The court determined that the Executive Order No. 11,246 process satisfied the requirements of the Fourth Amendment because the regulatory scheme provided for resort to the courts before an inspection is conducted. The court held that after that initial determination, "the specific search that is sought [must be measured] against the broad Fourth Amendment test of 'reasonableness.'" *Id.* The court then specified the elements of a reasonable search:

> One element of the question is whether the proposed search is authorized by statute, and a second is whether it is properly limited in scope. . . . A third element should be an examination of how the agency chose to initiate this particular search. The search will be reasonable if based either 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. It is important that the decision to enter and inspect . . . not be the product of the unreviewed discretion of the enforcement officer in the field.

Id. at 907-908 (quoting *See v. Seattle*, 387 U.S. 541, 545 (1967) (citations and internal quotations omitted). [10]

4. *Consent Exception to the Fourth Amendment*

Consent is an exception to the requirement that searches be conducted under the authority of a warrant or its equivalent. The Supreme Court held in *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973):

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[10] The court remanded the cases for determinations as to whether these constitutional requirements were met. In a subsequent case, *United States v. New Orleans Pub. Serv., Inc.,* 723 F.2d 422 (5th Cir. 1984) *(NOPSI III*), it held that NOPSI was not selected for review pursuant to neutral criteria. The MP&L litigation concluded when the District Court, on remand, found that OFCCP had developed an administrative plan with neutral criteria but it was not followed in selecting MP&L for review. *United States v. Mississippi Power and Light Company*, 33 Fair Empl. Prac. Co. (BNA) 1356, 1360 (S.D. Miss. 1984).

> It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is "per se unreasonable . . . subject only to a few specifically established exceptions." . . . It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.

(Citations omitted.) *See also Freeman v. City of Dallas*, 242 F.3d 642, 668 (5th Cir. 2001) ("in the absence of consent or exigent circumstances, administrative searches or seizures of private houses or buildings without a judicial warrant violate the Fourth Amendment. . . ."); *United States v. Griffin*, 555 F.2d 1323, 1324 (5th Cir. 1977) ("Warrantless searches are per se unreasonable subject to a few narrowly drawn exceptions. . . . One such exception is the knowing and voluntary consent of the person subject to the search.").

5. Requirements for proof of consent to search

Schneckloth is also the leading Supreme Court case on what constitutes consent to a search. In that case the Court held:

> [W]hen the . . . State attempts to justify a search on the basis of . . .consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

412 U.S. at 248-49.

Consent can be established by proof of contemporaneous consent at the time of the actual search. Evidence of a prior agreement to permit a search for specific documents and of specific places in connection with obtaining a government benefit or contract may also establish consent.

A. Contemporaneous consent

In cases involving challenges to administrative searches, courts have held that when contemporaneous consent to the search was given, the search was lawful. In *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575 (1985), for example, the

D.C. Circuit held that the employer consented to a search broader than the parameters of a complaint filed with OSHA. It found evidence of consent in the fact that Simplex's safety engineer consulted with counsel before permitting the search, indicating he knew he could object at any time to the wider search, but remained silent as the inspection proceeded. 766 F.2d at 581. *See also* cases cited in *Simplex* at 766 F.2d 581-82: *Stephenson Enterprises, Inc. v. Marshall*, 578 F.2d 1021, 1023-24 (5th Cir. 1978) (company consented to walk-through inspection when its representative accompanied inspector and failed to raise any objections); *Sec'y of Labor v. Concrete Constr. Co*., 1992 O.S.H.D. (CCH) P 29,681, 1992 WL 117120, at *3 (O.S.H.R.C.) ("there is no indication that [the OSHA inspector coerced the foreman] or misled [him] in any way. [The OSHA inspector] simply explained that he was on the worksite to conduct an inspection, and [the foreman] made no further inquiry."). *See also Lake Butler Apparel Co. v. Sec'y of Labor*, 519 F.2d 84, 88 n.14 (5th Cir. 1975) (holding that a consensual inspection exists "where the compliance officer presented himself at the plant in the same manner as might any other government official and the [employer's representative] had the same right of refusal," and distinguishing cases in which the search is not lawful because consent was given only after law enforcement officials made misrepresentations regarding their authority to conduct the search); *Sec'y of Labor v. Sanders Lead Co.*, 1993 O.S.H.D. (CCH) P 29,980, 1993 WL 840006 (O.S.H.R.C.) (consent to inspection voluntarily given where employer had previous experience with OSHA inspections and had benefit of professional consultant and legal counsel at all stages of inspection). *Cf. Cody-Zeigler, Inc. v. Sec'y of Labor*, 2002 WL 595167, 19 O.S.H. Cas. (BNA) 1777, 2002 O.S.H.D. (CCH) P 32,559, (D.C. Cir. Mar. 15, 2002) (employer's objection under OSHA Section 8(a) and Fourth Amendment to manner in which it was selected for inspection, after unsuccessful challenges to five citations, rejected because employer consented to 12 inspections); *Donovan v. Carolina Stalite Co*., 734 F.2d 1547 (D.C. Cir. 1984) (company effectively consented to inspection under Mine Safety and Health Act when upper-level managers, having heard inspector's interpretation of statute, had ample opportunity to familiarize themselves with its procedures); *In the Matter of Trinity Industries, Inc*., 2002 WL 826938 (Environmental Protection Agency, Office of the Administrator, April 24, 2002) (voluntary consent to inspection shown by receipt of prior notice, presentation of credentials on day of inspection, explanation of purpose of inspection, and signature by company of Notice of Inspection.).[11]

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[11] BOA has also cited to us *Donovan v. A. A. Beiro Const. Co*., 746 F.2d 894 (D.C. Cir.1984), in which a construction company, after initially objecting to and preventing an OSHA inspection of the portion of a construction site on which it was working, did not resist after OSHA inspectors returned and claimed authority to inspect based on consent from the site's owner. The D.C. Circuit's statements regarding Beiro's consent to the inspection while interesting, are *dicta*. The court's holding was that Beiro had no expectation of privacy in the common and open areas of the site (and therefore citations relating to those areas and to what could be seen in plain view were lawful), and that the ALJ's decision dismissing (based on language in the pertinent regulation) OSHA's citations

B. Consent as condition of receiving government contracts or benefits

(1) Cases Holding Consent by Contract Renders Search Lawful

In cases arising under a variety of government programs, courts also have held that consent given as a condition of receiving government contracts or benefits precludes an objection to a search on Fourth Amendment grounds. *See, e.g., United States v. Brown*, 763 F.2d 984, 987-88 (8th Cir. 1985) (pharmacy "explicitly consented to reasonable warrantless inspections" of its records by entering into contract; warrantless inspection which occurred during business hours and in presence of defendant pharmacist did not violate Fourth Amendment); *Zap v. United States*, 328 U.S. 624 (1946) (where government contract required access to contractor's records, Navy contractor had no Fourth Amendment claim to privacy in these mandatory records).

(2) Cases Holding Consent by Contract Only Authorizes Reasonable Search

Several courts have held that the process for selecting the subject of the search must be reasonable, even when the subject gave prior consent by contract to be searched. Those courts have reasoned that the contractual consent constituted only consent to a constitutionally reasonable search.

In *First Alabama Bank of Montgomery v. Donovan*, 692 F.2d 714 (1982), the Eleventh Circuit considered the constitutionality of an OFCCP compliance review under all three contract compliance laws. First Alabama Bank was covered under these laws by virtue of its contracts as a depository of federal funds and an issuer and paying agent of United States savings bonds.[12] In those contracts, it agreed to be bound by the provisions of Executive Order No. 11,246 and Department of Labor regulations, including the requirements to furnish all information and reports required by the Order and regulations and to permit access to its books, records and accounts for purposes of investigation of its compliance. 692 F.2d at 716, 719; *see* Executive Order No. 11,246, Section 202(5) and 41 C.F.R. §§ 60-1.7 and 60-2 (1992).[13]

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relating to flammable items stored in Beiro's tool trailer, was supported by substantial evidence.

[12] BOA admitted in its answers to OFCCP's interrogatories that it was a depository of government funds and an issuing and paying agent for United States savings bonds and that it was a covered government contractor.

[13] *See also Beverly Enterprises, Inc. v. Herman*, 130 F. Supp. 2d 1, 14 (D.D.C. 2000) ("Executive Order 11,246, which requires companies that contract with the federal government to maintain an affirmative action program, has been widely held to authorize administrative searches to confirm compliance with its mandates.").

The bank argued that its contractual agreement did not include consent to searches that are unreasonable or otherwise unconstitutional.[14] The court agreed and held that the bank expressly consented only to reasonable searches, but that the proposed search was reasonable. 692 F.2d at 720, 721.

The court first set forth "general considerations" relevant to the case. 692 F.2d at 720. It found "most significant . . . the finding of the district court that the search would have imposed 'no real burden' on the bank [because] the records in question either already had been prepared or would have been prepared in any event," and that this was relevant to the reasonableness of the search.

In addition, the Eleventh Circuit found that First Alabama Bank's "express and voluntary" agreement to the record keeping and access requirements of the Executive Order, as well as the low burden on the bank in providing the information, decreased the strength of the bank's privacy interest. The court contrasted that low privacy interest with the "relatively strong public interest in providing for full equal employment opportunity." *Id*. at 720-21.

The court then examined the particular compliance review more closely. The court found it was clear that OFCCP met the first two of the three *MP&L* tests for evaluating the reasonableness of an administrative search, since searches conducted pursuant to Executive Order 11,246 are within proper statutory legal authority and are properly limited in scope. *Id.* at 721. Turning to the third element (which in that case was whether the search was pursuant to an administrative plan containing neutral criteria), the court noted that OFCCP's plan to focus compliance reviews on the banking industry and on banks with more than 50 employees and over $50,000 in government contracts "seems neutral on its face." *Id.*[15] It then rejected the bank's attack on the plan's reasonableness, finding that DOL's decision to pursue the investigation met Fourth Amendment requirements, despite the fact that the bank had been reviewed previously. *Id*. at 721-22.[16]

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[14] The government had argued that the bank waived any Fourth Amendment right to object to a compliance review by signing contracts in which it agreed to accept the obligations of the Executive Order. The court found, nonetheless, that the government did not controvert the bank's assertion that it had consented only to reviews which employ reasonable searches under the Fourth Amendment. It stated that, in any event, it would not be inclined to read the contract otherwise. 692 F.2d at 719.

[15] The bank did not dispute the government's contention that DOL's plan was neutral on its face.

[16] The bank contended that the plan was not neutral because the government had selected it

Similarly, in *United States v. Harris Methodist Fort Worth*, 970 F.2d 94 (1992), the Fifth Circuit held that a hospital that had signed agreements to comply with Title VI of the Civil Rights Act of 1964 consented to administrative searches "that comport with constitutional standards of reasonableness." 970 F.2d at 100. Relying primarily on the so-called *NOPSI* (*New Orleans Public Service, Inc.*) trilogy,[17] including *MP&L*, the court held that the crucial question was how Harris Methodist was selected for the search. It found that the selection was arbitrary because the regional HHS official who made the selection admitted there was no written administrative plan establishing criteria for selection, and he could not explain how the several unwritten criteria he claimed to have in mind when making the selection "militated" in favor of selecting Harris Methodist. *Id*. at 102. The court detailed how several of the criteria actually supported selection of hospitals other than Harris Methodist and the regional official's concessions that that was the case "suggested that his decision was arbitrary [and] slipshod." *Id.* at 102-103. The court found that the regional official "acted arbitrarily and without an administrative plan containing neutral criteria." *Id*. at 103.

Beverly Enterprises, Inc. v. Herman, 130 F. Supp. 2d. 1 (D.D.C. 2000), raised issues very similar to those before us. There, the United States District Court for the District of Columbia rejected a government contractor's argument that its selection for a Corporate Management Review (CMR) by OFCCP under Executive Order No. 11,246 violated the Fourth Amendment. As here, an OFCCP District Office was instructed to select one contractor in its geographical area for a CMR from a computer-generated list of companies that had corporate headquarters in its district. Beverly claimed it had not been selected according to a neutral administrative plan. Beverly made many of the same arguments advanced by BOA here: that the local OFCCP official should have included more than three companies on his "candidate list" for a CMR; that many other companies in the area were qualified to be on the list; and that OFCCP had issued a memorandum stating that it was using the EEDS computer selection system. 130 F. Supp. at 9-10.

Applying *Barlow's* and *MP&L*, the District Court held that Beverly was properly selected because OFCCP's criteria for inclusion of companies on the computerized list

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even though it had previously been reviewed. The court found that there were factors present which made the decision to continue with the investigation sufficiently reasonable to meet constitutional requirements. 692 F.2d at 722.

[17] *United States v. New Orleans Pub. Serv., Inc.*, 723 F.2d 422 (5th Cir. 1984) (NOPSI III); *United States v. Mississippi Power & Light.*, 638 F.2d 899 (5th Cir.) (NOPSI II); and *United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459 (5th Cir.) (NOPSI I) *rehearing denied*, 559 F.2d 30 (1977), *vacated, New Orleans Pub. Serv., Inc. v. United States*, 436 U.S. 942 (1978).

and for striking companies from the list by the OFCCP local official were neutral.[18] *Id*. at 15. The court also held that OFCCP actually applied neutral criteria in selecting Beverly. *Id*. at 15-16. It implicitly rejected Beverly's arguments that more companies should have been on the CMR candidate list because many other companies in the area qualified to be on the list, and that OFCCP had another selection procedure, the EEDS, that should have been followed.

ANALYSIS

1. Existence of genuine issues of material fact

A. Voluntary contemporaneous consent

The case law clearly establishes that voluntary contemporaneous consent to search constitutes an exception to Fourth Amendment requirements and allows a search to proceed without a warrant or its equivalent (see discussion above at 13-14). If, as OFCCP argues, BOA voluntarily consented to the compliance review, the requirements of the Fourth Amendment would be satisfied, and further consideration of the existence of a plan with neutral criteria would be unnecessary.[19] Therefore, even if we were to adopt the ALJ's finding that the selection of the Bank's Charlotte headquarters was not made pursuant to a plan with neutral criteria, that alone would not entitle BOA to dismissal of this case. The ALJ erred by not recognizing that contemporaneous consent would remove the search from the requirements of the Fourth Amendment. He did not examine the facts relevant to contemporaneous consent and apply the pertinent law. We will now do so.

BOA urges us to find, based on the scheduling letter alone, that it could not have given voluntary contemporaneous consent, and that OFCCP cannot succeed as a matter of law. That would require us to determine, as BOA suggests, that the scheduling letter can only be construed as coercive or as misrepresenting OFCCP's authority. Moreover, we would have to find that the language of the letter was so coercive or so misrepresented OFCCP's actual authority with respect to the instant review, that any subsequent consent could not have been voluntary. The evidence submitted by BOA on this issue has not indisputably established that that was the case.

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[18] The court in *Beverly* applied the requirement for a plan with neutral criteria to the Executive Order compliance review without discussing the effect of prior contractual consent.

[19] We consider only contemporaneous consent, since OFCCP has not raised BOA's contractual consent.

We note that the scheduling letter preceded the actual review by more than thirty days, it is susceptible of interpretation both as to content and effect (see OFCCP's Exceptions to the Recommended Order at 17-21), and factors other than the letter could have entered into whether voluntary contemporaneous consent was given.[20] [21] Also, there is no evidence that the Bank could not have inquired as to its selection, leaving aside the question of challenging it. Thus, we cannot find on this record that the scheduling letter precluded the Bank from giving voluntary contemporaneous consent. We therefore remand this case for hearing. The Board expects that the evidence submitted on remand will fully establish the totality of the circumstances pertinent to whether consent was voluntarily given to the compliance review. [22]

As noted above, we would not dismiss this case even if we found the OFCCP review was not conducted pursuant to a plan with neutral criteria. Whether there was such a plan remains a relevant concern because, if OFCCP had such a plan and implemented it, the motion for summary judgment should be denied on that ground alone as well. We therefore next address that issue.

B. Search pursuant to an administrative plan containing neutral criteria

Genuine issues of material fact exist as to whether there was a plan with neutral criteria and whether that plan was implemented. The ALJ therefore erred in granting summary judgment to BOA.

BOA contended that the undisputed facts establish that the EEDS Manual was OFCCP's only administrative plan for selecting contractors for compliance reviews, that it was not followed in selecting contractors for the corporate management review of the Charlotte facility, and that therefore the search was not conducted pursuant to a plan with neutral criteria. The ALJ accepted BOA's contentions. For the following reasons, we

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[20] OFCCP asserts that bank officials cooperated fully in the conduct of the review.

[21] Moreover, BOA's argument that its consent was not voluntary rests on the assumption that OFCCP did not proceed pursuant to a plan with neutral criteria. Our remand on the issue of whether there was a plan with neutral criteria issue (see analysis below) removes the assumption and thereby eliminates the basis for BOA's argument at this time.

[22] The actual behavior and communications between OFCCP's and BOA's employees would be highly relevant. Evidence clarifying the nature and extent of contacts between the parties at each step prior to, and at the time of, the compliance review, *e.g.*, correspondence, and telephone and in-person conversations between the Bank and OFCCP personnel related to the subject of compliance reviews, as well as what actually happened when the on-site review was conducted at the Charlotte facility, would be particularly germane.

reject the ALJ's recommendations.[23]

Before discussing the role of the EEDS in selection of contractors for review, we think it is important to point out that the EEDS did not confer any rights on BOA. Several courts have held that private parties may not challenge agency action on the grounds that the agency failed to follow, or modified, an internal agency manual or guidance on conducting its activities. For example, in *Sunbeam Appliance Co. v. EEOC*, 532 F. Supp. 96, 99 (N.D. Ill. 1982), the court refused to order EEOC to follow the investigatory procedures in its Compliance Manual and enforced an EEOC investigatory subpoena. It rejected the argument that EEOC had a duty to follow the procedures in its Compliance Manual with respect to its investigation of Sunbeam because "procedures set forth in the EEOC Compliance Manual are internal guidelines for the use of the agency." Quoting with approval the court's decision in *Hall v. EEOC,* 456 F. Supp. 695, 702-03 (N.D. Cal. 1978), the court in *Sunbeam* said:

> To reach the opposite conclusion would be to hamstring agencies in their efforts to improve their internal procedures regarding the way they conduct their business, and rob them of virtually all flexibility in dealing with increasing workloads. Neither the APA nor notions of elementary fairness, ... require such a result.

The Compliance Manual, the court said, is in the nature of "interpretive rules, guidelines, general policy statements, and instructions to staff" which are internal guidelines for EEOC and confer no rights on private parties. *Id*. at 100. Even if the investigation was of the type covered by a particular section of the Compliance Manual, the court held that failure to follow that section did not "render the subpoena illegal and unenforceable." *Id*.

Hall was a case involving differing internal agency guidance documents quite similar to the facts here. After EEOC had issued its Compliance Manual, it also issued an Accelerated Procedures Memorandum (APM) for use during the so-called Transitional Quarter in 1976. Plaintiffs claimed that their charges were not adequately investigated

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[23] Although OFCCP has not specifically filed exceptions to this aspect of the ALJ's recommendations, the ARB has the power to review the record and reach its own conclusions. Under the Administrative Procedure Act, "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b) (2000). On review of an initial decision an agency has the authority to either adopt or reject an ALJ's findings and conclusions and also may reach its own conclusions from the record independent from those of the ALJ. See *Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986); *NLRB v. Stocker Mfg.*, 185 F.2d 451, 453-54 (3d Cir. 1950); *Containerfreight Transp. Co. v. I. C. C.*, 651 F.2d 668, 670 (9th Cir. 1981); *Union Mechling Corp. v. United States*, 390 F. Supp. 411, 419 (W.D. Pa.1974) (3-judge court).

and no *bona fide* attempt was made to conciliate the charges because of the use of accelerated procedures. The court rejected that claim, holding, among other things, that the APM "did not have a substantial impact on private rights" and was not subject to the rulemaking requirements of the Administrative Procedure Act. 456 F. Supp. at 701-02. The court held:

> The Accelerated Procedures Memorandum modified temporarily the procedures established by the EEOC Compliance Manual for processing charges filed with the EEOC. . . . The purpose of manuals such as this one is to instruct and provide guidance for the agency's staff in administering its responsibilities. The Compliance Manual fleshes out the bare bones of the statute and regulations with explanations of the agency's specific policies and procedures; however, the Manual does not determine any rights or obligations of parties before the EEOC. Thus, the changes in EEOC procedures brought about by the Accelerated Procedures Memorandum did not significantly affect any existing rights or obligations.

Id. at 702. *See also United States v. Craveiro*, 907 F.2d 260, 264 (1st Cir. 1990) ("the internal guidelines of a federal agency, that are not mandated by statute or the constitution, do not confer substantive rights on any party" (citations omitted)) (government's alleged violation of its Handbook on the Comprehensive Crime Control Act of 1984); *United States v. Tipton*, 11 F.3d 602, 612 (6th Cir. 1993) (government's alleged violation of Petite policy).

Sunbeam and *Hall* suggest that, like the EEOC Compliance Manual, the EEDS Manual did not confer any rights on private parties. OFCCP, therefore, had no obligation to BOA to utilize only the EEDS procedures for selecting contractors for compliance reviews. Just as EEOC could implicitly modify its Compliance Manual ("the Accelerated Procedures Memorandum . . . *in effect* modified the procedures of the EEOC's Compliance Manual") with regard to the processing of certain charges, *Hall*, 456 F. Supp. at 697 (emphasis added), OFCCP could modify the EEDS by means of another selection plan for particular circumstances. OFCCP's obligation, vis-à-vis BOA, only was to utilize selection procedures that met Fourth Amendment requirements as articulated in *Barlow's* and *NOPSI III*. (The record contains no indication that the OFCCP officials lacked authority to adopt alternative procedures.). We therefore reject the premise of the ALJ's decision that OFCCP acted arbitrarily simply by not following the EEDS.

We next consider whether it was undisputed fact, as BOA contends, that OFCCP had only one plan for selecting contractors for compliance reviews, and the EEDS was that plan (BOA Fact #3). Careful reading of the record indicates that BOA's assertion

cannot be accepted as an undisputed fact. *See McKinney v. Dole*, 765 F.2d 1129, 1135 (D.C. Cir. 1985) "'the record must show the movant's right to [summary judgment], with such clarity as to leave no room for controversy,'" quoting *National Association of Government Employees v. Campbell*, 593 F.2d 1023, 1027 (D.C. Cir. 1978). *See also Weiss v. Kay Jewelry Stores, Inc.*, 570 F.2d 1259, 1262 (D.C. Cir. 1972) (Summary judgment "should be awarded only when the truth is quite clear.").

The FY'94 Operational Plan, issued by the Acting Director of OFCCP in September 1993, directed the Regional Offices to conduct corporate management reviews. Attachment to BOA Exhibit I. It listed such reviews under the heading "special initiatives" and specifically advised the Regional Offices that special initiatives were compliance reviews. There is no evidence that the FY '94 Operational Plan was not a legitimate document or that its instructions were not based on a legitimate exercise of authority. OFCCP listed the FY '94 Operational Plan, but not the EEDS Manual, as a document on which it relied in selecting the Charlotte facility. *Id.*, OFCCP Response To First Request for Production of Documents, Response to Request No. 11.

The EEDS Manual in the record (Exhibit D) contains no mention of corporate management reviews. Geathers testified that to his knowledge the EEDS did not provide for corporate management reviews, and that the review here was a discretionary review that did not come under the EEDS.[24] Exhibit H at 117.

If corporate management reviews were compliance reviews (as the FY '94 Plan specified), but the EEDS did not apply to selecting contractors for them, then the EEDS did not supply the criteria for selecting contractors for all compliance reviews. The EEDS thus could not have been OFCCP's exclusive basis for selecting contractors for compliance reviews. As a consequence, BOA's assertion of the manual's exclusivity cannot be adopted as an undisputed fact.[25] [26]

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[24] The record does not establish that Geathers was specifically qualified to provide definitive testimony on the relationship between the EEDS and corporate management reviews; however, his testimony is sufficient to raise a question.

[25] In determining that BOA's assertion concerning the exclusive nature of the EEDS Manual cannot be accepted as fact, we do not make an affirmative finding to the contrary.

[26] We also note that the ALJ's acceptance of the 1995 Policy Alert, issued in April 1995, as establishing the exclusivity of EEDS procedures in November 1993, went beyond the evidence. The existence of a 1995 memorandum which referenced the 1992 Manual was an insufficient basis from which to infer that the 1992 Manual's procedures were required in November 1993 and that they were exclusive (particularly where the 1995 memorandum is a "reminder," suggesting that the continuous application of the EEDS Manual from 1992 through 1995 may not have been a given).

Before the ALJ, OFCCP contended that the Region and District followed a plan. OFCCP further contended that that plan was implemented in the selection of the Bank's Charlotte office. More specifically, OFCCP submitted that the depositions of Geathers, Deavers, and Gaudin, established that the Charlotte headquarters was chosen through use of criteria in the following manner: the criteria were received by Geathers and passed on to Deavers; the criteria were modified by Geathers for budget reasons to limit consideration to contractors in the Charlotte/Mecklenberg area;[27] Gaudin supplemented the criteria to require that only one company per industry be selected in the Region and to take into account that the company was in a growing industry with opportunities for affirmative action. OFCCP submitted that those criteria were neutral. In contrast, BOA asserted that the EEDS was the only plan OFCCP's Regional and District Offices were authorized to follow and they did not do so. Further, BOA argued that the criteria employed by OFCCP were not neutral – in particular, it suggested that the bank was selected because Gaudin was biased against banks.

Based on the record submitted, genuine issues of fact exist as to: what plan pertained (the EEDS Manual; the FY '94 Operational Plan; a plan devised by the Central, Regional, and District Offices of OFCCP; or some combination); what criteria pertained (the EEDS criteria or the criteria set forth in the depositions of the Central, Regional, and District Office officials); whether the criteria for contractor selection were neutral; and whether the review was actually conducted pursuant to a relevant plan and its neutral criteria (including whether Gaudin's views on banks entered into the selection process and if so whether those views constituted a permissible non-neutral criterion). Those matters therefore were not ripe for summary decision.

Since we have established that exclusive application of the EEDS cannot be accepted as an undisputed fact, we need not consider the second component of BOA's assertion – that OFCCP ignored the EEDS Manual in selecting the Charlotte office for review.[28] However, we observe that the criteria for discretionary reviews in the EEDS, unlike those for other types of EEDS reviews, are phrased as advice ("should"), rather than as directives, leaving open the possibility that the EEDS could have been followed. *Cf. EEOC v. Univ. of Pittsburgh*, 643 F.2d 983, 986 n.4 (3d Cir. 1981) ("the EEOC need not follow the procedures outlined in its compliance manual in every case. The manual's provisions are discretionary in this respect. . . ."), and compare EEDS ("Fifteen percent Discretionary Selections . . . When deciding [on selection of contractors for

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[27] It is unclear whether this modification occurred before or after the list and criteria were given to Deavers.

[28] *But see* discussion above of agency discretion in the adherence to internal guidelines.

discretionary reviews], the Director *should* consider . . . ." (emphasis added)).

BOA made an additional argument for its proposition that the uncontested facts established that Charlotte was not selected based on a plan with neutral criteria, *to wit* that OFCCP's selection of the Charlotte headquarters was the product of the agency's unbridled discretion. The ALJ agreed and found that the selection process actually used by OFCCP was "not neutral, but was arbitrary to the point of being unconstitutionally unreasonable." Recommended Order at 13.

The ALJ found that the selection of the Charlotte facility was arbitrary in part because he accepted BOA's assertion that at least 20 eligible contractors had headquarters facilities in the Charlotte area and OFCCP did not explain how it selected BOA from among those 20 facilities. BOA cites this ALJ finding in arguing before the Board that the selection was arbitrary.

Geathers made location within the Charlotte-Mecklenburg area a criterion for selection because of staffing and budgetary considerations and his desire personally to oversee the corporate management review (the first his office had undertaken). Exhibit H at 103-104. The record does not disclose that Geathers was not authorized to impose a geographic limitation because of staffing and budgetary concerns, and we are not prepared to find that such a limitation was arbitrary and capricious on its face.[29] We note that the document relied on by BOA to establish the number of facilities eligible for review, Exhibit L, was dated November 29, 1993, after the Charlotte facility was selected for review, although the computer printout attached to the transmittal memorandum was dated 1992. Assuming the same list of headquarters facilities was available before the Charlotte facility was selected, there were only seven facilities in Charlotte itself, making only those seven eligible for consideration (not 20 as suggested by BOA). Exhibit L at 24.[30]

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[29] Such a challenge to this additional criterion sounds more appropriately under the APA than under the Fourth Amendment, and in any event, is questionable for the reasons discussed above.

[30] It appears that none of the other companies on the Charlotte list were located in Mecklenberg County, the only other area referenced by Geathers. In any event, the inclusion of even all of the other cities on the Charlotte list would have brought the number of companies up to a maximum of 13. There was no evidence in the record that Geathers included cities on the Raleigh or Columbia, lists locations which BOA included in arriving at its assertion (adopted by the ALJ) that at least 20 companies would have qualified for review. The ALJ thus substituted BOA's suggested criteria for the criteria OFCCP said it used. We find no basis for doing so. We take notice that companies on the lists included by BOA were located a significant distance from Charlotte, for example, Greenville, South Carolina is over 100 Miles from Charlotte, and Raleigh is 170 miles.

The record also does not disclose whether all seven of the companies met the other criteria the Assistant District Director was given. Exhibit F at 30-32. OFCCP did state the criteria it used to narrow down the list of Charlotte headquarters facilities – that the facility must be the headquarters of a corporation on the Fortune 500 or 1,000 list; that the corporation have at least 4,000 or 5,000 employees; that the corporation must be a multi-establishment company; that the facility must not have been previously reviewed.[31] Exhibits F, H at 102-105, K at 49 and 53. In addition, the company must have been one of the top five in the region, and there must have been significant opportunities for affirmative action at the facility. Exhibit M at 7. These criteria are not arbitrary on their face. *See* discussion above of *Beverly Enterprises, Inc. v. Herman* and *United States v. Harris Methodist Fort Worth.* Application of these criteria could eliminate companies from the list, consistent with OFCCP's contentions. See Deavers' deposition discussed above. Thus it is not apparent that OFCCP acted arbitrarily.

Furthermore, as the court in *First Alabama Bank* noted, the fact that First Alabama Bank was one of twelve banks in the region that met OFCCP's criteria for selection, did not render the choice of that bank arbitrary. 692 F.2d at 717. It is well accepted that a prosecutor's choice of one out of a number of subjects for investigation or prosecution is well within her discretion and cannot be considered arbitrary for that reason alone. *Cf. Esmail v. Macrane*, 53 F.3d 176, 178-79 (7th Cir. 1995) ("simply failing to prosecute all known lawbreakers, whether because of ineptitude or (more commonly) because of lack of adequate resources [is not actionable]. The resulting pattern of nonenforcement may be random, or an effort may be made to get the most bang for the prosecutorial buck by concentrating on the most newsworthy lawbreakers, but in either case the result is that people who are equally guilty of crimes or other violations receive unequal treatment, with some being punished and others getting off scot-free. That form of selective prosecution, although it involves dramatically unequal legal treatment, has no standing in equal protection law."). *See Beverly Enterprises*, 130 F. Supp. 2d at 15 (consideration of only three companies for selection from computerized list of numerous contractors in area not arbitrary).[32]

Therefore, genuine issues of material fact exist as to what plan with criteria (plan)

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[31] Although there are some variations in OFCCP officials' descriptions of the criteria, it is not apparent from the face of the record that the differences are significant.

[32] We also cannot agree with the ALJ that Gaudin's comment about the affirmative action record of banks is proof of bias or arbitrary selection. The record does not demonstrate that Gaudin's views, expressed in a conversation more than a year after the selection of the Charlotte office, entered into the process used for that selection. Being a bank was not a selection factor listed by OFCCP. Moreover, as the court noted in *Beverly Enterprises*, "targeting an industry is not a non-neutral factor." 130 F. Supp. 2d at 16 n.9.

actually applied to selecting the Charlotte facility and whether that plan actually was implemented in Charlotte's selection. Whether the plan and its application met Fourth Amendment requirements is also at issue.

Accordingly, this matter is **REMANDED** to the ALJ for further proceedings consistent with this order.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge