



In the Matter of:

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

ARB CASE NO. 07-090

ALJ CASE NO. 2006-OFC-003

PLAINTIFF,

DATE: September 30, 2009

v.

BANK OF AMERICA,

DEFENDANT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:

**Katherine E. Bissell, Associate Solicitor, Beverly Dankowitz, Esq., James M. Kraft,
Esq., *United States Department of Labor*, Washington, District of Columbia**

For the Defendant:

**Bruce M. Steen, Esq., Aaron J. Longo, Esq., *McGuire, Woods LLP*, Charlotte, North
Carolina; W. Carter Younger, Esq., *McGuire, Woods LLP*, Richmond, Virginia**

FINAL DECISION AND ORDER

Bank of America (BOA or bank) appeals from an order directing it to permit the Office of Federal Contract Compliance (OFCCP) to examine employment records and interview employees at its North College Street facility in Charlotte, North Carolina. OFCCP seeks to

determine whether the North College Street establishment is in compliance with the affirmative action and anti-discrimination requirements of Executive Order 11246¹ and its implementing regulations.² Executive Order 11246 prohibits Federal contractors and subcontractors from discriminating based on race, color, religion, sex, or national origin.

BOA concedes that it is a federal contractor subject to the Executive Order, but argues that OFCCP's inspection would violate the Fourth Amendment prohibition on unreasonable searches.³ For the reasons that follow, we hold that the proposed on-site records inspection and employee interviews do not violate the Fourth Amendment, and we direct BOA to give OFCCP the requested access forthwith.

BACKGROUND

The Department of Labor Administrative Law Judge (ALJ) thoroughly discussed the facts of this case as presented at the hearing on December 6, 2006.⁴ We summarize briefly.

At all times relevant to this case, BOA operated a bank at 200 North College Street, Charlotte, North Carolina. BOA contracted with the United States to serve as a depository of federal funds and an issuing and paying agent for U.S. Savings Bonds.⁵ As an employer subject to Title VII,⁶ BOA was required to file annually a Standard Form 100 (EEO-1), the "EEO-1 Survey" for each of its establishments. The form required that the bank report, inter alia, its major industry classification, its status as a federal contractor, and the number of minority and female employees in nine job categories at each of its establishments.⁷

¹ 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 the Department of Labor).

² 41 C.F.R. Part 60-1 (2009).

³ Defendant's Brief (Br.) at 15.

⁴ Recommended Order Enforcing On-Site Review (R. O.) at 2-6.

⁵ Hearing Transcript (Tr.) at 92-93.

⁶ 42 U.S.C.A. § 2000e-2 (West 2003).

⁷ Tr. at 74-75.

Each year, OFCCP specified for each field office the number of routine compliance reviews it was to conduct at establishments within its geographic area. The field offices selected establishments for review from Equal Employment Data System lists (EEDS lists). OFCCP's national office generated the EEDS lists of federal contractors by geographic area, using EEO-1 data submitted by the contractors. The EEDS lists were computer-generated and placed the establishments in random order.⁸

OFCCP's national office also provided written procedures, "Scheduling Procedures for Supply and Service Compliance Evaluations, Corporate Management Compliance Evaluations, and University Evaluations" ("selection order"). The selection order required OFCCP field offices to conduct the requisite number of reviews in the same random order provided by the EEDS list.⁹

OFCCP's national office issued EEDS lists to its field offices in 2002. By February 2004, the OFCCP district office in Charlotte, North Carolina, had reached the 153rd establishment on its list, which was BOA's North College Street facility. District director Jerome Geathers determined that the North College Street facility qualified for a routine compliance review.¹⁰ On February 27, 2004, Geathers sent OFCCP's standard notice and request for copies of the BOA affirmative action plan applicable to the North College Street facility with supporting documentation to BOA Vice President Josephine Bryant.¹¹

Bryant asked Geathers to confirm in writing the process by which he had selected the North College Street facility. Geathers responded that the facility was selected "in order" from the "current EEDS Random computer list dated June 27, 2002 for the Charlotte District OFCCP" and in accordance with procedures set forth in the selection order. Bryant in turn provided the additional documents. The district office then performed a "desk audit" of the information collected.¹²

The desk audit revealed that BOA was paying men more than women and non-minorities more than minorities in several job classifications. OFCCP therefore concluded it should take a

⁸ Tr. at 101.

⁹ Tr. at 49-50, 74-76; Defendant's Exhibit (DX) -1.

¹⁰ The compliance review was also based on Section 503 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 793 (West 1999), the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C.A. § 4212 (West 2002), and the Immigration Reform and Control Act of 1986, 8 U.S.C.A. § 1324a (West 2004). See PX-2.

¹¹ Tr. at 26, 29-31, 35; Plaintiff's Exhibit (PX) -1; PX-2.

¹² DX-6, 7, 8; Tr. at 44-47. See 41 C.F.R. § 60-1.20(a)(1)(i).

closer look and asked Bryant for more detailed information: “In an attempt to better understand the actual compensation practices of your company, and to ensure that we complete a thorough, balanced and accurate investigation, we are requesting that you provide additional data for further analysis and clarification.”¹³ Again, Bryant complied.¹⁴

In November 2004, the OFCCP regional office in Atlanta, Georgia, performed a “regression analysis” on the more detailed information.¹⁵ The OFCCP national office had created the model for the regression analysis. Donald Cirino, OFCCP’s Director of Regional Operations for the Southeast Region, called the result of the analysis “an overall indicator of salary disparities against women.”¹⁶

After completing the regression analysis, OFCCP’s Charlotte office asked Bryant for detailed position descriptions, which Bryant again provided.¹⁷ But even with the new details, the office was unable to create groups of similarly situated employees, a necessary step in the analysis. At that point, the OFCCP Charlotte staff decided that they needed to interview “employees in order to differentiate their duties” and “managers that were involved in the compensation system” as well as “documents pertaining to the compensation practices, and to see if there was any factor that we were overlooking that they used in their compensation.”¹⁸ The OFCCP Charlotte staff also wanted to review any additional documents that described job content, responsibility levels, and qualifications.¹⁹

¹³ PX-3. Specifically, Geathers asked for the following information for each North College Street employee: identification suitable for matching purposes, gender, ethnicity, time with company or date of hire, time in current position or date of last change in grade/title, age or date of last degree earned, current annual salary or hourly wage, part-time versus full-time status, salary or hourly pay status, job title, grade level of salary band classification, and employee location if not housed at North College Street.

¹⁴ Tr. at 30; DX-3,4; PX-3.

¹⁵ A “regression analysis” is a statistical study examining variables such as compensation, education, experience, performance, and other neutral factors, which might explain race and gender disparities in nondiscriminatory terms. Tr. at 111; Plaintiff’s Br. at 6.

¹⁶ Tr. at 71, 83.

¹⁷ DX-5.

¹⁸ Tr. at 60.

¹⁹ Tr. at 59-60, 68; DX-5.

OFCCP decided that the best way to conduct further research would be to examine documents and interview employees on-site. Accordingly, Sam Maiden, OFCCP's Assistant District Director for Charlotte, notified Bryant in March 2005 that OFCCP wanted to come on-site to interview certain employees and review certain categories of documents.²⁰

At this point, BOA announced that, pursuant to advice of counsel, it would no longer cooperate. BOA's attorney had reviewed the selection order and concluded that OFCCP should not have selected the North College Street establishment for a routine compliance review in the first place. BOA's counsel took the position that the North College Street establishment was part of an on-going enforcement action and therefore, according to OFCCP's own inspection manual, was exempt from routine review.²¹

OFCCP explained that the enforcement-action exemption applies only if the two reviews would involve the same compliance issues. Although employment practices at the North College Street establishment might be part of a previous enforcement case being litigated against BOA (ALJ Case No. 1997-OFC-016), there could be no overlap with the 2004-2005 investigation. The 1997 case charged BOA with discriminating against minority applicants for entry-level positions in the early 1990s and with refusing to identify and compensate the individuals whom they had unlawfully rejected.²² Here, the investigation was focused on BOA's current employment practices and evidence of possible gender discrimination with regard to women whom BOA had hired.²³

Despite the explanation, BOA continued to deny OFCCP access to records and employees at North College Street. Accordingly, on August 23, 2006, OFCCP filed an administrative complaint against the bank for violating its regulatory and contractual obligations "by refusing to permit [OFCCP] to perform an on-site compliance review."²⁴ OFCCP requested that BOA be permanently enjoined from failing and refusing to comply with the regulations, that BOA's government contracts be cancelled, and that it be declared ineligible for government contracts until such time as OFCCP determines that the bank and its subcontractors are in

²⁰ Tr. at 59-64; PX-4.

²¹ Tr. at 62.

²² PX-7; *OFCCP v. Bank of America*, ARB No. 00-079, ALJ No. 1997-OFC-016, slip op. at 2 (ARB Mar. 31, 2003).

²³ *OFCCP v. Bank of America*, Administrative Complaint for Expedited Hearing Procedures (Administrative Complaint), ALJ No. 2006-OFC-003, filed August 23, 2006.

²⁴ *Id.* at 4; see 42 U.S.C.A. §§ 60-1.7(a)(3), 60-1.43.

compliance with the Executive Order.²⁵ An ALJ conducted a hearing on the complaint in Charlotte, North Carolina, on December 6, 2006.

Before the ALJ, BOA argued that the proposed on-site investigation would violate the Fourth Amendment prohibition against unreasonable searches and that OFCCP's selection of the North College Street establishment would be reasonable only if the facility were chosen pursuant to a neutral administrative plan.²⁶ BOA further contended that although OFCCP had a neutral plan, it failed to comply with it in this instance.²⁷

The bank complained specifically of the following alleged errors: (1) the selection order required that any deviations from the order be in writing, but Charlotte OFCCP acted pursuant to oral instructions from the national office when it skipped some twenty establishments because of their involvement in an EEO survey; (2) the Charlotte OFCCP field office failed to document some of its selection decisions in more than one format as the selection order required; (3) the Charlotte OFCCP field office selected the North Charlotte Street facility even though this establishment was part of an ongoing enforcement action and therefore exempt from routine review under the official selection order. Thus, OFCCP failed to prove that its selection of the North College Street facility was the result of a neutral administrative plan and not the result of the unreviewed discretion of an officer in the field.²⁸

BOA also argued that OFCCP lacked administrative probable cause necessary to justify entry into BOA's premises. OFCCP had relied on the results of the regression analysis, but BOA's expert witness testified without rebuttal that the regression analysis was too flawed to provide meaningful evidence of gender discrimination.²⁹

The ALJ concluded that OFCCP's selection of the North College Street facility for review and its proposed site visit comported with Fourth Amendment principles.³⁰ Although he found that OFCCP failed to prove that it selected the North College Street bank for compliance review in accordance with a neutral administrative plan, he nevertheless found that the desk audit

²⁵ Administrative Complaint at 5.

²⁶ Defendant's Br. at 10-11, citing *United States v. Mississippi Power & Light Co.*, 638 F.2d 899, 907-908 (5th Cir. 1981), citing *See v. City of Seattle*, 387 U.S. 541, 545 (1976) and *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978).

²⁷ *Id.* at 22-24.

²⁸ *Id.* at 24-26.

²⁹ *Id.* at 18-20.

³⁰ Recommended Order Enforcing On-Site Review (R. O.) at 14.

did not violate the Fourth Amendment because BOA voluntarily consented to it. In this regard, he found that BOA turned over its Affirmative Action Plan (AAP) and supporting documents knowingly and voluntarily. He further found that OFCCP did not coerce or mislead the bank to obtain its consent. Thus, BOA consented to the desk audit, the first part of the compliance review.³¹

With respect to the proposed on-site review, the ALJ concluded that the flawed regression analysis did not establish specific evidence of an existing violation, which is necessary to establish administrative probable cause.³² But he found that BOA had voluntarily provided data that established a reasonable suspicion that the North College Street facility was discriminating against female employees and minorities.³³ On that basis, he ordered BOA to permit OFCCP on-site to conduct further document review and to interview employees. The ALJ did not address OFCCP's request for a debarment order and related sanctions.

BOA timely filed exceptions to the ALJ's Recommended Order Enforcing On-Site Review (R.O.).

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB or the Board) has jurisdiction to review the Defendants' exceptions to the ALJ's R. O. and to issue the Department's final decision.³⁴ The regulations governing adjudications by the Department of Labor's Office of Administrative Law Judges provide that, "[u]nless otherwise required by statute or regulations, hearings shall be conducted in conformance with the Administrative Procedure Act."³⁵ The Executive Order and its implementing regulations are silent concerning the burden of proof to be applied in enforcement cases under the Order. Accordingly, the burden of proof required by the APA governs enforcement cases under the Executive Order. Under the APA, the standard of proof in

³¹ *Id.* at 11-13.

³² *Id.* at 13-14.

³³ *Id.* at 14; PX-3.

³⁴ 41 C.F.R. §§ 60-30.30, 60-250.65(b)(1), 60-741.65. Executive Order No. 11246, and the regulations implementing the contract compliance laws, 41 C.F.R. §§ 60-1.26, 60-250.64, 60-741.65, and 41 C.F.R. § 60-30 (2009). The ALJ's decision is a recommendation, and the Board has plenary power to issue the final administrative order. 41 C.F.R. §§ 60-30.29, 60-30.30; Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (October 17, 2002).

³⁵ 5 U.S.C.A. § 554 (West 1996); 41 C.F.R. § 18.26 (2009).

administrative adjudications “is the traditional preponderance-of-the-evidence standard.”³⁶ Our review is de novo.³⁷

DISCUSSION

BOA argues that the on-site portion of the North College Street compliance review would violate Fourth Amendment principles in two ways: (1) the OFCCP Charlotte office did not follow a neutral administrative plan when it selected BOA’s North College Street facility for a desk audit; (2) the proposed on-site visit is not supported by “specific evidence of an existing violation.”³⁸

For an administrative search to be valid under the Fourth Amendment, an agency must first show probable cause.³⁹ In *Marshall v. Barlow’s*, the Supreme Court held that administrative probable cause is established when there is either “specific evidence of an existing violation” or when it is established that the agency chose the particular company according to “reasonable legislative or administrative standards.”⁴⁰ The Fifth Circuit, interpreting *Barlow’s*, has held that a warrantless administrative search is reasonable if it is: (1) authorized by statute; (2) properly limited in scope; and (3) initiated in a proper manner.⁴¹ The third element requires an examination of the agency’s selection method: the search will be reasonable if based on either specific evidence of an existing violation, reasonable legislative or administrative standards, or an administrative plan containing neutral criteria.⁴²

³⁶ *Steadman v. SEC*, 450 U.S. 91, 102 (1981) (construing the provision at 5 U.S.C. § 556(d) (1990) that provides, “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof”); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 277 (1994) (reaffirming *Steadman*).

³⁷ 5 U.S.C.A. § 557(b) (West 1996); *OFCCP v. Keebler Co.*, ARB No. 97-127, ALJ No. 1987-OFC-020, slip op. at 24-25 (ARB Dec. 21, 1999).

³⁸ Defendant’s Br. at 17.

³⁹ 436 U.S. 307, 320 (1978).

⁴⁰ *Id.* at 320.

⁴¹ *Mississippi Power & Light Co.*, 638 F.2d at 907-908 (“[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.”).

⁴² *Id.*

It is 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.”⁴³ When the constitutionality of a search conducted pursuant to this exception is challenged, the government bears the burden of proving that consent was freely and voluntarily given.⁴⁴ “[T]he question whether a consent to a search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.”⁴⁵

The regulations implementing Executive Order 11246 provide for a compliance review in three stages: (1) a desk audit; (2) an on-site review conducted at the contractor’s establishment; and (3) an off-site analysis of information gathered.⁴⁶ Here, the ALJ found that during the desk audit stage of the compliance review, BOA turned over its AAP and supporting documents to OFCCP knowingly and voluntarily, and OFCCP did not coerce or mislead the bank to obtain its consent:

[The OFCCP] did not misrepresent its authority in any way, and there is no evidence of harassment, intimidation, or threats made to effect or induce defendant’s compliance. While the [February 27, 2004 scheduling] letter does remind defendant that § 60-2.2 of the regulations authorizes the initiation of enforcement proceedings should OFCCP find that the AAP it submitted is not in compliance with the regulations, at no point in the scheduling letter does OFCCP discuss the enforcement consequences of a contractor’s failure to submit materials in response to a desk audit request. The letter contains no language suggesting that defendant would be precluded from questioning or challenging its selection, and even provides a contact name and telephone number for defendant’s questions concerning the compliance review Finally, Ms. Bryant testified that upon defendant’s receipt of the letter, she had no cause for concern since the letter was the “standard” letter used by OFCCP to schedule compliance reviews, and based on her experience and involvement with past compliance reviews, she found nothing “unusual” in the letter scheduling the desk audit for the [North College Street] facility (TR at 93).^[47]

⁴³ *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

⁴⁴ *Id.* at 222, 228-229.

⁴⁵ *Id.* at 227.

⁴⁶ *See* 41 C.F.R. § 60-1.20(a)(1).

⁴⁷ R.O. at 12.

Thus, the ALJ concluded that BOA consented to the first part of the compliance review, including selection of the North College Street facility for review.⁴⁸ A preponderance of the evidence supports the ALJ's determination.

BOA urges us to find, however, that it could not have given voluntary contemporaneous consent based on the scheduling letter alone. But we cannot find on this record that the scheduling letter precluded the bank from giving voluntary contemporaneous consent. 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. We would also 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 BOA submitted on this issue has not indisputably established that that was the case. Moreover, as the ALJ found, BOA Vice President Bryant informed OFCCP that the bank was willing to cooperate with the compliance review, and she "showed no reluctance in submitting the requested information."⁴⁹ Since we agree with the ALJ that the bank consented to the desk audit, we need not consider the issue of whether OFCCP selected the bank's North College Street facility for compliance review in accordance with a neutral administrative plan.

We also agree with the ALJ that the bank did not consent to the proposed on-site visit. Accordingly, we must next consider whether OFCCP's proposed on-site visit conforms to Fourth Amendment requirements. As noted above, "specific evidence of an existing violation" establishes administrative probable cause.⁵⁰ OFCCP argued before the ALJ that the results of a regression analysis provided sufficient evidence of an existing violation. But BOA's expert, Dr. Carol Amidon, demonstrated conclusively that the regression analysis was too flawed to support any conclusions about the bank's personnel practices.⁵¹ The ALJ therefore rejected OFCCP's contention that its regression analysis established a reasonable suspicion of a violation of the Executive Order.⁵² He did, however, find evidence that created a reasonable suspicion of a violation in OFCCP's September 23, 2004 letter to BOA, which contained tables based on data from the desk audit.⁵³ The tables indicated that for certain groups of employees the average

⁴⁸ R.O. at 11-13.

⁴⁹ R. O. at 12-13.

⁵⁰ *Barlow's*, 436 U.S. at 320.

⁵¹ Tr. at 118-119. Amidon testified without rebuttal that the regression analysis was too flawed to provide meaningful evidence of discrimination.

⁵² R. O. at 13.

⁵³ PX-3.

salaries of males were approximately 9 to 23% higher than those of females, and that the average salaries of non-minorities were approximately 5 to 23% higher than those of minorities. Like the ALJ, we find that there is no evidence in the record disputing this data.⁵⁴ We therefore conclude that OFCCP has established sufficient evidence to justify an on-site review of the BOA's North College Street facility.

CONCLUSION

For the reasons discussed above, we find that BOA violated E.O. 11246 and its implementing regulations by failing to provide OFCCP access to its North College Street facility to conduct an on-site compliance review.

ORDER

We order BOA, no later than 30 days from the issuance of this Order, to cease and desist from violating Executive Order 11246, by denying the OFCCP access to its North College Street facility to conduct an on-site compliance review, including interviews, and inspection of such records and other materials as may be relevant and material to verifying BOA's compliance status pursuant to 41 C.F.R. Part 60-1.

If BOA fails to comply with this order within thirty days of its issuance, we order that its current government contracts be canceled, terminated, or suspended, and that BOA be declared ineligible for further contracts and subcontracts, and from extension or modification of any existing contracts and subcontracts, until such time as it can satisfy the Secretary of Labor or her designee that it is in compliance with the provisions of E.O. 11246 and its implementing regulations.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

⁵⁴ R. O. at 14.