



In the Matter of:

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

ARB CASE NO. 10-132

ALJ CASE NO. 2010-OFC-002

DATE: May 8, 2012

PLAINTIFF,

v.

FRITO-LAY, INC.,

DEFENDANT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:

**Theresa Schneider Fromm, Esq.; Consuela A. Pinto, Esq.; Beverly I. Dankowitz, Esq.; Christopher Wilkinson, Esq.; and M. Patricia Smith, Esq.;
United States Department of Labor, Washington, District of Columbia**

For the Defendant:

Joshua S. Roffman, Esq., Littler Mendelsohn, P.C., McLean, Virginia

For the Equal Employment Advisory Council as Amicus Curiae,

**Jeffrey A. Norris, Esq. and Rae T. Vann, Esq., Norris Tysse Lampley & Lakis,
LLP, Washington, District of Columbia**

**Before: Paul M. Igasaki, Chief Administrative Appeals Judge; Luis A. Corchado,
Administrative Appeals Judge; and Lisa Wilson Edwards, Administrative Appeals
Judge**

FINAL ADMINISTRATIVE ORDER

This action arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended by Executive Order 11375 (32 Fed. Reg. 14303), Executive Order 12086 (43 Fed. Reg. 46501), and Executive Order 13279 (67 Fed. Reg. 77141, and the implementing regulations under 41 C.F.R. Part 60 (2011)). This case involves the question whether plaintiff Office of Federal Contract Compliance Programs (OFCCP) has authority to request certain data relating to defendant Frito Lay, Inc.'s Affirmative Action Plan (AAP) as part of a 2007 Desk Audit. On July 23, 2010, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order Granting Defendant's Motion for Summary Decision and Dismissing the Complaint (R. D. & O.). The ALJ held that the scope of the 2007 Desk Audit precluded OFCCP from requesting 2008 and 2009 AAP data. OFCCP petitioned for review. We reverse and order Frito-Lay to comply with the OFCCP data request.

A. *Proceedings Below*

Pursuant to a Scheduling Letter dated July 13, 2007, OFCCP informed Frito-Lay that it would be conducting a desk audit (the 2007 Desk Audit) and requested AAP data pertaining to the previous year, 2006, and potentially 2007. Frito-Lay produced data for the years 2005, 2006, and 2007; more than OFCCP requested. One year later, OFCCP informed Frito-Lay that there was a "statistically significant disparity" (the "Disparity") in the AAP data. Pursuant to a letter dated November 10, 2009, to further investigate the perceived Disparity, OFCCP requested more data (the 2008 and 2009 AAP plans) as part of its continuing 2007 Desk Audit. Frito-Lay objected and refused to produce 2008 and 2009 AAP data, asserting that such data fell outside the scope of the Scheduling Letter. OFCCP initiated an enforcement action and requested an expedited hearing to compel Frito-Lay's compliance.¹ Following cross-motions for summary judgment, the ALJ issued his R. D. & O. In this decision, the ALJ agreed with Frito-Lay and recommended dismissal of OFCCP's complaint, focusing mostly on the nature of a desk audit and drawing inferences from OFCCP's Federal Contract Compliance Manual (FCCM). Essentially, the ALJ concluded that there was a temporal scope to the 2007 Desk Audit that precluded OFCCP from requesting 2008 and 2009 AAP data.

¹ During this appeal, the parties waived the request for expedited proceedings. See ARB's *Order Granting Motion for Enlargement of Time to File Exceptions* dated August 12, 2010 (OFCCP requested an extension of time and Frito-Lay consented).

Pursuant to the regulations, the R. D. & O. and the record must be certified to the Administrative Review Board (ARB) for a final administrative order.² The regulations also permit parties to file exceptions and responses to exceptions with the ARB.³ The ARB is required to review the recommended decision, the record, and the exceptions to the recommended decision, and to issue the Department of Labor's final administrative order.⁴ On September 1, 2010, OFCCP filed exceptions to the R. D. & O. with the ARB. In its exceptions, OFCCP sought only the reversal of the ALJ's decision and an order requiring Frito-Lay to produce the 2008 and 2009 AAP data.⁵

B. Frito-Lay's Request for Dismissal of the Appeal

Before addressing the merits of this case, we must address Frito-Lay's recent request for dismissal of this matter. Frito-Lay moves for issuance of a notice of case closure, asserting that the time in which the ARB had to issue a decision has passed. Frito-Lay cites to the provision in 41 C.F.R. § 60-1.26(b)(2) providing that the ARB issue a final order within one year of either the ALJ's recommended decision or the submission of exceptions and responses to exceptions, whichever occurs first. Frito-Lay asserts that since the last filing was its October 1, 2010 response brief, the ARB had until October 1, 2011 to act. Frito-Lay notes that the ARB issued a "Notice of Case Closure" in *USDOL, OFCCP v. United Space Alliance, LLC*, ARB No. 11-033, ALJ No. 2011-OFC-002 (April 11, 2011), which, unlike this case, was under expedited review.⁶ OFCCP has responded in opposition to the motion.

It is well settled that a statutorily-set decision deadline on agency action is directory unless there is clear language to the contrary specifying consequences resulting from the passage of such deadline. *See Minthorne v. Commonwealth of Va.*, ARB No. 09-098, ALJ Nos. 2009-CAA-004, -006 (ARB July 19, 2011), citing *Brock v. Pierce County*, 476 U.S. 253 (1986)(Secretary of Labor's 120-day deadline to issue a final determination on a complaint of federal grant fund misuse was meant to spur him to action, not to limit the scope of his authority, so that his untimely action was valid); *Barnhart v. Peabody Coal*, 537 U.S. 149, 159 (2003)(If a statute does not specify a consequence for noncompliance with statutory timing provisions, federal courts will not ordinarily impose their own coercive sanction), and *United States v. James Daniel Good*

² 41 C.F.R. § 60-30.27 (2011).

³ 41 C.F.R. § 60-30.28.

⁴ 41 C.F.R. § 60-30.30, Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010).

⁵ Plaintiff OFCCP's Exceptions to the ALJ's Recommended Decision and Order at 24.

⁶ 41 C.F.R. § 60-30.37.

Real Prop., 510 U.S. 43, 63 (1993)(same). The regulation at 41 C.F.R. § 60-1.26(b)(2) does not specify a consequence for failure to comply with the one-year time period and thus, such period is directory not jurisdictional. Consequently, Frito-Lay is not entitled to the relief it requests. Moreover, Frito-Lay's reliance on *United Space Alliance* is unavailing where that appeal involved the regulation at 41 C.F.R. § 60-30.37 under the expedited procedures of Title 41, Chapter 60, which are not at play here and where that regulation sets forth consequences in the event the ARB fails to act within the 30-day time period. Based on the foregoing, we deny Frito-Lay's motion.⁷ We now turn to the merits of this case.

C. OFCCP's Duty to Seek Compliance and Redress

Frito-Lay raises objectively good faith reasons for its refusal to produce the 2008 and 2009 AAP data. Frito-Lay argues that the relevant regulations and OFCCP's internal procedures intend for desk audits to be a quick and limited compliance review of the contractor's activities during the time period specified in the Scheduling Letter. The Scheduling Letter in this case was served in July 2007 and requested AAP data from the preceding year and potentially from 2007. Frito-Lay points to various FCCM provisions to argue that compliance reviews allow OFCCP only to look backwards two or more years from the Scheduling Letter, depending on whether a continuing violation is alleged. Ultimately, Frito-Lay's arguments boil down to a proposition that OFCCP has no discretion to request data beyond the date of the Scheduling Letter in cases where OFCCP discovers a potential violation during a desk audit. We disagree.

We find that OFCCP clearly has discretion to request AAP data covering activity occurring after the Scheduling Letter in the specific circumstances of this case.⁸ In deciding this matter, we begin with the duties imposed upon federal contractors and OFCCP's fundamental mission under Executive Order 11246. First, as OFCCP points out, Frito-Lay had an ongoing duty from 2007 through 2009 to comply with Executive Order 11246, the equal opportunity clause in the federal contracts, and the implementing regulations.⁹ This duty includes, among other things, promoting and insuring "equal opportunity," taking "affirmative action" where appropriate, and providing reports

⁷ On April 26, 2012, Frito-Lay filed an intent to submit a reply to OFCCP's response, to which OFCCP objected on April 27, 2012, and argued that it should be permitted to file an additional response. On April 30, 2012, Frito-Lay and OFCCP notified the ARB that they had reached an agreement about further filings. Our ruling denying Frito-Lay's motion for case closure renders requests for any additional filings moot.

⁸ Our focus is narrow in this case. We do not address whether OFCCP has the ability to ask for post-Scheduling Letter data in all desk audits or where OFCCP has not objectively identified a concern about compliance.

⁹ There is an indication in the record that Frito-Lay had federal contracts exceeding \$200 million from 2005 through 2012. Administrative Complaint, allegation 6.

required by Executive Order 11246.¹⁰ OFCCP is charged with ensuring compliance with these mandates.¹¹ To enable OFCCP in its mission, the regulations empower it with discretion to conduct various types of compliance reviews “to determine if the contractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action”¹² By regulation, a desk audit focuses on federal contractors’ AAPs.¹³ Regulations specifically require federal contractors through their AAPs to monitor and examine the impact that their employment decisions may have on women and minorities.¹⁴ Requesting statistical data is common in determining whether a disparate impact occurred.¹⁵ When OFCCP finds “deficiencies,” it may make reasonable efforts “to secure compliance through conciliation and persuasion.”¹⁶ A significant statistical disparity can indicate a “deficiency,” for example, proof of discriminatory disparate impact.¹⁷ Ultimately, there is no question that seeking “compliance” with the affirmative action mandate in Executive Order 11246 is a primary duty of OFCCP.¹⁸

We conclude that OFCCP has regulatory authority to request the 2008 and 2009 AAP data in furtherance of its 2007 Desk Audit. First, OFCCP was pursuing a concern about a statistically significant disparity in hiring women, specifically finding “a disparity

¹⁰ 41 C.F.R. §§ 60-1.1,1.4.

¹¹ 41 C.F.R. §§ 60-1.2, 1.20.

¹² 41 C.F.R. § 60-1.20 (“a compliance evaluation may consist of any one or any combination of . . .” investigative procedures, including various types of compliance reviews listed in the regulations).

¹³ 41 C.F.R. § 60-1.20(A)(1)(i).

¹⁴ 41 C.F.R. § 60-2.10(2).

¹⁵ *See, e.g., Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 987 (1988)(evidence in these disparate impact cases usually focus on statistical disparities)(obsolete on other grounds).

¹⁶ 41 C.F.R. § 60-1.20(b).

¹⁷ *See Malave v. Potter*, 320 F.3d 321, 325 (2d Cir. 2003)(substantial statistical disparity may support a prima facie case of discriminatory impact).

¹⁸ In its Amicus Curiae brief, the Equal Employment Advisory Council (EEAC) advocated for the employee “victims” by suggesting that OFCCP first should have investigated and sought redress for the disparity it found in the 2005 through 2007 data. EEAC Amicus Brief at 17–18. EEAC’s advocacy for “any 2005-2007 victims” is laudable, but it fails to appreciate an equally important mission of the OFCCP: compliance with Executive Order 11246 as a condition to benefitting from ongoing federal contracts. *Id.* at 17.

in the hiring rates of females as compared to males that was statistically significant at 3.26 standard deviations”¹⁹ A statistical showing of two standard deviations has long been accepted as significant in adverse impact analysis.²⁰ It is also clear from this case precedent that a sustained duration of a statistically significant disparity can further demonstrate discrimination. A request for two subsequent years is consistent with a proper disparate impact analysis.²¹ Consequently, OFCCP’s impetus in making further inquiries and the reason for its requesting two additional years’ AAP data is reasonable and consistent with OFCCP’s duty to ensure Frito-Lay’s compliance with Executive Order 11246. OFCCP’s request for 2008 and 2009 AAP data was narrow and motivated by the objective deficiency discovered during the 2007 Desk Audit, and focused only on AAP plans and data for two years. Contrary to the focus of the ALJ and Frito-Lay, this is not a case where OFCCP simply extended a desk audit; it is a case where a deficiency motivated the request for more information.

For several reasons, we reject the remaining procedural arguments suggesting that these desk audits have an inflexible temporal limitation. As the parties acknowledged, the regulations were amended to remove the 60-day limitation on desk audits, clearly implying that they might last longer.²² Reliance on the FCCM as placing inflexible restrictions on OFCCP is unpersuasive. The FCCM provides internal guidance to OFCCP, but we view the FCCM as an internal manual that courts generally consider “non-binding statements of general policy” that do not provide due process rights in the public, except in unusual circumstances.²³ Ironically, Frito-Lay implicitly recognizes that these same guidelines provide that a new desk audit could have been performed in 2009, which presumably would have involved production of the exact same data being

¹⁹ Administrative Complaint, allegation 12.

²⁰ *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 280 (5th Cir. 2008); *Malave*, 320 F.3d at 327 citing *Smith v. Xerox Corp.*, 196 F.3d 358, 364 (2d Cir.1999)(acknowledging the significance of two standard deviations).

²¹ See *Malave*, 320 F.3d at 324 (five years of data analyzed); *Paige v. California*, 291 F.3d 1141, 1149 (9th Cir. 2002)(explaining the importance of aggregating data over a number of years).

²² Compare 41 C.F.R. § 60-1.20 (2011), with 41 C.F.R. § 60-60.7 (rescinded and removed Aug. 19, 1997)(providing OFCCP with 60 days to find contractor in compliance with affirmative action program or, alternatively, to issue show cause notice). Defendant Frito-Lay’s Response to Plaintiff OFCCP’s Exceptions to the ALJ’s Recommended Decision and Order at 19 – 20. Frito-Lay attempts to rely on the comments to these changes, 62 Fed. Reg. 44174, at 44180 (Aug. 19, 1997), to suggest the existence of a temporal limitation notwithstanding that the 60-day limitation on desk audits was, in fact, removed from the regulations.

²³ See *United Space Alliance, LLC v. Solis*, __ F.Supp. 2d __ (D.D.C. Nov. 14, 2011).

withheld in this case.²⁴ In short, Frito-Lay's procedural arguments based on an inference from internal guidelines and comments to regulatory amendments cannot overcome the discretion provided by the regulations themselves. We conclude that the Executive Order 11246 and implementing regulations require Frito-Lay to produce to OFCCP the 2008 and 2009 AAP data. We see no other pending issues remaining and, therefore, find that our conclusion fully resolves this matter.²⁵

For the foregoing reasons, we **REVERSE** the ALJ's recommended decision dismissing OFCCP's complaint. We order Frito-Lay to comply with OFCCP's request for the 2008 and 2009 Affirmative Action Plans data.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

²⁴ Defendant Frito-Lay's Response to Plaintiff OFCCP's Exceptions to the ALJ's Recommended Decision and Order at 19 (citing to the Department of Labor's comments to the 1997 regulatory amendments that the OFCCP's practice was to conduct compliance reviews "no more frequently than once every two years").

²⁵ As we noted earlier, in the exceptions to the Recommended Decision and the responses to the exceptions, the parties focused entirely on OFCCP's authority to request the 2008 and 2009 AAP data. Plaintiff OFCCP's Exceptions to the ALJ's Recommended Decision and Order at 24; Defendant Frito-Lay's Response to Plaintiff OFCCP's Exceptions to the ALJ's Recommended Decision and Order at 1.