



In the Matter of:

ENERGY SERVICES, INC.;
ENERGY MISSISSIPPI, INC.;
ENERGY TEXAS, INC.; ENERGY
NUCLEAR OPERATIONS, INC.;
ENERGY OPERATIONS, INC.;
and ENERGY GULF STATES,
LOUISIANA, LLC;

ARB CASE NO. 13-025

ALJ CASE NO. 2013-OFC-001

DATE: May 19, 2014

COMPLAINANTS,

v.

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

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainants:

John C. Fox, Esq. and Alexa Morgan, Esq.; Fox, Wang & Morgan, P.C.; San Jose, California

For the Respondent:

M. Patricia Smith, Esq.; Christopher Wilkinson, Esq.; Beverly I. Dankowitz, Esq.; Consuela A. Pinto, Esq.; Theresa Schneider Fromm, Esq.; and Kiesha N. Crockett; United States Department of Labor, 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 DECISION AND ORDER

This case arises under Executive Order 11246 (E. O. 11246), as amended¹, Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C.A. § 793 (Thomson Reuters/West 2008), and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), 38 U.S.C.A. § 4212 (West 2002) (collectively the Equal Opportunity Laws or EO Laws). Complainants Entergy Services, Inc.; Entergy Mississippi, Inc.; Entergy Texas, Inc.; Entergy Nuclear Operations, Inc.; Entergy Operations, Inc.; and Entergy Gulf States, Louisiana, LLC (Entergy) are federal contractors subject to the EO Laws. On October 26, 2012, the Office of Administrative Law Judges (OALJ) received a filing from Entergy entitled "Administrative Complaint for Declaratory Relief" (Complaint) seeking declaratory relief from compliance reviews scheduled by the Office of Federal Contract Compliance Programs (OFCCP). On November 27, 2012, the Chief Administrative Law Judge (ALJ) entered a Decision and Order (D. & O.) dismissing the Complaint. Entergy petitions the Administrative Review Board (ARB) for exception to the ALJ decision. For the foregoing reasons, we affirm the ALJ's D. & O. and dismiss the Complaint.

BACKGROUND

In May 2012, OFCCP informed Entergy that several of their sites had been selected for compliance reviews under the EO Laws. See Pet. Exceptions, Exh. A-B. On September 6, 2012, Entergy objected to OFCCP's compliance reviews as unconstitutional. On October 26, 2012, Entergy submitted the Complaint to OALJ, seeking a declaratory ruling that the manner in which OFCCP selected Entergy establishments "for compliance reviews violates the Plaintiff's Fourth Amendment rights under the United States Constitution to be free from 'unreasonable searches and seizures.'" Complaint at 1. On November 5, 2012, the ALJ ordered briefing on the OALJ's authority to hear the matter. See ALJ's Notice of Docketing and Order to Brief Procedural Posture of the Matter (issued Nov. 5, 2012).

On November 27, 2012, the ALJ issued the D. & O. dismissing the complaint for lack of "subject matter jurisdiction." D. & O. at 6. On December 12, 2012, Entergy filed Exceptions to the ALJ's Order with the ARB. 41 C.F.R. § 60-30.28.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review exceptions to an ALJ's decision and order and is charged with authority to issue final decisions in cases arising under the EO Laws. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 41 C.F.R. § 60-30.28. We

¹ Executive Order 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965) was amended by Executive Order 11375, 32 Fed. Reg. 14,303 (Oct. 13, 1967) (adding gender to list of protected characteristics), and Executive Order 12086, 43 Fed. Reg. 46,501 (Oct. 5, 1978) (consolidating enforcement function in the Department of Labor).

review de novo an ALJ's order to dismiss a case for lack of jurisdiction. *Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-010 (ARB Jan. 31, 2001).

DISCUSSION

The Office of Administrative Law Judges is an administrative tribunal that exercises authority only as defined by statute or regulation. *See, e.g., Matthews v. Leavitt*, 452 F.3d 145, 152 (2d Cir. 2006) (“The authority of an ALJ is circumscribed by the appointing agency’s enabling statutes and its regulations.”). On review of the Exceptions Entergy filed, and the administrative record of proceedings below, the ALJ correctly determined that Entergy’s complaint for declaratory relief was not properly before the OALJ. Under the prehearing procedures set forth in the Rules of Practice and Procedure for Administrative Proceedings pertaining to Executive Order 11246 and the EO Laws,² administrative complaints are commenced as follows:

41 C.F.R. § 60-30.5. Administrative complaint.

(a) Filing. The Solicitor of Labor, Associate Solicitor for Labor Relations and Civil Rights Regional Solicitors and Regional Attorney upon referral from the Office of Federal Contract Compliance Programs, are authorized to institute enforcement proceedings by filing a complaint and serving the complaint upon the contractor which shall be designated as the defendant. The Department of Labor, OFCCP, [] shall be designated [as] plaintiff.

This section expressly grants only the OFCCP the authority to file a complaint.³ We see no authorization in the statutes or their implementing regulations empowering any other party to file a complaint under the EO Laws. The same is true for the rules governing expedited hearings. See 41 C.F.R. § 60-30.32(a) (“Expedited hearings shall be commenced by filing an administrative complaint in accordance with 41 C.F.R. 60-30.5.”). The complaint for declaratory relief Entergy filed was thus not properly before the OALJ because the events in this case do not show that the Solicitor of Labor, or her designate, instituted an administrative enforcement proceeding by filing a complaint with OALJ as required by 41 C.F.R. § 60-30.5.

² 41 C.F.R. § 60-250.65 (a), (b) (incorporating Rules of Practice and Procedure for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246 contained in 41 C.F.R. Part 60-30, to VEVRAA administrative enforcement proceedings); 41 C.F.R. § 741.65(a), (b) (incorporating same to Rehabilitation Act administrative enforcement proceedings).

³ *See, e.g., U.S. Security Assocs., Inc. v. OFCCP*, ALJ No. 2012-OFC-004, slip op. at 5 (ALJ Sept. 17 2012) (ALJ stating that OALJ “obtains the regulatory authority to adjudicate an OFCCP dispute *only* upon the filing of an administrative complaint by OFCCP through the Office of the Solicitor.”) (emphasis in original), appeal dismissed, ARB No. 13-003 (ARB June 20, 2013).

CONCLUSION

For these reasons, the ALJ's D. & O. dismissing Entergy's complaint for declaratory relief is **AFFIRMED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge