



Issue Date: 30 December 2021

In the Matter of:

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

v.

**CONVERGYS CUSTOMER MANAGEMENT
GROUP, INC., now known as CONCENTRIX CVG
CUSTOMER MANAGEMENT GROUP, INC.,¹**
Defendant.

OALJ Case Nos.

2015-OFC-00002
2015-OFC-00003
2015-OFC-00004
2015-OFC-00005
2015-OFC-00006
2015-OFC-00007
2015-OFC-00008
2016-OFC-00003

**RECOMMENDED DECISION AND ORDER ON REMAND:
GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
DIRECTING DEFENDANT TO COMPLY WITH EXISTING LAW
UNDER THREAT OF IMPOSED SANCTIONS**

Appearances: John Rainwater, Esq.
Mary Kay Cobb, Esq.
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Office of the Solicitor
U.S. Department of Labor
Dallas, Texas
For the Plaintiff

George E. Yund, Esq.
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Frost Brown Todd LLC
Cincinnati, Ohio
For the Defendant

Before: **THEODORE W. ANNOS**
Administrative Law Judge

¹ The caption has been amended due to Defendant's name change. See *Order Granting Motion to Amend Caption* (May 14, 2020).

These consolidated cases arise under Executive Order 11246, 30 Fed. Reg. 12319, as amended,² the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. § 4212, section 503 of the Rehabilitation Act, 29 U.S.C. § 793, and the rules and regulations pursuant to 41 C.F.R. Chapter 60.

I. BACKGROUND

Executive Order ("EO") 11246 prohibits federal contractors from discriminating against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin, and requires contractors to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin.³ The Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA") requires federal contractors to take affirmative action to employ and advance in employment qualified covered veterans.⁴ Section 503 of the Rehabilitation Act ("Rehabilitation Act") requires federal contractors to take affirmative action to employ and advance in employment qualified individuals with disabilities.⁵ The purpose of 41 C.F.R. Chapter 60 is to "achieve the aims" of EO 11246 and "set forth the standards for compliance" with the VEVRAA and Rehabilitation Act.⁶

The Office of Federal Contract Compliance Programs of the United States Department of Labor ("OFCCP" or "Plaintiff") is authorized to conduct compliance evaluations to determine if a federal contractor is complying with EO 11246, the VEVRAA, and the Rehabilitation Act.⁷ A compliance evaluation may consist of a "compliance review," which is an analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor.⁸ A compliance review typically begins with a "desk audit" of the written affirmative action program and supporting documentation to determine whether all elements required by the regulations are included, whether the affirmative action program meets agency standards of reasonableness, and whether the

² See Executive Order 11375, 32 Fed. Reg. 14303; Executive Order 12086, 43 Fed. Reg. 46501; Executive Order 12107, 44 Fed. Reg. 1055; Executive Order 13279, 67 Fed. Reg. 77141; Executive Order 13665, 79 Fed. Reg. 20749; Executive Order 13672, 79 Fed. Reg. 42971.

³ 30 Fed. Reg. 12319.

⁴ 38 U.S.C. § 4212

⁵ 29 U.S.C. § 793

⁶ 41 CFR §§ 60-1.1, 60-300.1(a), 60-741.1(a)

⁷ 41 C.F.R. §§ 60-1.20(a), 60-300.60(a), 60-741.60(a).

⁸ *Id.*

affirmative action program and supporting documentation satisfy agency standards of acceptability.⁹

Convergys Customer Management Group, Inc., now known as Concentrix CVG Customer Management Group, Inc. (“Convergys” or “Defendant”), is a customer relationship management company headquartered in Cincinnati, Ohio with several Government contracts for various locations and facilities across the United States.

Pursuant to its regulatory authority, Plaintiff initiated a compliance review desk audit for several of Defendant’s facilities, requiring it to submit copies of its affirmative action programs and several additional supporting documents. Defendant failed to submit the requested programs and documents. These proceedings followed.

II. PROCEDURAL HISTORY

On December 15, 2014, Plaintiff filed with the Office of Administrative Law Judges (“OALJ”), seven administrative complaints against Defendant, 2015-OFC-00002 through -00008 (collectively, “2015 Complaint”). Plaintiff sought an expedited hearing and an order: (1) permanently enjoining Defendant for failing and refusing to comply with the requirements of EO 11246, the VEVRAA, the Rehabilitation Act, and 41 C.F.R. Chapter 60, and (2) directing defendant to provide all affirmative action programs and additional supporting documents pursuant to the desk audit.¹⁰

On December 31, 2014, Defendant filed answers to the administrative complaints (collectively, “2015 Answer”). Defendant admitted that it is a contractor within the meaning of EO 11246, the VEVRAA, the Rehabilitation Act, and 41 C.F.R. Chapter 60, and further admitted that it failed to submit the documents Plaintiff requested pursuant to the desk audit.¹¹ However, Defendant averred that Plaintiff lacks constitutionally sufficient cause to justify its attempt to audit Defendant, and therefore sought an order, *inter alia*, finding that Plaintiff violated Defendant's Fourth Amendment right against unreasonable searches and seizures, and instructing Plaintiff to cease and desist from further investigating Defendant.¹²

On February 26, 2015, Plaintiff filed a motion for decision on the pleadings (“Pleadings Motion”), arguing that OFCCP is entitled to an order requiring Defendant to

⁹ *Id.*

¹⁰ 2015 Complaint at 4-5.

¹¹ 2015 Answer at 3-4.

¹² *Id.* at 4-6.

provide its affirmative action programs and supporting data as a matter of law. Defendant opposed the Pleadings Motion, contending that a genuine dispute remains regarding material facts.

On October 23, 2015, Chief Administrative Law Judge Stephen R. Henley issued a *Recommended Decision and Order Granting Plaintiff's Motion for a Decision on the Pleadings and Directing Defendants to Comply with Existing Law and Implementing Regulations Under Threat of Imposed Sanctions* ("2015 RDO"). In the 2015 RDO, Chief Judge Henley determined that the *Lone Steer* standard is appropriate and satisfied as a matter of law, that Defendant violated 41 C.F.R. § 60-1.12(c)(2) by failing to provide its written affirmative action programs and supporting data upon request, and that Defendant did not have good cause to excuse the violation.¹³ Accordingly, Chief Judge Henley granted summary decision in favor of Plaintiff.

On December 1, 2015, Defendant filed exceptions to the 2015 RDO with the Administrative Review Board ("ARB" or "the Board").¹⁴

On December 10, 2015, Plaintiff filed with OALJ an eighth administrative complaint for additional facilities owned by Defendant, 2016-OFC-00003 ("2016 Complaint"). On February 7, 2017, Plaintiff filed an amended 2016 Complaint ("2016 Am. Complaint"). Plaintiff sought the same relief as requested in the 2015 Complaint.¹⁵

On January 5, 2016 and May 23, 2017, Defendant filed an answer to the 2016 Complaint ("2016 Answer") and an answer to the 2016 Am. Complaint ("2016 Am. Answer"), respectively. Defendant once again admitted that it is a contractor within the meaning of EO 11246, the VEVRAA, the Rehabilitation Act, and 41 C.F.R. Chapter 60, and that it failed to submit the documents Plaintiff requested pursuant to the desk audit.¹⁶ Defendant also asserted the same constitutional challenges and the same relief it sought in the 2015 Answer.¹⁷ In addition, Defendant asserted a counterclaim against Plaintiff for declaratory judgment and permanent injunctive relief.¹⁸ The counterclaim was subsequently denied by Chief Judge Henley, who determined that the applicable statutes and regulations do not empower Defendant to file a complaint or plead a counterclaim.¹⁹

¹³ 2015 RDO at 11-13. See also *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984).

¹⁴ See *OFCCP v. Convergys*, ARB Case No. 16-013.

¹⁵ 2016 Am. Complaint at 7-8.

¹⁶ 2016 Am. Answer at 5, 8.

¹⁷ *Id.* at 8-10.

¹⁸ 2016 Answer at 11-16.

¹⁹ See *Order Denying Motion for Joinder of Claims, Counterclaim and Request for Hearing* (Feb. 11, 2016).

On July 31, 2017, Chief Judge Henley issued a *Recommended Decision and Order Granting Joint Request for a Decision on the Pleadings and Directing [Defendant] to Comply with Existing Law Under Threat of Imposed Sanctions* (“2017 RDO”). In the 2017 RDO, Chief Judge Henley determined that the *Lone Steer* standard is appropriate and satisfied as a matter of law, that Defendant violated 41 C.F.R. § 60-1.12(c)(2) by failing to provide its written affirmative action programs and supporting data upon request, and that Defendant did not have good cause to excuse the violation.²⁰ Accordingly, Chief Judge Henley granted judgment on the pleadings in favor of Plaintiff.

On August 31, 2017, Defendant filed exceptions to the 2017 RDO with the Board. The Board thereafter consolidated the appeal of 2016-OFC-00003 with ARB Case No. 16-013, which contained the pending appeals in 2015-OFC-00002 through -00008.

On September 19, 2017, Plaintiff moved for the appeals to be held in abeyance pending the U.S. Supreme Court’s decision in *Lucia v. SEC*,²¹ which the Board subsequently granted.

On January 26, 2018, Plaintiff moved to lift the stay and remand the cases to OALJ. Defendant opposed the motion, requesting that the cases remain with the Board until *Lucia* had been decided. The Board did not address Plaintiff’s motion.²²

On January 31, 2019, the Board issued an *Order Lifting Stay and Remanding the Case to a New Administrative Law Judge* (“Remand”), wherein it dismissed Defendant’s appeals and remanded the cases to OALJ pursuant to *Lucia*.²³

On September 17, 2019, the cases were assigned to the undersigned, and on October 16, 2019, I issued an *Order Inviting Briefs on Remand*. The parties agreed to

²⁰ 2017 RDO at 10-12.

²¹ 138 S. Ct. 2044 (2018).

²² See *Order Lifting Stay and Remanding the Case to a New Administrative Law Judge*, ARB No. 16-013 (Jan. 31, 2019).

²³ *Id.* In reviewing the record, it does not appear that Defendant asserted an Appointments Clause challenge at any point when the cases were pending before Chief Judge Henley. See *OFCCP v. WMS Solutions, LLC*, ARB No. 2020-0057, ALJ No. 2015-OFC-00009, slip op. at 8, 13 (ARB Nov. 18, 2021) (“OFCCP regulations require issue exhaustion, which [Defendant] did not do in this case. Because [Defendant] failed to exhaust the issue by not raising an Appointments Clause challenge at any point during the ALJ proceedings, its Appointments Clause challenge is waived. ... [R]aising it now in the proceeding before the Board is untimely.”). See also *Perez v. BNSF Ry. Co.*, ARB Nos. 2017-0014, -0040, ALJ No. 2014-FRS-00043 (ARB Sept. 24, 2020); *Riddell v. CSX Transportation, Inc.*, ARB No. 2019-0016, ALJ No. 2014-FRS-00054 (ARB May 19, 2020).

extend the briefing deadline on several occasions because they were engaged in settlement discussions. However, they were unable to come to a resolution.

On June 1, 2020, Plaintiff filed a *Brief in Support of its Motion for Summary Judgment on Remand* (“Pl. Br.”), and Defendant filed a *Brief On Behalf Of [Defendant] On Remanded Cases And Issues Previously Raised In Exceptions To The Vacated July 31, 2017 Recommended Decision And Order* (“Def. Br.”).

On June 15, 2020, Defendant filed a *Reply to Plaintiff’s Brief in Support of its Motion for Summary Judgment* (“Def. Reply”). On June 29, 2020, Plaintiff filed a *Response to Convergys’ Brief on Remanded Cases and Issues Raised in Exceptions to the July 31, 2017 Recommended Decision and Order* (“Pl. Reply”).

III. ISSUES ON REMAND

Pursuant to *Lucia*, the Board “dismiss[e]d Convergys’ petition for review and remand[ed] this case to the Office of Administrative Law Judges for the appointment of an ALJ to reconsider the issues raised in Convergys’ exceptions to ALJ Henley’s July 31 2017 Recommended Decision and Order [i.e. the 2017 RDO].”²⁴

As an initial matter, I note that the 2017 RDO only applied to 2016-OFC-00003, and not the remaining consolidated cases, which were initially disposed of by the 2015 RDO. More importantly, *Lucia* mandates *de novo* proceedings on remand.²⁵ Accordingly, my review is not limited to Defendant’s exceptions to the 2015 RDO and 2017 RDO. Rather, this decision and order is based on a *de novo* review of the entire record, including the parties’ prior pleadings and motions.²⁶

IV. PARTIES’ CONTENTIONS

Plaintiff seeks summary judgment. It contends that Defendant’s refusal to provide the records that were lawfully requested restricts Plaintiff’s investigative authority beyond the Fourth Amendment’s legal limits. According to Plaintiff, “it is undisputed that OFCCP has only made requests for the ‘off-site’ production of documents” and has “not requested entry onto Convergys’ private premises.” Plaintiff therefore requests that I “find that the Fourth Amendment subpoena standard set forth in *Donovan v. Lone Steer*, 464 U.S. 408 (1984) controls this matter,” and that Plaintiff’s document requests satisfy the Fourth

²⁴ Remand at 2.

²⁵ See *Lucia*, 138 S. Ct. at 2055.

²⁶ The parties agree that *de novo* review is appropriate. See Def. Br. at 15; Pl. Reply at 2.

Amendment's subpoena standard. Since “these are the central questions before the Court, finding in OFCCP’s favor on these issues means OFCCP is entitled to the relief requested in its Complaints as a matter of law.”²⁷

Defendant contends that Plaintiff’s document requests are unconstitutional under the Fourth Amendment because OFCCP has failed to articulate a basis for having selected any of Defendant’s facilities for compliance review according to a neutral administrative plan. Defendant further argues that the number of document requests is unreasonably burdensome and thus unable to satisfy the *Lone Steer* requirements. According to Defendant:

OFCCP asserts only its untested, and untestable, conclusion that its voluminous document requests satisfy the procedural safeguards of the Fourth Amendment. The Constitution, however, requires a means for judicial review of such assertions. Under the current regulations implementing Executive Order No. 11246, judicial review of the constitutionality of these document requests is not available as Convergys cannot go directly to the courts, nor can it initiate proceedings with the Office of Administrative Law Judges. Without the ability to pursue judicial review, the Company had no choice but to refuse to comply with the Agency’s burdensome requests.²⁸

Defendant also argues that the position Plaintiff advances in these cases is inconsistent with its publicly announced commitment to “transparency in its process of selecting contractors for audit, and reduction of regulatory burden in its administration of the Executive Order and related legislation.” Defendant contends that Plaintiff’s selection of its facilities for audit are contrary to OFCCP’s 2018 ‘Bill of Rights’ for federal contractors,” which “include OFCCP’s promise to use a transparently neutral selection system for the scheduling compliance evaluations and to ‘never’ target individual contractors for an excessive and burdensome number of compliance reviews.”²⁹

In addition, Defendant asserts a due process violation under the Fifth Amendment. It contends that the regulations preserve the due process right of a defendant to be heard in a hearing by the administrative law judge, and that because it properly requested and preserved its right to a hearing pursuant to 41 C.F.R. § 60-30.6(b), granting Plaintiff’s

²⁷ Pl. Br. at 3.

²⁸ Def. Br. at 2.

²⁹ *Id.* at 2-3.

motion denies Defendant its fundamental right to due process under the Fifth Amendment.³⁰

Finally, Defendant contends that it can plead a counterclaim against Plaintiff, and reasserts its request for declaratory and injunctive relief.³¹ Specifically, Defendant requests a finding that: (1) Plaintiff's "failure to select the Convergys facilities using a neutral selection system, and the Agency's unreasonably burdensome request to audit a disproportionate number of Convergys's facilities, are violations of the Fourth Amendment of the United States Constitution"; and (ii) Plaintiff's "efforts to prevent the Company from putting on a full defense to the Agency's claims violate the Fifth Amendment to the United States Constitution."³² Additionally, Defendant requests that this tribunal "enjoin the Agency from conducting any compliance reviews that were scheduled in violation of the Constitution and to cease and desist all enforcement actions in connection with the Convergys facilities at issue in this Answer and Counterclaim."³³

V. REGULATORY FRAMEWORK

Affirmative action programs ("AAP") are "designed to ensure equal employment opportunity" by, *inter alia*, including "policies, practices, and procedures that the contractor implements to ensure that all qualified applicants and employees are receiving an equal opportunity for recruitment, selection, advancement, and every other term and privilege associated with employment."³⁴ An AAP must include an organizational profile, job group analysis, placement of incumbents in job groups, determining availability, comparing incumbency to availability, placement goals, designation of responsibility for implementation, identification of problem areas, action-oriented programs, and periodic internal audits.³⁵

Supply and service government contractors must develop and maintain a written AAP for each of its establishments, if it has 50 or more employees and a contract of

³⁰ *Id.* at 24-25.

³¹ *Id.* at 20-21.

³² 2016 Answer at 11-16.

³³ *Id.*

³⁴ 41 C.F.R. § 60-2.10(a); 41 C.F.R. § 60-741.40(a); 41 C.F.R. § 60-300.1(a)(requiring "Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified protected veterans").

³⁵ 41 C.F.R. § 60-2.10(b). See also 41 C.F.R. §§ 60-2.11 thru 2.17; 41 C.F.R. § 60-741.44; 41 C.F.R. § 60-300.44.

\$50,000 or more.³⁶ Contractors must maintain and make available to OFCCP documentation of their compliance with the AAP regulatory requirements.³⁷

The regulations authorize OFCCP to conduct compliance evaluations to determine whether a contractor's AAP meets all elements required by the regulations, whether the AAP meets agency standards of reasonableness, and whether the AAP satisfies agency standards of acceptability.³⁸ Specifically, 41 C.F.R. § 60-1.20 provides:

(a) OFCCP may conduct compliance evaluations to determine if the contractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated during employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin. A compliance evaluation may consist of any one or any combination of the following investigative procedures:

(1) *Compliance review.* A comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages:

(i) A desk audit of the written AAP and supporting documentation to determine whether all elements required by the regulations in this part are included, whether the AAP meets agency standards of reasonableness, and whether the AAP and supporting documentation satisfy agency standards of acceptability. The desk audit is conducted at OFCCP offices, except in the case of preaward reviews. In a preaward review, the desk audit normally is conducted at the contractor's establishment.

(ii) An on-site review, conducted at the contractor's establishment to investigate unresolved problem areas identified in the AAP and supporting documentation during the desk audit, to verify that the

³⁶ 41 C.F.R. § 60-2.1(b); 41 C.F.R. § 60-741.40(b)(1); 41 C.F.R. § 60-300.40(a)(VEVRAA's AAP requirements apply to contractors that have 50 or more employees and a contract of \$100,000 or more).

³⁷ 41 C.F.R. § 60-2.1(c); 41 C.F.R. § 60-741.40(b)(2); 41 C.F.R. § 60-300.40(b).

³⁸ 41 C.F.R. § 60-1.20(a); 41 C.F.R. § 60-741.60(a); 41 C.F.R. § 60-300.60(b).

contractor has implemented the AAP and has complied with those regulatory obligations not required to be included in the AAP, and to examine potential instances or issues of discrimination. An on-site review normally will involve an examination of the contractor's personnel and employment policies, inspection and copying of documents related to employment actions, and interviews with employees, supervisors, managers, hiring officials; and

(iii) Where necessary, an off-site analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review.

(2) *Off-site review of records.* An analysis and evaluation of the AAP (or any part thereof) and supporting documentation, and other documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of the Executive Order and regulations;

(3) *Compliance check.* A determination of whether the contractor has maintained records consistent with § 60-1.12; at the contractor's option the documents may be provided either on-site or off-site; or

(4) *Focused review.* An on-site review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.³⁹

OFCCP may institute administrative enforcement proceedings and may seek an expedited hearing if a contractor refuses to submit an AAP or other requested records or information.⁴⁰ The purpose of the expedited process is to allow OFCCP an “opportunity to demonstrate the basis for the request for sanctions and/or remedies,” and allow the contractor “an opportunity to show that the violation complained of did not occur and/or that good cause or good faith efforts excuse the alleged violations.”⁴¹

³⁹ 41 C.F.R. § 60-1.20(a). See 41 C.F.R. § 60-741.60; 41 C.F.R. § 60-300.60.

⁴⁰ 41 C.F.R. §§ 60-1.20(e), -1.26(b)(1), -30.31. See also 41 C.F.R. §§ 60-300.65(b)(1), 60-741.65(b)(1) (enforcement proceedings under the implementing regulations for the VEVRAA and the Rehabilitation Act “shall be governed by the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246 contained in 41 CFR part 60-30[.]”).

⁴¹ 41 C.F.R. § 60-30.34.

Summary judgment is available to both parties under the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246.⁴² A motion for summary judgment shall be granted “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 judgment as a matter of law.”⁴³ Summary judgment rendered for or against OFCCP or the contractor shall constitute the administrative law judge’s recommended findings and conclusions on the issues involved.⁴⁴

VI. PROPOSED FINDINGS AND CONCLUSIONS

1) At all times relevant to these cases, Defendant was a contractor within the meaning of EO 11246, the VEVRAA, the Rehabilitation Act, and 41 C.F.R. Chapter 60.⁴⁵

2) At all times relevant to these cases, Plaintiff was authorized to conduct compliance evaluations to determine, *inter alia*, whether a contractor’s AAP meets all elements required by the regulations, whether the AAP meets agency standards of reasonableness, and whether the AAP satisfies agency standards of acceptability.⁴⁶

3) From April 2013 to June 2016, Plaintiff sent scheduling letters to Defendant stating that OFCCP had selected 16 of its establishments for a compliance review.⁴⁷ In

⁴² 41 C.F.R. § 60-30.23.

⁴³ 41 C.F.R. § 60-30.23. A material fact is one whose existence affects the outcome of the case. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). A genuine issue exists when the non-moving party produces sufficient evidence of a material fact so that a fact finder is required to resolve the parties’ differing versions at trial. *Id.* at 249. In deciding a motion for summary judgment, the tribunal must consider all the material submitted by both parties, drawing all reasonable inferences in a manner most favorable to the non-moving party and determine whether a fact-finder could rule in favor of the non-moving party. *Id.* at 255; *Matsushita Elec. Industrial v. Zenith Radio*, 475 U.S. 574, 587 (1986). The moving party has the burden to show that the non-moving party cannot make a showing sufficient to establish an essential element of the case. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met its burden, the non-moving party must show that there is a genuine issue of material fact. *Id.* at 324. If the non-moving party fails to sufficiently show an essential element of their case, there is necessarily no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party’s case renders all other facts immaterial. *Id.* at 322-23.

⁴⁴ 41 C.F.R. § 60-30.23.

⁴⁵ 2015 Complaint, ¶¶ 4-5; 2016 Am. Complaint, ¶¶ 5-6; 2015 Answer at 3-4; 2016 Am. Answer at 5.

⁴⁶ 41 C.F.R. § 60-1.20(a); 41 C.F.R. § 60-741.60; 41 C.F.R. § 60-300.60.

⁴⁷ Defendant asserts that there is a material issue of fact with respect to the number of facilities selected by Plaintiff for review. Def. Br. at 23. The basis for this contention appears to be that Plaintiff “continued to target Convergys facilities for compliance reviews.” *Id.* at 34, n.9. However, the scheduling letters and facilities at issue in this litigation are limited to those 16 specifically identified in the administrative complaints. See 2015 Complaint, 2016 Complaint, 2016 Am. Complaint.

the scheduling letters, Plaintiff requested that Defendant submit copies of its AAPs and supporting data for each location, which were needed to conduct the desk audit phase of its compliance review.⁴⁸

4) Defendant failed to submit the AAPs and supporting data in response to Plaintiff's scheduling letters.⁴⁹

5) Plaintiff's scheduling letters are reviewed under the *Lone Steer* standard.

a) The level of Fourth Amendment protections that a business is afforded depends on the type of compliance evaluation that an agency seeks. If an agency seeks nonconsensual entry onto non-public property, then the protections of an administrative warrant attach, which requires that the inspection be authorized by statute, properly limited in scope, and initiated in a proper manner, meaning that it is based on specific evidence of an existing violation, reasonable legislative or administrative standards, or a showing that the search was initiated pursuant to a neutral administrative plan (i.e., the *Barlow's* standard).⁵⁰

b) Those same protections, however, do not attach when an agency seeks the production of documents without nonconsensual entry onto a public area. Instead, the less rigorous protection of an administrative subpoena is sufficient, which requires that the inspection be limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome (i.e., the *Lone Steer* standard).⁵¹

c) Here, Plaintiff's scheduling letters do not seek nonconsensual entry onto Defendant's property and are limited to the off-site review of documents.⁵² Therefore, the scheduling letters are not administrative warrants subject to review under the *Barlow's* standard. Although the scheduling letters are also not technically administrative subpoenas, they are "practically identical to one,"⁵³ and thus reviewing them under an administrative subpoena standard is adequate to

⁴⁸ 2015 Complaint, ¶¶ 8-9; 2016 Am. Complaint, ¶¶ 9-15, Ex. A; 2015 Answer at 4; 2016 Am. Answer at 5-7.

⁴⁹ 2015 Complaint, ¶ 10; 2016 Am. Complaint, ¶ 19; 2015 Answer at 4; 2016 Am. Answer at 8.

⁵⁰ *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 319-323 (1978). See also *U.S. v. Mississippi Power & Light Co.*, 638 F.2d 899, 907 (5th Cir. 1981).

⁵¹ *Lone Steer*, 464 U.S. at 415. See also *United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 91 (D.D.C. 2011).

⁵² See 2015 Complaint, ¶¶ 8-9; 2016 Am. Complaint, ¶¶ 9-15, Ex. A.

⁵³ *United Space Alliance*, 824 F.Supp.2d at 92.

protect Defendant's Fourth Amendment rights. Accordingly, it is appropriate to evaluate Plaintiff's scheduling letters under the *Lone Steer* standard.⁵⁴

6) Plaintiff's scheduling letters satisfy the *Lone Steer* standard.

a) The scheduling letters are specifically limited to Defendant's AAPs and supporting data,⁵⁵ and are directly related and relevant to Plaintiff's compliance responsibilities and authority under 41 C.F.R. Chapter 60.

b) As a contractor, Defendant was required to develop and maintain a written AAP for each of its facilities even in the absence of the scheduling letters,⁵⁶ and thus Defendant would not be unduly burdened by the production of documents that it has presumably already prepared and should be keeping in the normal course of its business as a contractor. Indeed, Defendant offered to submit the requested documents provided Plaintiff agreed to certain conditions.⁵⁷ Defendant's apparent willingness and ability to provide the documents belies its contention that compliance with the scheduling letters would be overly burdensome.

c) Therefore, Plaintiff's scheduling letters are "limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."⁵⁸

7) Defendant's unexcused failure to submit the AAPs and supporting data in response to the scheduling letters was a violation of 41 C.F.R. § 60-1.12(c)(2).

a) Defendant's arguments concerning Plaintiff's selection process are without merit. It contends that Plaintiff's scheduling letters are constitutionally deficient because OFCCP failed to articulate a basis for having selected any of Defendant's facilities for compliance review according to a neutral administrative plan. It also argues that the position Plaintiff advances in these cases is inconsistent with OFCCP's 2018 "Bill of Rights" for federal contractors, which includes OFCCP's promise to use a transparently neutral selection system for the scheduling

⁵⁴ See *id.* at 93 (OFCCP's request for the production of documents under EO 11246 and its implementing regulations "does not authorize entry onto private areas of [contractor's] property, and so it is properly tested under *Lone Steer*.").

⁵⁵ 2015 Complaint, ¶¶ 8-9; 2016 Am. Complaint, ¶¶ 9-15, Ex. A; 2015 Answer at 4; 2016 Am. Answer at 5-7.

⁵⁶ 41 C.F.R. § 60-2.1(b). See 41 C.F.R. § 60-741.40(b)(1); 41 C.F.R. § 60-300.40(a).

⁵⁷ 2016 Am. Answer at 3, Ex. F.

⁵⁸ *Lone Steer*, 464 U.S. at 415 (quotations and citations omitted).

compliance evaluations. There is no such requirement for a neutral selection process in this instance. *Lone Steer* “focuses on the breadth of the subpoena rather than the motivation for its issuance,”⁵⁹ and therefore any alleged lack of neutrality in Plaintiff’s selection criteria does not excuse Defendant’s failure to provide the requested documents.

b) Equally without merit is Defendant’s contention concerning its inability to pursue judicial review. *Lone Steer* “in no way leaves an employer defenseless against an unreasonably burdensome administrative subpoena requiring the production of documents,” but rather “provide[s] protection for a subpoenaed employer by allowing him to question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court.”⁶⁰ In this instance, it is the final administrative order that exposes Defendant to the cancellation of contracts and debarment from future contracts for failure to comply,⁶¹ and that final order is subject to judicial review granted by the Administrative Procedure Act.⁶² The Fourth Amendment requires no more.⁶³

8) The expedited procedures applicable to these proceedings satisfy a defendant’s Fifth Amendment right to due process. Both *United Space Alliance* and *Beverly Enterprises* specifically held that the expedited hearing procedures under 41 C.F.R. §§ 60-30.31 – 60-30.37 “respect the due process rights of federal contractors[.]”⁶⁴ Contrary to Defendant’s contention, the fact that this decision and order is issuing on a

⁵⁹ *United Space Alliance*, 824 F.Supp.2d at 91. See also *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (“Even if one were to regard the request for information ... as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.”).

⁶⁰ *United Space Alliance*, 824 F.Supp.2d at 91-92 (quoting *Lone Steer*, 464 U.S. at 415) (alteration in original).

⁶¹ 41 C.F.R. § 60-30.30.

⁶² See *Entergy Servs. v. U.S. Dept. of Labor*, 2014 U.S. Dist. LEXIS 183517 at *34 (E.D. La. Dec. 15, 2014) (“APA is the appropriate vehicle for [the] Court’s review” of the Department of Labor’s final action in a case arising from EO 11246).

⁶³ See *United Space Alliance*, 824 F.Supp.2d at 92-93 (“United Space further objects that an OFCCP official’s request for information cannot be immediately challenged in an Article III court, as a subpoena can. Here it is mistaken about what constitutes the ‘final agency action’ presently under review. ... [T]his Court reviews the agency’s final administrative order that United Space comply with the OFCCP data request—and not the original request itself. ‘[B]efore suffering any penalties for refusing to comply with’ that order, United Space can ‘question [its] reasonableness ... by raising objections in an action in district court.’ Indeed, it has done so, and the Court reviews its constitutional arguments as though presented here for the first time. The Fourth Amendment requires no more.”) (alterations in original; citation omitted).

⁶⁴ *Id.* at 95. See *Beverly Enterprises, Inc. v. Herman*, 130 F. Supp. 2d 1, 20 (D.D.C. 2000).

motion for summary judgment rather than after Defendant's requested hearing does not deprive it of due process.⁶⁵

9) Defendant is not authorized to plead a counterclaim. Only 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 defendant.⁶⁶ The only pleading the defendant is authorized to file is an answer; it is not empowered to file a complaint, plead a counterclaim, or otherwise seek declaratory or injunctive relief.⁶⁷

Based on the foregoing, and pursuant to my review of the entire record, including the administrative complaints, answers, and the exhibits attached thereto, along with the parties' briefs, I find that there is no genuine issue of material fact and that Plaintiff is entitled to judgment as a matter of law.⁶⁸ Accordingly, summary judgment for Plaintiff is **GRANTED**, Defendant's counterclaim is **DISMISSED**, and it is hereby **ORDERED** that:

1) Defendant, through its officers, directors, partners, representatives and agents, jointly and individually, shall provide all information Plaintiff requested in the scheduling letters that were identified in the administrative complaints filed in these consolidated cases. Defendant shall provide the information to Plaintiff's representatives no later than 4:00 PM on the business day next following the thirtieth calendar day after this Order becomes final under the law.

2) Should Defendant fail to comply with the Order set forth above, Plaintiff is directed to take all administrative steps necessary to terminate all existing Government contracts held by Defendant, jointly and individually, and to debar Defendant from

⁶⁵ See *Burks v. Wisconsin Dept. of Transp.*, 464 F.3d 744, 759 (7th Cir. 2006) ("To the degree that [plaintiff] is arguing that, as a principle of law, summary judgment cannot be squared with the Constitution, we previously have rejected arguments that summary judgment violates either the Fifth or Seventh Amendments. As for the Fifth Amendment, we stated that '[t]he Supreme Court has made it abundantly clear that summary judgment has a proper role to play in civil cases,' and thus granting summary judgment does not violate a plaintiff's right to due process.") (citation omitted; some alterations in original); *Beverly Enterprises*, 130 F. Supp. 2d at 19 (Fifth Amendment "only requires that a person receive his due process, not every procedural device that he may claim or desire.") (citation omitted).

⁶⁶ 41 C.F.R. §§ 60-30.5, -30.32.

⁶⁷ 41 C.F.R. §§ 60-30.6, -30.21. See also *Energy Services, Inc. v. OFCCP*, ARB No. 13-025, ALJ No. 2013-OFC-00001 (ARB May 19, 2014) (affirming a dismissal by OALJ due to lack of jurisdiction where federal contractors sought declaratory relief from OFCCP compliance reviews).

⁶⁸ See 41 C.F.R. § 60-30.23 (summary judgment shall be granted "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 judgment as a matter of law.").

receiving and participating in any future Government contracts for a period of at least three years or until Defendant complies with the provisions of EO 11246, the VEVRAA, the Rehabilitation Act, and 41 C.F.R. Chapter 60, whichever period is longer.

SO ORDERED.

THEODORE W. ANNOS
Administrative Law Judge
Washington, DC

NOTICE OF APPEAL RIGHTS: To appeal, you must file exceptions ("Exceptions") with the Administrative Review Board ("Board") within **ten (10) days** of the date of receipt of the administrative law judge's recommended decision.

Exceptions may be responded to by other parties. Responses must be filed with the Board within seven (7) days after receipt of the exceptions. Briefs or exceptions and responses shall be served simultaneously on all other parties to the proceeding. See 41 C.F.R. § 60-30.36.

After expiration of the time for filing exceptions, the Board is to issue a final Administrative order which shall be served on all parties. If the Board does not issue a final Administrative order within thirty (30) days after the expiration of the time for filing exceptions, this recommended decision shall become a final Administrative order which shall become effective on the thirty-first (31st) day after expiration of the time for filing exceptions. See 41 C.F.R. § 60-30.37; see also 41 CFR § 60-30.30 (which is applicable to the Board's review of this recommended decision, except as to specific time periods).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing has become mandatory for parties represented by counsel. Parties represented by counsel must file an appeal by accessing the eFile/eServe system (EFS) at <https://efile.dol.gov/> EFILE.DOL.GOV.

Filing Your Appeal Online

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at <https://efile.dol.gov/support/>.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at <https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf> and/or the video tutorial at <https://efile.dol.gov/support/boards/new-appeal-arb>. Existing EFSR system users will not have to create a new EFS profile. Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at <https://efile.dol.gov/contact>.

If you file your appeal online, no paper copies need be filed with the Board.

You are still responsible for serving the notice of appeal on the other parties to the case and for attaching a certificate of service to your filing. If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing of your document on those registered parties. Non-registered parties must be served using other means. Include a certificate of service showing how you have completed service whether through the EFS system or otherwise.

Filing Your Appeal by Mail

Self-represented (pro se) litigants may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

<https://efile.dol.gov/support/boards/request-access-an-appeal>

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.

SERVICE SHEET

Case Name: **OFCCP_-_ATLANTA_GA_v_CONVERGYS_CUSTOMER_M_**

Case Numbers: **2016OFC00003, 2015OFC00002, 2015OFC00003, 2015OFC00004, 2015OFC00005, 2015OFC00006, 2015OFC00007, 2015OFC00008**

Document Title: **RECOMMENDED DECISION AND ORDER ON REMAND**

I hereby certify that a copy of the above-referenced document was sent to the following this 30th day of December, 2021:

KAREN SEALY

Law Clerk

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