U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 28 February 2011

Case No.: **2011-OFC-00002**

In the Matter of:

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

v.

UNITED SPACE ALLIANCE, LLC,
Defendant.

Appearances: John A. Black, Esq.
For Plaintiff

William E. Doyle, Jr., Esq.
For Defendant

Before: Daniel A. Sarno, Jr.
District Chief Administrative Law Judge

RECOMMENDED DECISION AND ORDER

On November 10, 2010, Counsel for the Office of Federal Contract Compliance Programs, United States Labor (OFCCP or Plaintiff) filed an Administrative Complaint against United Space Alliance, LLC (USA or Defendant). The action brought by OFCCP is to enforce the contractual obligations imposed by Executive Order 11375 (32 Fed. Reg. 14303), Executive Order 12086 (43 Fed. Reg. 46501), and Executive Order 13279 (67 Fed. Reg. 77141) ("Executive Order"); section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793 ("Rehabilitation Act"); section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. § 4212 ("VEVRAA"), as amended; and the regulations issued pursuant thereto.

In Defendant's answer to the administrative complaint, Defendant admitted that:

1. Jurisdiction over the action exists under Executive Order 11246, as amended[1];

[1] Although the complaint also cited the Rehabilitation Act and VEVRAA, the additional data requested by OFCCP during the desk audit involved only information pertinent to the Executive Order.

2. Defendant United Space Alliance, LLC is a federal contractor engaged in the business of helping National Aeronautics and Space Administration ("NASA") to operate human space operations, included the Space Shuttle and the International Space Station.
3. At all times pertinent hereto, Defendant has maintained an establishment at 8550 Astronaut Boulevard, Cape Canaveral, Florida 32920, and its corporate headquarters at 1150 Gemini Street, Houston, Texas 77058.
4. Defendant had in place appropriate written affirmative action programs ("AAPs") under the Executive Order, Section 503 and VEVRAA for the Cape Canaveral facility during 2009, and provided those AAPs to Plaintiff in response to the August 7, 2009 scheduling letter.
5. At all times pertinent hereto, Defendant has had a Government contract of $100,000.00 or more.
6. At all times pertinent hereto, Defendant has had more than 50 employees.
7. By letter dated August 7, 2009, Plaintiff OFCCP notified Defendant that it had been selected for a compliance review under Executive Order 11246, Section 503, and 38 U.S.C. § 4212 at its Cape Canaveral, Florida facility and requested Defendant provide OFCCP with its affirmative action programs and certain supporting documents and records. Defendant provided its AAPs and the requested supporting documents.[2]

The Presiding Judge granted Plaintiff's request for an expedited hearing pursuant to 41 C.F.R. § 60-30.31 by Pre-Hearing Order #3. By Pre-Hearing Order #5, I denied Defendant's motion to reconsider that ruling. The hearing commenced on Monday, February 14, 2011 and continued through Tuesday, February 15, 2011, on which date the record was closed. The Presiding Judge has 15 days to submit a Recommended Decision to the Administrative Review Board (see 41 C.F.R. § 60-30.35).

Issues

Following Defendant's initial consent to the desk audit, did OFCCP establish a reasonable suspicion of a violation of the Executive Order sufficient to ask for more information during the desk audit and was it limited in scope?

Did OFCCP establish a reasonable suspicion of a violation of the Executive Order sufficient to ask for an on-site compliance review under not only the Executive Order but also the Rehabilitation Act and VEVRAA.

Findings of Fact[3]

Testimony of District Director Rivera

[2] In Defendant's answer to the administrative complaint, Defendant raises a defense that "Plaintiff selected USA's Cape Canaveral facility for an audit in a manner that was inconsistent with Fourth Amendment standards." In Pre-Hearing Order #6, I ruled that Defendant's initial compliance constituted consent of the initial search, thus waiving Plaintiff's burden of showing OFCCP followed a neutral administrative plan when it selected Defendant for the audit.

[3] Due to the expedited nature of this hearing, the Presiding Judge is working from a "Rough-Draft- Not Proofread" hearing transcript. As a result, transcript page numbers will not be cited because of their unreliability in the rough draft.

Miguel Rivera, Jr., is the District Director in the Orlando and Miami, Florida OFCCP offices. The mission of the Agency is to ensure that federal contractors comply with the regulations dealing with Affirmative Action Programs and Equal Employment Opportunity as it relates to race, gender, religion, national origin, disability, and veteran's status.

Mr. Rivera testified how the compliance evaluation process works. First, the OFCCP National Office generates a list of those individuals or contractors selected for review. Each District Office then reviews the list and sends out scheduling letters to contractors notifying them that they will be conducting a compliance evaluation. The contractors are requested to submit their AAP and activity data. The review of the AAP and the activity data by the District Office is referred to as a desk audit. If there are unresolved issues during the desk audit, additional data may be requested for analysis. If the unresolved issues persist, the District Office may request an on-site review.

In August 2009, the OFCCP National Office generated a list of contractors selected for review. On August 7, 2009, Defendant was sent a scheduling letter by the Orlando District Office, signed by Mr. Rivera who was the Assistant District Director at that time. (P-1).[4] The scheduling letter asked Defendant to provide its AAP as well as personnel activity data as itemized in an attachment. The itemized list was generated by the National Office. Item 11 of the list requested compensation data. During the desk Audit this data would be analyzed for possible disparities involving Defendant's AAP.

Defendant responded to the scheduling letter by letter dated October 13, 2009. (P-2). The AAP was included with the letter. (D-2). The letter noted that items 9, 10, and 11 would be mailed later that week. The items were submitted later. The item 11 compensation data was included as an e-mail attachment on October 14, 2009. (P-3, P-4).

Compliance Officer Teresi took the item 11 compensation data and did an initial desk audit analysis. The initial test performed was a threshold indicator test.[5] The results turned up no indicators of possible pattern of pay disparity between men and women. In other words, it passed the threshold indicator test.

Notwithstanding that the threshold analysis showed no indicators of pay disparity, the compliance officer performed another test called a pattern analysis which did not include thresholds. This analysis did show indicators of possible pay disparity between men and women. (P-5). Mr. Rivera reviewed these results and decided to perform a "30 and 5" test to get a more refined analysis of the compensation data. The 30 and 5 test also showed indicators of possible pay disparity between men and women, in favor of men. (P-5). Based upon these results, Mr. Rivera decided to request additional data from Defendant.

By letter dated November 9, 2009, Mr. Rivera notified Defendant that the desk audit review suggested possible indicators of compensation discrimination. It went on to request

[4] Plaintiff's Exhibits are identified as P-1, P-2, etc. Defendant's exhibits are identified as D-1, D-2, etc.

[5] The threshold indicator test was developed by the National Office. The specific thresholds used in the test are for internal use by OFCCP and were not produced or divulged at the hearing.

additional detailed data. (P-6). There were 15 items to be answered for all employees in Defendant's work force.

Defendant replied to the request by letter dated November 18, 2009. (P-7). Defendant noted that their initial item 11 submission inadvertently included salaries as of February 7, 2009, along with future dated promotions that were approved and funded to be effective throughout calendar year 2009. Defendant promised to submit a revised item 11 without the future promotions included in the data.

By letter dated December 10, 2009, District Director Rivera expanded its request to 18 items. (P-8).

Defendant never submitted the requested additional data. Mr. Rivera testified that OFCCP then requested an on-site compliance review. Mr. Rivera stated that the purpose was to continue OFCCP's compliance evaluation to resolve the unresolved issues involving possible compensation discrimination against women. However, the written request for the on-site compliance review specifically stated that on-site review would not be limited to possible violations of the Executive Order. It would include VEVRAA and the Rehabilitation Act as well. (D-14).

Testimony of Dr. Stephen G. Bronars (D-20)

Dr. Stephen G. Bronars is a labor economist.[6] His testimony was offered as rebuttal to that of District Director Rivera with regard to the analyses conduced on the data provided during the initial phase of the desk audit.

Dr. Bronars noted that the threshold test developed by the national office divides job groups into three categories: one where it is pretty clear that women get paid less than men; one where it is pretty clear that women get more than men; and a third category where it is too close to call.[7] He went on to say that the pattern test goes over the same steps as the threshold test, except it includes every pay division regardless of how small or inconclusive that evidence would be as to the percent difference or dollar difference in average pay. In other words, the pattern test does not have any thresholds that ignore insignificant pay differences. It is his opinion that the pattern analysis basically covers the same ground with no thresholds and does not add any information. It just muddies the water.

Dr. Bronars opined that there should be some reasonable thresholds. He went on to state that if you look at men and women and don't control for the extent of their previous experience, you will find a larger gender gap than if you actually do control for their previous experience, the amount of time in the job, the amount of time prior to this job did they get in the labor force, whether it is part-time work or full-time work, and if their experience was interrupted. He concluded that if all of this is left out of the analysis as it was in the pattern analysis, it's going to mean that there will be a more negative pay for women relative to men. However, he concluded

[6] He was accepted as a labor economist with an expertise in statistics and statistical analysis.
[7] There is no question that Defendant passed the threshold test.

that the threshold analysis did not take any of these factors into account either. Nor did he know what thresholds were used in the threshold test.

Dr. Bronars testified that the 30 and 5 analysis is also without thresholds. The analysis throws out a handful of very small grounds and the results are pretty much the same as the pattern analysis. Dr. Bronars concluded that neither the pattern analysis nor the 30 and 5 analysis were sufficient to establish a reasonable suspicion of discrepancy in compensation against women.

On cross examination he agreed that both the threshold and pattern analyses could be described as rudimentary non-statistical tests. He also agreed that a statistical regression analysis is commonly viewed as the gold standard because it compares "average pay, holding constant other factors that should influence pay and having the statistical methodology sort of adjust pay so that you're not allowing factors to confound any comparisons that you would be making."[8]

Dr. Bronars agreed that he really didn't know how much better a job the threshold test would do at identifying potential discrimination than the pattern test.

Dr. Bronars noted because he did not know the exact threshold numbers that were used in the threshold test, he could not be confident that the threshold test as applied here was a reasonable way to determine whether to request additional compensation data.

Dr. Bronars agreed that the pattern test provided different information than the threshold test. He didn't consider this information to be probative or valuable; however, he also acknowledged that he did not know how valuable or probative the information provided by the threshold test was either. Dr. Bronars agreed that "ignoring that a threshold test was done in this case [he has] not provided an opinion that the pattern test by itself would not be a reasonable basis to provide evidence of potential discrimination."

Discussion

Following Defendant's initial consent to the desk audit did OFCCP establish a reasonable suspicion of a violation of the Executive Order sufficient to ask for more information during the desk audit and was it reasonably limited in scope?

The record establishes that Defendant initially consented to the requested desk audit by supplying its AAP and various supporting documents.[9] It was only after Plaintiff requested more information that Defendant refused to continue with the desk audit. Plaintiff must show that it had a reasonable suspicion of a violation of the Executive Order.

In the instant proceeding, Defendant submits that Plaintiff has not met its burden. Defendant maintains that Plaintiff was bound to accept the results of the threshold test which was

[8] Dr. Bronars also agreed that a regression analysis would include many, if not all, of the data requested by OFCCP in this case after its pattern analysis showed indicators of possible discrimination.
[9] See OFCCP v. Bank of America, ARB No. 00-079, 1997-OFC-16 (March 31, 2003).

devised by OFCCP's National Office. According to Defendant, since Defendant passed the test, the District Director and/or Compliance Officer were precluded from using any other tests to determine if a reasonable suspicion of a violation existed. In this instance after the threshold analysis was done, a pattern analysis was conducted which did reveal indicators of possible pay disparity between men and women in favor of men. This test was followed up by a 30 and 5 analysis which also showed a pattern similar to the pattern analysis. Defendant insists that both of these tests are inferior to the threshold analysis, which showed no such indicators.

Notwithstanding Defendant's insistence that Plaintiff was bound to accept the threshold analysis results and go no further, there is nothing in the record to substantiate this assertion. District Directors are tasked with the Agency mission of ensuring that Federal contractors comply with the regulations dealing with Affirmative Action Programs and Equal Employment Opportunity as it relates to race, gender, religion, national origin, disability and veteran's status. They are given broad discretion in carrying out this mission. I think it is quite reasonable for the District Director to use additional analyses to test the results of the threshold analysis.

Defendant also submits that the threshold analysis is superior to the pattern analysis and the 30 and 5 analysis because neither employ thresholds like the threshold analysis. Defendant's expert, Dr. Bronars, believed that the threshold analysis was a better analysis than other analyses not using thresholds. However, he also referred to both types of analyses as rudimentary, non-statistical tests. He noted that the gold standard analysis was a statistical regression analysis. Moreover, he agreed a regression analysis would include many, if not all, of the additional data requested by OFCCP in its follow-up requests. District Director was not using any rudimentary non-statistical test to charge Defendant with any violations. Rather, he was merely attempting to gather additional information to conduct a regression analysis before making any decision with regard to determining whether Defendant should be charged with any violations. I find his actions to be prudent and quite reasonable. Moreover, I find the additional 18 questions presented to Defendant to be quite limited in scope.

Did OFCCP establish a reasonable suspicion of violation of the Executive Order sufficient to ask for an on-site compliance under not only the Executive Order but also Rehabilitation Act and VEVRAA?

It is clear that Plaintiff requested the on-site compliance review once Defendant refused to produce the additional data and/or documents requested by Plaintiff. District Director Rivera insisted that the on-site compliance review was merely to acquire such data and/or documents which related to possible violations of the Executive Order. However, the letter requesting the on-site compliance review noted the on-site inquiry would be expanded to include the Rehabilitation Act as well as VERAA. Moreover, the instant complaint in this proceeding includes the Executive Order, the Rehabilitation Act and VEVRAA.

Plaintiff has made no attempt to show that expanding its requested on-site compliance review beyond acquiring data and/or documentation related to possible violations of the Executive Order. Nor do I find such an extension to be reasonable or limited in scope.

<u>Other Defenses Raised by Defendant</u>

Paperwork Reduction Act

United Space Alliance asserts the information sought by OFCCP in its November 2, 2009 request letter was requested in violation of the Paperwork Reduction Act (PRA), 44 U.S.C. § 3501 *et seq.*. One of the purposes of the PRA is to "minimize the paperwork burden" resulting from the collection of information by the federal government. It requires that for certain requests, a government agency first obtain a valid control number from the Office of Management and Budget (OMB). That number must be displayed on a request for information, and if it is not, the PRA provides a defense to having to produce the requested information. 44 U.S.C. § 3512. The PRA further indicates that it does not apply to collection of information during "an administrative action or investigation involving an agency against specific individuals or entities." 44 U.S.C. § 3518(c)(1)(B)(ii).

USA argues that OFCCP's request for additional compensation data is a form letter request, not an individualized request, and therefore is subject to the PRA's requirement that an OMB control number be obtained and displayed. USA observed that District Director Rivera testified that in a year the Orlando office sends out between 40 and 50 requests for additional compensation data out of approximately 80 audits conducted. Rivera estimated that approximately the same percentage would apply within his district, suggesting that the numbers would be between 60 and 70 requests for additional compensation data out of 120 audits. He stated that he could not speak for the other district offices. USA argues that the fact that requests are made for additional compensation data in approximately 50 to 60 percent of audits shows that the requests are not individualized and thus do not fall under the exception at 44 U.S.C. § 3518(c)(1)(B)(ii). OFCCP disagrees and notes that the December 10, 2009 letter sent to USA to clarify the additional requests was not simply a form letter as it contained two items specific to USA. Rivera testified the original fifteen items requested in the November 2, 2009 letter are ones that in his experience correlate with pay. The additional two items were added in response to concerns USA had raised regarding its data submission.

The scheduling letter, which initiated the audit of USA, properly listed an OMB control number. (P-1). As a result of the annualized compensation data submitted by USA in response to that request, OFCCP reasonably requested additional information to be used to continue the desk audit. At that point, OFCCP's request was an individualized investigation of USA. The request was being made solely of USA, not of all federal contractors, or even of all federal contractors being audited. Although similar requests may have been made of multiple federal contractors, such requests are made as a result of an individualized audit and investigation into possible compensation discrepancies. Such circumstances are not ones in which the PRA applies. *See, e.g., MacKenzie Medical Supply v. Leavitt*, 506 F3rd 341 (4th Cir. 2007). Therefore, I find OFCCP's request for additional compensation data does not violate the PRA.

Equal Protection

USA also raises an equal protection defense, claiming the process used by the OFCCP improperly pushes employers to make pay adjustments in favor of women to avoid extensive audits. USA further argues OFCCP does not pursue discrimination against males as often as it

pursues discrimination against females. There is simply not sufficient evidence in the record to support an equal protection argument, nor is this the forum for such an argument, given the scope of the issue in this case.

Vindictive Prosecution

"Prosecutorial vindictiveness" has a precise and limited meaning: it occurs when the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights. *United States v. Goodwin,* 457 U.S. 368, 372, 102 S.Ct. 2485, 2488 (1982). "In other words, a prosecutorial action is 'vindictive' only if designed to penalize a defendant for invoking legally protected rights." *U.S. v. Meyer,* 810 F2d 1242, 1245 (D.C. Cir. 1987). The Supreme Court has held that vindictive prosecution violates due process. *Blackledge v. Perry,* 417 U.S. 21, S.Ct. 2098 (1974)*; see also Moran v. Burbine,* 475 U.S. 412, 106 S.Ct. 1135 (March 10, 1986).

The D.C. Circuit summarized the Supreme Court's approach to prosecutorial vindictiveness:

> The Supreme Court has established two ways in which a defendant may demonstrate prosecutorial vindictiveness. First, a defendant may show "actual vindictiveness" - that is, he may prove through objective evidence that a prosecutor acted in order to punish him for standing on his legal rights. *See Goodwin,* 457 U.S. at 380-81, 384 & n. 19. This showing is, of course, exceedingly difficult to make. Second, a defendant may in certain circumstances rely on a presumption of vindictiveness: when the facts indicate "a realistic likelihood of 'vindictiveness[,]' " a presumption will arise obliging the government to come forward with objective evidence justifying the prosecutorial action. *See Blackledge v. Perry,* 417 U.S. 21, 27-29, 29 n. 7, 94 S.Ct. 2098, 2102-03, 2103 n. 7, 40 L.Ed.2d 628 (1974). . . . [The standard is w]hether defendant has shown [that] all of the circumstances[,] when taken together[,] support a realistic likelihood of vindictiveness and, therefore, give a rise to a presumption of vindictiveness.

Meyer, 810 F2d at 1245-46.

Presumption of Vindictiveness

The Supreme Court has stressed that few actions are so likely to result from prosecutorial misconduct that they presume an improper vindictive motive. *Goodwin,* 457 U.S. at 373; *see also Town of Newton v. Rumery,* 480 U.S. 386, 107 S.Ct. 1187, (March 9, 1987). One such action would be for a prosecutor to increase charges in response to a defendant's exercise of his right to appeal. *Blackledge,* 417 U.S. 21. The parties stipulated that a prior audit commenced on December 16, 2002. The prior compliance evaluation was closed on December 21, 2006, with no charges brought against USA as a result of that audit. (DX 13) On November 10, 2010, OFCCP filed an administrative complaint against USA.

For USA to invoke the presumption, it must show facts indicating a realistic likelihood of vindictiveness. USA invokes assertions more than facts, claiming that, after a four-year audit was conducted from 2002 – 2006, OFCCP initiated a new audit as retaliation against USA's exercise of protected rights in the prior audit, including the First Amendment right to petition and the due process right to counsel. The only support it offers for this assertion is that the Similarly Situated Employee Groupings ("SSEG") data requested by OFCCP was not typical. USA's statement that the data request is atypical was not established by the evidence of record, and even if it had been, an atypical request alone is unlikely to be sufficient to indicate a realistic likelihood of vindictiveness without strong evidence of motive.

USA offers no direct proof of any motive for OFCCP to retaliate against it. The Supreme Court has stressed that "a mere opportunity for vindictiveness is insufficient." *Goodwin*, 457 U.S. at 384; *see also Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, (June 12, 1989). At most, USA has perhaps shown an opportunity, but fails to meet the burden of showing facts that indicate a realistic likelihood of vindictiveness. I find that USA has not invoked a presumption of vindictiveness.

Actual Vindictiveness

Where the presumption does not apply, defendant must affirmatively prove actual vindictiveness. *Wasman v. U.S.*, 468 U.S. 559, 569 (July 3, 1984). As I have found the presumption does not apply, USA must prove through objective evidence that OFCCP acted in order to punish USA for standing on its legal rights. The evidence submitted for this prong of the analysis is the same as that for the presumption. Again, USA has submitted no evidence of an intent to punish, motive to punish, or actual vindictiveness.

USA argued at hearing that it was not able to pursue evidence as to the basis for the initial selection, which it believed to be vindictive, because of the Court's finding that it consented to the initial selection. I ruled in a pre-hearing order that "Defendant's initial compliance constituted consent of the initial search, thus, waiving Plaintiff's burden of showing [that] OFCCP followed a neutral administrative plan when it selected Defendant for the audit. . . . Moreover, Defendant admitted this consent in its answer to the Administrative Complaint."[10] I stand by my prior ruling and though USA may continue to object to that finding, it remains that it has submitted no objective evidence that OFCCP acted in order to punish it for standing on its legal rights.

I find that USA has failed to demonstrate prosecutorial vindictiveness through either actual vindictiveness or a presumption of vindictiveness. Accordingly, OFCCP has not violated due process on these grounds.

Administrative Procedure Act

Counsel for United Space Alliance also offers the defense that the OFCCP failed to comply with the procedural notice and comment requirements of the Administrative Procedure

[10] Pre-Hearing Order #6, issued February 4, 2011.

Act (APA). 5 U.S.C. § 551 *et seq.* The APA requires agencies to publish in the Federal Register all "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and each amendment, revision, or repeal of the foregoing." 5 U.S.C. § 552(a)(1)(D). Defendant's theory is that the OFCCP had previously published a 'Frequently Asked Question' (FAQ) on their webpage which placed the regulated community on notice as to the OFCCP's policy for analyzing compensation data. In the instance at hand though, the OFCCP did not use only their published analysis, referred to in the hearing as the 'threshold analysis', but also analyzed the data separately under a second approach, referred to in the hearing as the '30 and 5- or 'pattern analysis.' Counsel argues the use of this second approach constitutes a change from a published statement of general policy or interpretation and therefore should have been published in order to place the regulated community on notice.

If an agency issues or revises a mandatory standard it is obligated to publish this proposed rule in the Federal Registrar. *See* 5 U.S.C. § 552. However, if the issuance or revision is of a mere general statement of policy then such publication is not required. *See Nat'l Mining Ass'n v Sec'y of Labor*, 589 F.3d 1368 (11th Cir. 2009). This delineation is made by determining whether the policy "leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case . . . As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency in question has not established a binding norm." *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983). To make this determination courts have looked at: (1) the agency's expressed intentions as reflected by its characterization of the statement, (2) whether the statement was published in the Federal Register or the Code of Federal Regulations, and (3) whether the action has binding effects on private parties. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006).

The FAQ challenged in this case states:

> **Has OFCCP developed procedures for conducting a desk audit of a contractor's compensation practices?**
>
> Each of OFCCP's regional offices uses the same basic procedures for conducting a desk audit review of a contractor's compensation practices. Generally speaking, during a desk audit, the agency will examine the following three criteria when evaluating a contractor's compensation practices:
>
> - Whether, for at least one pay division, there is a specified difference in average compensation between the groups being compared and, if so, whether at least one group appears to be adversely affected.
> - After combining the pay divisions meeting the above condition, whether the number of employees in the non-favored group is greater than a specified number and represents a specified percentage of the total employees in that group in the overall workforce.

- Whether the overall percentage of the group most adversely affected in the combined pay divisions is larger, by a specified amount, than the overall percentage of the other groups adversely affected.

The specific thresholds used in each of the three criteria above are not static, but rather are subject to change as OFCCP continues to evaluate its targeting methodology.

Department of Labor, OFCCP, http://www.dol.gov/ofccp/regs/compliance/faqs/emprfaqs.htm#Q24 (last visited February 16, 2011) In including language such as "generally speaking" and specifically reserving the right that these standards are "subject to change," the language of FAQ suggests the OFCCP did not intend these statements to be characterized as binding. Secondly, the OFCCP never published this statement in the Federal Register, again suggesting the OFCCP did not intend this statement to be binding. Finally, this statement had no binding effect on private parties or individuals, as District Director Rivera's testimony made clear he was not bound to follow only the 'threshold' analysis mentioned in the FAQ. Therefore under all three factors of the *Center for Auto Safety* analysis the FAQ does not constitute a binding norm, but rather is a mere policy statement intended to provide the OFCCP and the regulated community with guidance.

The 11th Circuit has previously made the same determination based on similar facts. In *National Mining Association v Secretary of Labor* the Mine Safety and Health Administration (MSHA) agency had issued a 'Procedure Instruction Letter' (PIL) which was challenged for failure to provide notice and comment under the APA. PIL's are letters periodically published by the MSHA intended to provide interpretation or clarification for the MSHA personnel as well as the regulated community, similar to the FAQ at question in this case. *Nat'l,* 589 F.3d at 1370. The 11th Circuit similarly worked through the *Center for Auto Safety* analysis noting both the permissive language of the PIL itself and the fact that PIL adjustments were routinely made on a case-by-case basis. *Id.* at 1372. Based on these facts similar to the case at hand the 11th Circuit held that the PIL constituted a mere general statement of policy and therefore the MSHA was not required to complete the procedural notice and comment requirements of the APA. *Id.* at 1373.

Based on a full review of the record as well as binding, factually similar precedent from the 11th Circuit, I find that the OFCCP has not violated the APA by failure to strictly follow a mere statement of policy contained within a published FAQ.

RECOMMENDED ORDER

It is recommended that:

1. The Administrative Review Board (ARB) order Defendant to comply with the desk audit within thirty days of the ARB's Final Decision;
2. Should the ARB order Defendant to comply with the on-site compliance review, it is recommended that the compliance review should be limited to gathering the data and/or documents related to the 18 questions concerning possible violations of the Executive Order;
3. Should Defendant fail to comply with the desk audit and/or on-site compliance review, it is recommended that the ARB cancel all Defendant's present federal contracts and debar all future federal contracts until such time as Defendant is in compliance with the ARB's order.[11]

SO ORDERED

A

Daniel A. Sarno, Jr.
District Chief Administrative Law Judge

DAS/ccb
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file exceptions ("Exception") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's recommended decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Any request for an extension of time to file the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the Exception is due. *See* 41 C.F.R. § 60-30.28.

On the same date you file the Exception with the Board, a copy of the Exception must be served on each party to the proceeding. Within fourteen (14) days of the date of receipt of the Exception by a party, the party may submit a response to the Exception with the Board. Any request for an extension of time to file a response to the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the response is due. *See* 41 C.F.R. § 60-30.28.

[11] Within 10 days after receipt of the recommended findings, conclusions and order, any party may submit exceptions to said recommendations. Exceptions may be responded to within 7 days after receipt by said parties of the exceptions. All exceptions and responses shall be filed with the Administrative Review Board, United States Department of Labor. Briefs or exceptions and responses shall be served simultaneously on all parties to the proceeding. 41 C.F.R. § 60-30.36.

Even if no Exception is timely filed, the administrative law judge's recommended decision, along with the record, is automatically forwarded to the Board for a final administrative order. *See 41 C.F.R. § 60-30.27.*