UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANK OF AMERICA, N.A., Plaintiff, v. HILDA L. SOLIS, et al., Defendants.	Civil Action No. 09-2009 EGS/DAR

REPORT AND RECOMMENDATION

Plaintiff, Bank of America, commenced this action to challenge the final decision of the United States Department of Labor that Plaintiff violated Executive Order No. 11246 by its failure to provide Defendant Office of Federal Contract Compliance Programs with access to Plaintiff's facility for an on-site compliance review. Bank of America's Petition to Hold Unlawful and Set Aside the Final Order of the Administrative Review Board (Document No. 19), and Defendants' Motion for Summary Judgment (Document No. 20), are pending for consideration by the undersigned. Referral to Magistrate Judge (Document No. 25) at 1. Upon consideration of the parties' written submissions, the administrative record, the applicable law and the entire record herein, the undersigned will recommend that Defendants' Motion for Summary Judgment be granted, and that Plaintiff's petition be denied.

BACKGROUND

Plaintiff, Bank of America, is a federally chartered national banking association that provides a diversified range of banking services to its customers. Complaint (Document No. 1) ¶ 3. Plaintiff has many locations throughout the country, including one located at 200 North College Street, Charlotte, North Carolina. *Id.*

Plaintiff alleges that Defendant, Hilda L. Solis, Secretary of the Department of Labor ("the Secretary"); the Department of Labor; Patricia A. Shiu, Director of the Office of Federal Contract Compliance Programs, and the Office of Federal Contract Compliance Programs, are proper defendants to this action for review of the final decision of the Department of Labor pursuant to 5 U.S.C. § 703.[1] Complaint ¶¶ 4-6.

Defendant United States Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP"), conducts compliance evaluations to determine a contractor's compliance with its non-discrimination and affirmative action obligations pursuant to Executive Order No. 11246, which provides that government contractors "will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin[,]" and requires government contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, religion, or national origin." Executive Order No. 11246, § 201 *et seq.*[2]

The applicable regulations require government contractors and subcontractors, as defined

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[1] Section 703 of Title 5 of the United States Code provides that "[i]f no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or *the appropriate officer*." 5 U.S.C. § 703 (emphasis supplied).

[2] "[T]he Order provides for enforcement by the Department of Labor, to which the President's authority to investigate non-compliance and pursue criminal and/or civil proceedings is delegated." *Shekoyan v. Sibley Intern. Corp.*, 217 F. Supp. 2d 59, 70 (D.D.C. 2002) (citations omitted).

in 41 C.F.R. § 60-1.3, with 50 or more employees and a covered contract of $50,000 or more, to develop written affirmative action programs ("AAP") for each facility, within 120 days from the commencement of the contract. 41 C.F.R. § 60-2.1(b)(2)(i) and (c); *see also* Memorandum in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiff's Petition to Hold Unlawful and Set Aside the Final Order of the Administrative Review Board ("Defendants' Memorandum") (Document No. 20-1) at 6. The Executive Order further requires that the AAP must be developed and maintained for each establishment, updated annually, and must be provided to the OFCCP upon request. *See* 41 C.F.R. § 60-2.1(c) and (d). A financial institution with 50 or more employees must also develop an Executive Order AAP if it "(1) serves as a depository of Government funds in any amount; or (2) is an issuing or paying agent for U.S. savings bonds and notes in any amount." 41 C.F.R. § 60-2.1(b)(1)(iii) and (iv).

The regulations require that covered contractors provide the OFCCP access to their records and facilities so that the OFCCP can evaluate compliance with their nondiscrimination and affirmative action obligations. 41 C.F.R. § 60-1.20. The "access to records" regulation, 41 C.F.R. § 60-1.43, requires that the contractor agree to

> permit access during normal business hours to its places of business for the purpose of conducting on-site compliance evaluations and compliant investigations and inspecting and copying such books and accounts and records, including computerized records, and other materials as may be relevant to the matter under investigation and pertinent to compliance with the act or this part [of the regulations].

41 C.F.R. § 60-1.43.

On February 27, 2004, Defendant OFCCP notified Plaintiff, by letter, that it had selected its facility located at 200 North College Street in Charlotte, North Carolina for a compliance

review.[3] Memorandum of Points and Authorities in Support of Bank of America's Petition to Hold Unlawful and Set Aside the Final Order of the Administrative Review Board ("Plaintiff's Memorandum") (Document No. 19-1) at 5. In its selection letter, Defendant OFCCP explained that it would conduct the review pursuant to 41 C.F.R. § 60-1.20(a)(1), and requested that Plaintiff provide Defendant OFCCP with copies of its affirmative action plans and other documents for purposes of the desk audit phase of the compliance review within 30 days from its receipt of the letter. Administrative Record (Document No. 17-6) at 594-95.[4]

On March 15, 2004, Plaintiff sent a letter to Defendant OFCCP requesting that Defendant confirm, in writing, the process that resulted in the selection of its facility. Administrative Record (Document No. 17-4) at 309. Plaintiff indicated its willingness to cooperate with a compliance review, and also requested an extension of time until June 16, 2004 to produce the requested documents. Administrative Record (Document No. 17-8) at 759.

On March 24, 2004, Defendant OFCCP responded to Plaintiff's inquiry and stated that it selected the 200 North College Street facility based upon the "Selection Procedure . . . set forth in the OFCCP Order ADM 01-1/SEL [Selection Order]." Administrative Record (Document No. 17-4) at 311. Defendant OFCCP also granted the requested extension until June 16, 2004. *Id.* Subsequently, Plaintiff produced all documents requested for the purpose of the review. *Id.*

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[3] A "compliance review" is "[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." 41 C.F.R. § 60-1.20(a)(1). A compliance review may proceed in three stages: a desk audit; an on-site review; and, "where necessary," an off-site analysis. 41 C.F.R. § 60-1.20(a)(1)(i)-(iii).

[4] A desk audit, usually conducted at the OFCCP's offices, involves a review of the contractor's 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 affirmative action program and supporting documentation satisfy agency standards of acceptability." 41 C.F.R. § 60-1.20(a)(1)(i).

On September 23, 2004, Defendant OFCCP responded by letter to Plaintiff and stated that "[u]pon completion of the desk audit portion of [its] analysis, [it] found indicators . . . of a need for further-in-depth investigation of Plaintiff's compensation practices." Administrative Record (Document No. 17-5) at 381-83. Included in this letter were tables indicating that Plaintiff paid men more than women and non-minorities more than minorities in several job classifications. *Id.* at 381-382; Administrative Record (Document No. 17-9) at 859. Subsequently, on October 20, 2004, November 10, 2004 and January 7, 2005, Plaintiff produced additional information requested by Defendant OFCCP regarding job descriptions for job titles and the inclusion of a "date of birth or age" category to current roster information. Administrative Record (Document No. 17-8) at 755, 757.

On March 1, 2005, Defendant OFCCP sent a confirmation letter to Plaintiff regarding an on-site review, which it scheduled for April 19, 2005.[5] Administrative Record (Document No. 17-6) at 604-07. Defendant OFCCP requested that Plaintiff make certain documents and information available for examination and discussion during the review, and to arrange for a tour of the facility with a representative familiar with the jobs being performed. *Id.* at 604. Defendant OFCCP also notified Plaintiff that it intended to interview "all individuals involved in the compensation development and administration process for [the AAP] whether or not the individuals are located at the facility." *Id.* at 606.

On April 11, 2005, Plaintiff requested that Defendant OFCCP provide copies of OFCCP Order ADM 01-1/SEL and of the June 27, 2002 random computer list pursuant to which

[5] "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 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." 41 C.F.R. § 60-1.20(a)(1)(ii).

Defendant OFCCP represented it had selected the facility for a compliance review. Administrative Record (Document No. 17-2) at 51. In response, on April 13, 2005, Defendant OFCCP provided a copy of OFCCP Order ADM 01-1/SEL and a redacted copy of document entitled "FY 2002(00 EEDS) [Equal Employment Data System] Compliance Evaluation Random List." *Id.* at 53-54.

On June 8, 2005, Plaintiff's counsel, representatives from Defendant OFCCP and representatives from the Office of the Solicitor for the United States Department of Labor conducted a telephone conference to discuss the selection issue. *See* Administrative Record (Document No. 17-2) at 105-06. On December 9, 2005, Defendant OFCCP issued a Notice to Show Cause why enforcement proceedings should not be initiated due to Plaintiff's failure to permit Defendant OFCCP to perform an on-site review. Administrative Record (Document No. 17-7) at 677-78.[6]

On January 6, 2006, Plaintiff responded to Defendant OFCCP's Notice to Show Cause and requested information regarding the selection process. Administrative Record (Document No. 17-2) at 105-07. On January 27, 2006, Plaintiff inquired regarding the status of the request for information in its January 6 letter. *Id.* at 112. On March 15, 2006, Defendant OFCCP informed Plaintiff that it would not provide any additional information or documents regarding the selection of its facility.[7] *Id.* at 114.

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[6] "When the Deputy Assistant Secretary has reasonable cause to believe that a contractor has violated the equal opportunity clause he may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted." 41 C.F.R. § 60-1.28.

[7] In the letter of the same date, Defendant indicated that it had already provided Plaintiff with documents regarding selection procedures and a verbal explanation of the basis for Plaintiff's facility being selected for review.

On July 21, 2006, counsel for Plaintiff and Defendant OFCCP met to discuss Plaintiff's concerns regarding the selection procedure. *See* Administrative Record (Document No. 17-2) at 118. In its follow-up letter, on August 15, 2006, Plaintiff again requested that Defendant OFCCP produce documents regarding the selection of the facility for a compliance review. *Id.*

On August 23, 2006, Defendant OFCCP filed an Administrative Complaint, Case No. 2006-OFC-00003, pursuant to Executive Order No. 11246 and 41 C.F.R. Chapter 60, and in it, alleged that Plaintiff violated Executive Order No. 11246 and the regulations issued pursuant thereto, including 41 C.F.R. § 60-1.43, by refusing to permit Defendant OFCCP to perform an on-site compliance review.[8] Administrative Record (Document No. 17-2) at 2-10. Defendant OFCCP invoked the expedited hearing procedures of 41 C.F.R. § 60-30.31, *et seq*. *Id.*

Plaintiff filed a motion by which it objected to the expedited hearing procedures on the ground that the limited discovery permitted by those procedures would deny Plaintiff access to the discovery necessary to allow it to determine whether the 200 North College Street facility was properly selected for a compliance review.[9] Administrative Record (Document No. 17-2) at 20-120; Administrative Record (Document No. 17-3) at 121-183. Defendant OFCCP opposed Plaintiff's motion. Administrative Record (Document No. 17-3) at 196-203.

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[8] "If a contractor refuses to submit an affirmative action program, or refuses to supply records or other requested information, or *refuses to allow OFCCP access to its premises for on-site review*, . . . , OFCCP may immediately refer the matter to the Solicitor." 41 C.F.R. § 60-1.26(b)(1) (emphasis supplied). "Administrative enforcement proceedings shall be conducted under the control and supervision of the Solicitor of Labor and under the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246[.]" 41 C.F.R. § 60-1.26(b)(2).

[9] "Expedited hearings may be used, inter alia, when a contractor or subcontractor has violated a conciliation agreement; has not adopted and implemented an acceptable affirmative action program; has refused to give access or to supply records or other information as required by the equal opportunity clause; or has refused to allow an on-site compliance review to be conducted." 41 C.F.R. § 60-30.31.

On September 29, 2006, an Administrative Law Judge ("ALJ") rejected Defendant OFCCP's position with respect to the issue of an expedited hearing. Administrative Record (Document No. 17-3) at 205-07. The ALJ ruled that the "documentation" Defendant OFCCP provided to Plaintiff was "too redacted to be probative" and that the limited discovery provided by the expedited hearing procedures would not permit Plaintiff to determine the basis for the selection of the facility for a compliance review. *Id.* at 205.

Before the administrative hearing, the parties engaged in a brief discovery period. Plaintiff's Memorandum at 9. Discovery included, *inter alia*, Defendant OFCCP serving Requests for Admission on Plaintiff, and the deposition by Plaintiff of an individual serving as Defendant OFCCP's corporate representative. Administrative Record (Document No. 17-3) at 229-240; Administrative Record (Document No. 17-4) at 292-302.

On November 27, 2006, Defendant OFCCP filed a motion for summary judgment in the Office of Administrative Law Judges, in which it argued that the desk audit portion of the compliance review is not subject to the Fourth Amendment requirements because it does not involve entry onto non-public property, and, that the only issue for the ALJ was whether Defendant OFCCP had established a basis for the subsequent on-site review sufficient to meet the applicable Fourth Amendment standards. Administrative Record (Document No. 17-3) at 242-57. Defendant OFCCP argued that its request to conduct an on-site compliance review complied with the applicable Fourth Amendment standards because, at the time of its request, it possessed specific evidence sufficient to establish reasonable suspicion of a violation. Administrative Record (Document No. 17-3) at 250. Plaintiff opposed the motion for summary judgment. *Id.* at 259-268; Administrative Record (Document No. 17-4) at 269-276.

The hearing on the Administrative Complaint was held on December 6, 2006. Administrative Record (Document No. 17-5) at 450-483; Administrative Record (Document No. 17-6) at 484-582.

In its Post-Hearing Memorandum, Plaintiff argued that (1) Defendant OFCCP violated Plaintiff's Fourth Amendment rights because it had violated the Selection Order when it initially selected the 200 North College Street facility for a compliance review, and (2) Defendant OFCCP could not rely on a regression analysis as specific evidence sufficient to justify an on-site compliance review because Fourth Amendment principles must apply to Defendant OFCCP's initial selection process and because the regression analysis is fatally flawed.[10] Administrative Record (Document No. 17-9) at 773-808.

In its Post-Hearing Memorandum, Defendant OFCCP asserted that Fourth Amendment requirements do not apply to the initial selection of the facility for a compliance review, and that the facility had been selected pursuant to a neutral administrative plan. Administrative Record (Document No. 17-9) at 820-24. Defendant OFCCP also argued that its demand for an on-site compliance review complied with the Fourth Amendment because, at that time, it possessed a regression analysis that constituted specific evidence sufficient to establish a reasonable suspicion of a violation. Administrative Record (Document No. 17-9) at 824-25. Defendant OFCCP asked the ALJ to enter an order finding that Plaintiff had violated Executive Order No. 11246 and its implementing regulations, and requiring Plaintiff to permit an on-site review within a reasonable period of time. Administrative Record (Document No. 17-9) at 827-28.

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[10] On November 4, 2004, Defendant OFCCP's regional office in Atlanta, Georgia performed a regression analysis of Plaintiff's data, which revealed pay disparities between women in the "operational analyst" job group as compared to salaries paid to men in similar positions. *See* Administrative Record (Document No. 17-9) at 859.

On May 22, 2007, the ALJ issued Recommended Order Enforcing On-Site Review ("Recommended Order"). Administrative Record (Document No. 17-9) at 856. The ALJ proposed an order permitting Defendant OFCCP to access Plaintiff's premises to conduct an on-site review. *Id.* at 869. The ALJ found that Defendant OFCCP failed to meet its burden to prove that it actually applied its neutral administrative plan and selected Plaintiff according to its 2002 EEDS list. *Id.* at 866. The ALJ found that Plaintiff voluntarily consented to the desk audit and the EEDS list generated in 2002 did not deprive Plaintiff of its right under the Fourth Amendment. *Id.* at 864, 868. The ALJ also found that the desk audit data in Defendant OFCCP's September 23, 2004 letter provided specific evidence to justify an on-site review. Administrative Record (Document No. 17-9) at 869.

Plaintiff filed exceptions to the ALJ's Recommended Order. Administrative Record (Document No. 17-10) at 872-900. Plaintiff argued that the ALJ erred in finding that Plaintiff consented to the desk audit, given Defendant OFCCP's position that the Fourth Amendment does not apply to the desk audit since it does not involve entry onto the contractor's non-public property. *Id.* at 885-86. Plaintiff also argued that should the ARB adopt the ALJ's reasoning, Defendant OFCCP would be allowed to violate with impunity its own mandatory Scheduling Order and eliminate OFCCP's obligations pursuant to the Fourth Amendment. *Id.* at 887-88.

Defendant OFCCP responded to Plaintiff's exceptions but did not file its own exceptions to the ALJ's Recommended Order. Administrative Record (Document No. 17-10) at 911-46. Defendant OFCCP argued that it lawfully obtained the documents used in the desk audit because the Fourth Amendment does not apply to that stage of the compliance review. *Id.* at 928-30. Defendant OFCCP maintained that the evidence it obtained constituted specific evidence of an

existing violation because it gave OFCCP a reasonable belief of an ongoing violation that warranted further investigation. *Id.* at 930-34.

On September 30, 2009, the Administrative Review Board ("ARB") issued its Final Decision and Order in ARB Case No. 07-090 ("Final Order"). Administrative Record (Document No. 17-10) at 950-60. In its Final Order, the ARB (1) accepted the ALJ's determination that Plaintiff consented to the desk audit portion of the compliance review, and (2) concluded that the raw desk audit data created a reasonable suspicion of a violation of Executive Order No. 11246, which established specific evidence of an existing violation. *Id.* at 957-69.

The ARB ordered Plaintiff to "cease and desist from violating Executive Order 11246[] by denying [Defendant] OFCCP access to its North College Street facility to conduct an on-site compliance review[.]" Administrative Record (Document No. 17-10) at 960. It further ordered that "if [Plaintiff] failed to comply with [the] order within 30 days of its issuance[,]" then Plaintiff's "current government contracts be canceled, terminated, or suspended, and that [Plaintiff] be declared ineligible for further contracts and subcontracts, and from extension and modification of any existing contracts and subcontracts, until such time as it can satisfy the Secretary of Labor or her designee that it is in compliance with the provisions of Executive Order No. 11246 and its implementing regulations." *Id.*

On October 26, 2009, Plaintiff commenced this action by filing a three-count complaint seeking relief from the Department of Labor's Final Order pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702-706, and Rule 65 of the Federal Rules of Civil Procedure. Complaint ¶ 41. Plaintiff alleges that the Secretary's decisions that the OFCCP had provided "specific evidence" of a violation under Executive Order 11246 (Count I), and that

Plaintiff is properly enjoined from continuing to refuse to comply with OFCCP's requirements regarding an on-site compliance review (Count II), are not in accordance with law, contrary to constitutional right and not supported by substantial evidence. *Id.* ¶¶ 42-47. In Count III, Plaintiff further alleges that it will suffer irreparable harm in the form of non-recoverable economic losses and harm its business reputation in the event enforcement of the Final Order is not enjoined or stayed, and that Plaintiff is entitled to preliminary injunctive relief and stay of agency action. *Id.* ¶¶ 49-50.

In their Answer, Defendants deny the allegations that the challenged actions were not in accordance with law, contrary to constitutional right and not supported by substantial evidence. Defendants also deny that Plaintiff is entitled to any of the relief sought. Answer (Document No. 12) ¶¶ 42-50.

THE PARTIES' CONTENTIONS

Plaintiff contends that the ARB's finding that it consented to the desk audit portion of the compliance review is arbitrary and capricious and is not supported by substantial evidence. Plaintiff's Memorandum at 28-31. Plaintiff also contends that the ARB's finding that there is specific evidence of a violation of Executive Order No. 11246 is not supported by substantial evidence. *Id.* at 31-35.

Plaintiff, in its petition, asks that the court hold unlawful and set aside the ARB's Final Order. Plaintiff requests that the following "conclusions" by the ARB be set aside: (1) Plaintiff consented to the desk-audit portion of the compliance review; (2) the OFCCP possessed specific evidence of an existing violation to justify its demand for compliance review, and (3) Plaintiff

violated Executive Order No. 11246 by failing to provide the OFCCP access to its facility. Plaintiff's Memorandum at 35.

Plaintiff argues that the ALJ and ARB, in reaching their findings, implicitly understood that the desk audit portion of compliance review was subject to Fourth Amendment requirements, since both considered whether the initial selection was made pursuant to a neutral administrative plan. Plaintiff's Memorandum at 23. Plaintiff supplements this contention by citing authority in which courts have decided whether Fourth Amendment violations of compliance review had occurred by examining OFCCP's initial selection decision. *See, e.g., Beverly Enterprises, Inc. v. Herman*, 130 F. Supp. 2d 1 (D.D.C. 2000). Plaintiff argues that the authority on which Defendants principally rely, that is, *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984), is inapplicable, since that case dealt with administrative subpoenas *duces tecum* issued pursuant to sections 9 and 11 of the Fair Labor Standards Act, and not an OFCCP compliance review. Plaintiff's Memorandum at 24. Although Plaintiff acknowledges that compliance review is a multi-tiered process, Plaintiff submits that these stages are still part of a singular comprehensive procedure, and that if courts have considered compliance review under the Fourth Amendment, the desk audit portion of the compliance review must also be undertaken in accordance with the Fourth Amendment. *Id*. at 25-26. Plaintiff concludes that since the ALJ found that "the OFCCP violated its own mandatory Selection Order and could not prove that it selected the Bank of America facility for compliance review pursuant to a neutral administrative plan," its Fourth Amendment rights were violated by the OFCCP during the desk audit portion of compliance review. *Id.* at 27.

Plaintiff also contends that the ALJ and ARB erred by reaching the conclusion that it

consented to the desk audit portion of the compliance review. Plaintiff's Memorandum at 28. Plaintiff submits that due to the coercive language in the initial scheduling letter, including the references to the impositions of sanctions on contractors who do not submit to the desk audit portion of the compliance review, it did not voluntarily consent to the desk audit. *Id.* at 29. Plaintiff further asserts that consent was given to the desk audit on the premise that the OFCCP had asserted its lawful authority pursuant to Executive Order 11246 for compliance review selection based on neutral administrative criteria, which the ARB concluded it had not done. *Id.* at 29-30. Plaintiff further contends that its acquiescence to Defendant OFCCP's lawful authority is not voluntary consent. *Id.* at 30.

Plaintiff's final contention is that the ARB's conclusion that specific evidence of an existing violation of Executive Order No. 11246 justified on-site compliance review was an abuse of discretion and was not supported by substantial evidence. Plaintiff's Memorandum at 31. Plaintiff maintains that the regression analysis by the OFCCP was fatally flawed and could not have pinpointed a specific violation. Administrative Record (Document No. 17-9) at 868; Administrative Record (Document No. 17-10) at 959. Although the ALJ and ARB concluded the "raw desk audit set out in the OFCCP's September 23, 2004 letter justified the OFCCP's demand for an on-site review," Plaintiff contends that it never had a chance to reply to the ALJ's theory since it was not offered by the OFCCP. Plaintiff's Memorandum at 32-33. In addition, Plaintiff argues that the raw desk audit data could not have supported a finding of specific violation as the "OFCCP itself describes the desk audit analysis as 'rudimentary, at best,' 'based on extremely limited information' and 'not a finding of any problem with the your [Plaintiff's] compensation system." *Id.* at 33. Plaintiff argues that because OFCCP's protocol was to conduct a regression

analysis before deciding whether to conduct an on-site review, and the ALJ rejected the agency's protocol and substituted his own judgment for that of the agency, the decision was arbitrary and capricious. *Id.* at 34-35.

Defendants filed a consolidated opposition to Plaintiff's motion and a motion for summary judgment. *See* Defendant's Memorandum (Document No. 20-1). Defendants maintain that the Fourth Amendment is inapplicable to the desk audit phase, but to the extent that it does apply, their request for documents fully complied with the Fourth Amendment and, that in any event, Plaintiff consented to said request. Defendants' Memorandum at 17-23. Defendants further maintain that the ARB's finding that there is specific evidence of an existing violation and that Plaintiff should be subjected to an on-site review is not arbitrary and capricious and is supported by the administrative record. *Id.* at 27-34.

Defendants, in their response and cross motion for summary judgment, request that the court (1) deny Plaintiff's Petition to Hold Unlawful and Set Aside the Final Order of the Administrative Review Board and, (2) enter summary judgment in favor of Defendants, and order Plaintiff to comply with the ARB's September 30, 2009 decision that the Bank of America shall permit the OFCCP access to its premises at 200 North College Street, Charlotte, North Carolina to conduct on-site compliance review. Defendants' Memorandum at 34-35.

In support of their motion, Defendants contend that Defendant OFCCP's request for documents during the desk audit portion of compliance review is not subject to Fourth Amendment requirements. Defendants' Memorandum at 14. Defendants argue that a mere request for documents for the purpose of conducting a compliance review, such as the request during the desk audit, is not subject to the Fourth Amendment since it is not a search or seizure.

Defendants' Memorandum at 14 (citing *Immigration and Naturalization Serv. v. Delgado*, 466 U.S. 210, 216 (1984); *Florida v. Royer*, 460 U.S. 491, 497 (1983)). Furthermore, Defendants submit that since Plaintiff was required by both statute and its contract to keep the requested documents available for review by Defendant OFCCP, Plaintiff's Fourth Amendment rights could not have been violated. Defendants' Memorandum at 15. More specifically, Defendants note that pursuant to 41 C.F.R.§ 60-1.1, Executive Order 11246 applies to all government contractors, and 41 C.F.R. § 60-1.4(a)(5) provides that contractors shall furnish all information and reports required by Executive Order 11246.[11] Defendants further contend that because the documents were maintained pursuant to federal law, the records requested for the desk audit are not subject to the Fourth Amendment protections and come within the scope of the "required records" doctrine.[12] *Id.* at 16-17.

Defendants also maintain that Plaintiff voluntarily consented to the desk audit portion of compliance review. Defendants' Memorandum at 17-20. Defendants deny that Plaintiff's

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[11] "The purpose of the regulations in this part is to achieve the aims of parts II, III, and IV of Executive Order 11246 for the promotion and insuring of equal opportunity for all persons, without regard to race, color, religion, sex, or national origin, employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts. The regulations in this part apply to all contracting agencies of the Government and to contractors and subcontractors who perform under Government contracts, to the extent set forth in this part." 41 C.F.R.§ 60-1.1. "The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders." 41 C.F.R. § 60-1.4(a)(5).

[12] "The government may compel the production of required records without violating the fifth amendment." *United States v. Dean*, 989 F.2d 1205, 1209 (D.C. Cir. 1993) (citation omitted). "[C]ertain records will fall outside the scope of the Fifth Amendment privilege against self-incrimination if they are required to be kept as part of a regulatory scheme, and they have assumed public aspects which render them at least analogous to public documents." *Resolution Trust Corp. v. Lopez*, 794 F. Supp. 1, 3 (D.D.C. 1992) (internal quotations and citation omitted). Since there is no dispute in the record with respect to the Fifth Amendment privilege, the undersigned finds the required records doctrine inapplicable.

consent was given pursuant to an assertion of lawful authority, and that in any event, such an assertion would have been unnecessary since the document request for the desk audit portion of compliance review is not subject to Fourth Amendment protections. *Id.* at 19. Defendants add that Plaintiff could have refused to consent to Defendant OFCCP's request for documents and would have been entitled to an administrative hearing before a neutral officer prior to the imposition of any sanctions. *Id.* at 14, 19. Defendants' response to Plaintiff's contention that it only consented to a properly initiated compliance review is that OFCCP's "only obligation is to conduct compliance reviews such that they do not violate the law." *Id.* at 20. Defendant OFCCP submits it did not violate the law by not stringently adhering to its internal manual with regards to the Selection Order on the EEDS list. *Id.*

Defendants assert that since Executive Order No. 11246 authorized Defendant OFCCP to request documents for the purpose of a compliance review, "the OFCCP was free to use its statutory authority to request documents and had no duty to demonstrate any suspected violation or compliance with a plan at this stage [desk audit portion] of the compliance review." *Id.* at 22. Defendants argue that Plaintiff was not without remedy to challenge the requests for documents, and that Plaintiff could have denied Defendant OFCCP access to its records and Defendant OFCCP, in accordance with the applicable regulations, would "first issue preliminary findings of violation, attempt conciliation, and if that failed, issue a Notice of Show Cause and initiate administrative enforcement proceedings before an ALJ." *Id.*

With regard to Defendant OFCCP's proposed on-site review, Defendants contend that it complied with the Fourth Amendment obligations by finding specific evidence of an existing violation through its desk audit, which revealed disparities in pay based on gender and race

ethnicity. Defendants' Memorandum at 28-29. Defendants argue that they do not need to find an actual violation in order to conduct an on-site inspection, and instead, need only present facts that warrant further investigation, such as the unexplained statistical disparities disclosed during the desk audit. *Id.* at 29.

Finally, Defendants argue that administrative agency decisions are entitled to a presumption of regularity, and that since there was not a specific factual showing that Defendant OFCCP intentionally selected Plaintiff's bank facility for a compliance review, "the agency is not required to demonstrate that the plan was applied neutrally at every establishment on the list." Defendant's Memorandum at 33. Defendants submit that Defendant OFCCP selected the Plaintiff according to a neutral administrative plan. *Id.* at 34.

Plaintiff, in its Memorandum in Opposition Defendants' Motion for Summary Judgment and in Further Support of its Petition to Hold Unlawful and Set Aside the Final Order of the Administrative Review Board ("Plaintiff's Reply Memorandum") (Document No. 22), maintains that the Defendants' arguments that Plaintiff was required to keep documents are *post hoc* efforts to justify Defendant OFCCP's actions, and that the court should not accept *post hoc* rationalizations for agency action. Plaintiff's Reply Memorandum at 6. Plaintiff further argues that Defendants' reliance on *Delgado* and *Royer* to support the contention that the desk audit was a mere request for documents for the purpose of conducting a compliance review is misplaced. *Id.* at 7. Plaintiff contends that the deciding factor is whether a reasonable person would have believed he was free to leave if he refused to respond, and Plaintiff concludes that it was not free to leave as the government would have instituted administrative proceedings upon refusal. *Id*. at 7-8. Furthermore, Plaintiff contends the Defendants' argument regarding the "required records"

doctrine is incorrect, since the "required records" doctrine relates to the privilege of self-incrimination under the Fifth Amendment and has never been applied to the Fourth Amendment. *Id*. at 9. Furthermore, Plaintiff submits that "because an individual may be required to make or keep a record, . . . the individual is not required to produce it at the simple request of the government and, "[t]he government still must have a legal basis for requesting or demanding the document — that is, the government must have an independent basis for 'legally obtaining' the document." *Id*. Additionally, Plaintiff asserts that Defendants' contention that Defendant OFCCP was merely requesting documents and not contemplating an on-site review is false, since the initial selection letter discussed at length *the possibility* of an on-site review. *Id.* at 10 (emphasis supplied). Plaintiff avers that Defendant OFCCP could have elected a different compliance evaluation procedure, such as the off-site review of records. *Id*.

Regarding Defendants' claim that Plaintiff had consented to the review, Plaintiff submits that the so-called consent was premised upon the understanding that it had been selected in accordance with neutral administrative criteria. Plaintiff contends that by not administering the selection process according to neutral administrative criteria, Defendant OFCCP was not proceeding under lawful authority, and that Plaintiff's consent was not given voluntarily. Plaintiff's Reply Memorandum at 10-13.

Plaintiff argues that based on the administrative record, the ALJ could not make an independent judgment regarding the reliability of the desk audit results, or conclude that there was evidence of a violation. Plaintiff's Reply Memorandum at 20. Plaintiff argues that it addressed Defendant OFCCP's raw data when it responded to Defendant OFCCP's September 23, 2004 letter by showing that any differences in pay could be explained based on proper

factors, but since Defendants did not rely upon this rationale, Plaintiff never had a chance to fully challenge the raw desk audit data rationale. *Id*. at 21-22. Plaintiff contends that the raw data was not a basis for the ALJ finding specific evidence of a violation, since Defendant OFCCP did not rely upon it to justify its demand for on-site review. *Id.* at 22. Rather, Plaintiff contends that Defendant OFCCP relied solely on its now discredited regression analysis as the justification and basis for its demand for an on-site review. *Id*. Plaintiff submits that the ALJ and ARB therefore erred in finding that Defendant OFCCP satisfied its burden of proving that it had specific evidence of an existing violation sufficient to justify an on-site review. *Id*. at 23.

Finally, Plaintiff argues that Defendant OFCCP's assertion that the initial selection is entitled to a presumption of regularity is without merit. Plaintiff's Reply Memorandum at 24. Moreover, Plaintiff asserts that Defendants' reliance on *National Engineering & Contracting Co. v. OSHA*, 45 F.3d 476 (D.C. Cir. 1995), does not support their contention, as *National Engineering* is factually inapposite. Plaintiff's Reply Memorandum at 25. More specifically, Plaintiff argues that *National Engineering* does not involve a situation in which the evidence demonstrates that the agency violated its own procedures in making the selection decision. *Id.* Plaintiff argues that in this instance, since there is contrary evidence that Defendant OFCCP violated its own Selection Order, Defendant OFCCP should not be afforded the presumption of regularity. *Id*. Plaintiff therefore contends that the burden is on the agency to establish that the selection was actually made pursuant to its neutral administrative plan, and that the ALJ and ARB found that the OFCCP did not meet its burden. *Id*. at 28.

Defendants, in their Reply to Bank of America's Memorandum in Opposition to Defendants' Motion for Summary Judgment ("Defendants' Reply Memorandum") (Document

No. 23), submit that the Plaintiff's argument that it was subject to statutory, regulatory, and contractual obligations to preserve and furnish the employments records is not a new argument, since the Administrative Complaint filed by Defendant OFCCP detailed the requirements to which Plaintiff was subject. Defendants' Reply Memorandum at 7. Moreover, Defendants argue that although the required documents doctrine is applicable in the Fifth Amendment context, none of the cases on which Plaintiff relies stand for the proposition that the doctrine is inapplicable in the Fourth Amendment context or is only limited to the Fifth Amendment. *Id*. at 9.[13]

Defendants argue that Plaintiff was not subject to "any sanction or penalty for withholding the documents when and until it received a full administrative hearing, and was not precluded from forcing [Defendant] OFCCP to seek administrative hearing, and was not precluded from forcing [Defendant] OFCCP to seek administrative enforcement in order to obtain such a remedy." Defendants' Reply Memorandum at 11. Put another way, Defendants submit that "the fact that [Defendant] OFCCP is authorized to seek administrative enforcement if [Plaintiff] refused to provide the documents in no way implicates the Fourth Amendment[.]" *Id.* at 10. Defendants add that the scheduling letter did not force an on-site review of Plaintiff's facility, but rather merely notified the Plaintiff that compliance review might involve three phases pursuant to the applicable regulations. *Id*.

Regarding the neutral selection process, Defendants contend that Defendant OFCCP is not required to use the EEDS list because the EEDS Manual does not confer a substantive right on the party. Defendant's Reply Memorandum at 17. Defendants submit that in the desk audit

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[13] *See* n.12, *supra*.

stage of compliance evaluation, Defendant OFCCP merely seeks documents off-site, and the Fourth Amendment does not require that the agency use an EEDS list or any kind of "neutral plan." *Id.* Furthermore, Defendants argue that Plaintiff voluntarily provided documents at the desk audit stage, and that the OFCCP therefore did not have to prove the OFCCP complied with a neutral plan in order to proceed to conduct an on-site inspection. *Id*. at 18.

Furthermore, Defendants maintain that pursuant to *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946), the requirement is that the agency's inquiry be "authorized by law, that the materials sought be relevant, and that the information sought be particularly described." Defendants' Reply Memorandum at 6 n.5. Defendants submit that since Defendant OFCCP made a request for documents in accordance with Executive Order No. 11246 and did not intend an on-site review, the Fourth Amendment does not apply to the production of documents in the desk audit. *Id.* at 2.

Defendants submit that the regression analysis was not sole basis for requesting an on-site review of Plaintiff's facility. Defendant's Reply Memorandum at 23. Defendants maintain that it was the first document request that revealed pay disparities, and that Defendants asked for further documentation help resolve the question of the cause of the disparities. *Id*. Defendants argue that Defendant OFCCP was not required to find a violation in order to conduct an on-site inspection, but only to have facts sufficient to warrant further investigation or testing. *Id*. at 24. Defendants therefore conclude that their request for on-site inspection to investigate the pay disparities in Plaintiff's facility was justified. *Id*.

On November 18, 2011, Defendants filed a Notice of Supplemental Authority. *See* Notice of Supplemental Authority (Document No. 27). In it, Defendants notified the court of a

recent decision in *United Space Alliance, LLC v. Solis*, Civil Action No. 11-746, 2011 WL 5520428, at *1 (D.D.C. November 14, 2011). Defendants contend that the decision supports Defendants' Motion for Summary Judgment and in Opposition to Plaintiff's Petition to Hold Unlawful and Set Aside the Final Order of the Administrative Review Board, particularly with respect to their arguments regarding the applicability of the Fourth Amendment and the evidence of an existing violation sufficient to warrant an on-site review of Plaintiff's facility. *Id.* at 1.

As of the date of the filing of this report and recommendation, Plaintiff has not filed a response to Defendants' notice of supplemental authority.

APPLICABLE STANDARDS

Administrative Procedure Act

In civil actions in which judicial review proceeds in accordance with the Administrative Procedure Act, 5 U.S.C. § 706, "it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas 'the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'" *Buckingham v. Mabus*, 772 F. Supp. 2d 295, 300 (D.D.C. 2011) (quoting *Catholic Health Initiatives v. Sebelius*, 658 F. Supp. 2d 113, 117 (D.D.C. 2009)); *see also Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970) ("A court does not depart from its proper function when it undertakes the study of the record[.]").

Under the Administrative Procedure Act, the court must hold unlawful any agency action, findings and conclusions that it finds to be "arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). "This standard of review is narrow, and the court is not empowered to substitute its judgment for that of the agency." *Reed v. Salazar*, 744 F. Supp. 2d 98, 110 (D.D.C. 2010) (citation omitted). "The entire case on review is a question of law, and only a question of law." *United Space Alliance, LLC*, 2011 WL 5520428, at *4 (quoting *Marshall County Health Care Authority v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993)). "The APA also provides that a reviewing court shall 'hold unlawful and set aside agency action' that is 'not in accordance with law' or 'contrary to constitutional right.'" *Poett v. United States*, 657 F. Supp. 2d 230, 241 (D.D.C. 2009) (quoting 5 U.S.C. § 706(2)(A) & (B)). "Agency action enjoys a 'presumption of regularity' and a plaintiff faces a heavy burden in establishing that an agency's conduct violates this standard." *Nebraska, Dept. of Health & Human Services v. U.S. Dept. of Health and Human Services*, 340 F. Supp. 2d 1, 11 (D.D.C. 2004).

Agency action is considered "arbitrary and capricious" if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Catholic Health Initiatives*, 658 F. Supp. 2d at 117. The court is not "authorized to determine in a trial-type proceeding whether the [agency's decision] was factually flawed." *PPG Industries, Inc. v. U.S.*, 52 F.3d 363, 365 (D.C. Cir. 1995).

"The level of deference, however, depends on whether the agency's conclusion is based on factual interpretation or is purely a question of law." *Beverly Enterprises, Inc.*, 130 F. Supp. 2d at 1. If the agency's holding is based on factual analysis, the court will set aside the holding

only if the holding is unsupported by "substantial evidence." *Robinson v. District of Columbia Housing Authority*, 660 F. Supp. 2d 6, 18 (D.D.C. 2009). "In applying the substantial evidence test, we have recognized that an agency decision may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view." *Morall v. Drug Enforcement Administration*, 412 F.3d 165, 176 (D.C. Cir. 2005) (citation omitted). "[I]n the context of the APA, arbitrary and capricious review and the substantial evidence test are ' "are one and the same" insofar as the requisite degree of evidentiary support is concerned.'" *United Space Alliance, LLC*, 2011 WL 5520428, at *4 (citations omitted).

Where an agency's finding concerns a purely legal question and was addressed in its review, the court usually need not accord deference to the agency's decision, and reviews the finding *de novo. Cullman Regional Medical Center v. Shalala*, 945 F. Supp. 287, 293 (D.D.C. 1996). However, "where the agency has a lengthy record of practical experience with the subject matter," the court may "give some deference to the administrative decision." *NOW, Washington D.C. Chapter v. Social Sec. Admin. of Dep't of Health & Human Services*, 736 F.2d 727, 735 n. 78 (D.C. Cir. 1984) (citation omitted). In instances where the reviewing board has not addressed the constitutional issue in its review, the Court should review the legal arguments *de novo*. *Beverly Enterprises, Inc.*, 130 F. Supp. 2d at 13.

Furthermore, "review is to be based on the full administrative record that was before the Secretary at the time he made his decision." *American Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (citations omitted). "As long as an agency has examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made, a reviewing court will not disturb the agency's

action." *Genesis Health Ventures, Inc. v. Sebelius*, Civil Action No. 10-00381, 2011 WL 2938132, at *6 (D.D.C. July 22, 2011) (internal quotations and citations omitted).

Summary Judgment

"Summary judgment is an appropriate mechanism for deciding the question of whether agency action is supported by the administrative record." *Alaska v. Lubchenco*, Civil Action No. 10-0927, 2011 WL 5829767, at *4 (D.D.C. November 21, 2011) (citation omitted). "In such cases, a federal district court 'sits as an appellate tribunal' to review the purely legal question of whether the agency acted in an arbitrary and capricious manner.'" *Id.* (quoting *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001)). "However, due to the limited role of a court in reviewing the administrative record, the typical summary judgment standards set forth in Rule 56(c) are not applicable." *American Federation of Government Employees, AFL-CIO v. Shinseki*, Civil Action No. 08-1722, 2011 WL 5190263, at *6 (D.D.C. November 2, 2011) (citing *Stuttering Foundation of America v. Springer*, 498 F. Supp. 2d 203, 207 (D.D.C. 2007)). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Stuttering Foundation*, 498 F. Supp. 2d at 207 (citations omitted).

Fourth Amendment

The Fourth Amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures" and provides that no warrants shall issue without probable cause. U.S. Const. amend. IV. "[U]nlike searches of private homes, which generally must be conducted pursuant to a warrant, [] legislative schemes authorizing warrantless administrative searches of commercial property do no necessarily violate the Fourth Amendment." *Donovan v. Dewey*, 452 U.S. 594, 598 (1981).

"For an administrative search to be valid under the Fourth Amendment, an agency must first show probable cause." *See Beverly Enterprises*, 130 F. Supp. 2d at 13 (citing *Marshall v. Barlow's Inc.*, 436 U.S. at 320). Indeed, the Fourth Amendment protects the owner of commercial property from unreasonable intrusions onto his property by a showing of probable cause. *See Marshall v. Barlow's Inc.,* 436 U.S. at 320 ("For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]."). The standard established by *Barlow's* was interpreted by the Fifth Circuit to "require that the proposed search be: (1) authorized by statute; (2) properly limited in scope and (3) initiated in a proper manner." *Id.* (citing *United States v. Mississippi Power & Light Co.*, 638 F.2d 899, 907 (5th Cir. 1981)); *see also Shekoyan*, 217 F. Supp. 2d at 70 n.9 (*Mississippi Power* held that Executive Order No. 11246 is firmly rooted in congressionally delegated authority).

"An administrative search violates the Fourth Amendment unless the agency shows the company's selection for the search is based on: (1) specific evidence of an existing violation, (2) reasonable legislative or administrative standards that have been met with respect to that particular contractor or (3) an administrative plan containing specific neutral criteria." *Beverly*

Enterprises, 130 F. Supp. at 13 (citing *Mississippi Power*, 638 F.2d at 907). Therefore, an agency has the burden to show that it satisfied the constitutional obligations with respect to an administrative search.

In cases where the records are sought pursuant to a subpoena instead of entry onto property, the District of Columbia circuit recognizes the standard set forth in *Oklahoma Press*: such an inquiry is valid if it is "within the authority of the agency, the demand is not too indefinite[,] and the information sought is reasonably relevant." *United States v. Judicial Watch*, 371 F.3d 824, 833 (D.C. Cir. 2004) (citing *Oklahoma Press*, 327 U.S. at 209).

A judge of this court recently addressed the applicability of the Fourth Amendment with respect to a compliance review conducted pursuant to Executive Order No. 11246. In *United Space Alliance, LLC*, 2011 WL 5520428, at *1, the court held that an order requesting desk audit data should be evaluated under the Fourth Amendment standard set out in *Donovan v. Lone Steer, Inc.*, 464 U.S. at 414. The court in *United Space Alliance* held that the Fourth Amendment standards set forth in *Oklahoma Press* applied to the order requesting the desk audit, because the order did not provide for "nonconsensual entries into areas not open to the public," as was the case in *Barlow's*. *United Space Alliance*, 2011 WL 5520428, at *19.

DISCUSSION

The court undertakes a review of the ARB's Final Order applying the *de novo* standard to address the purely legal question of whether its decision was arbitrary, capricious, an abuse of discretion, or not in accordance with the law.

Fourth Amendment Applicability to the Desk Audit Portion of Compliance Review

The undersigned finds that the record does not create an issue regarding the applicability of the Fourth Amendment to the desk audit phase of the compliance review. The record shows that Defendant OFCCP did not comply with the standard in *Beverly Enterprises* regarding the initial selection pursuant to a neutral administrative plan, but nonetheless complied with the standard set forth in *Oklahoma Press* in requesting the corporate books and records for the desk audit, and that Plaintiff consented to the desk audit in the first instance.

However, should the court find that Plaintiff did not voluntarily consent to the desk audit, the undersigned, in assessing the applicability of the Fourth Amendment to the initial selection of the facility for a compliance review conducted pursuant to 41 C.F.R. § 60-1.20(a)(1)(i), finds that the standard set forth in *Beverly Enterprises* is applicable. With respect to the Fourth Amendment in this context, "[f]or a selection be valid, an agency must apply the neutral criteria in making the specific contested selection." *Beverly Enterprises*, 130 F. Supp. 2d 1, 15 (citation omitted). Moreover, "[t]his circuit has held that in order to prove that a company was properly selected for a compliance review from a computerized list, the employees of the agency need only attest that the target of the search was selected under the agency's normal procedures." *Id.* (citing *National Engineering & Contracting Co. v. OSHA*, 45 F.3d 476, 489 (D.C. Cir. 1995)).

Here, the court finds that the proposed search of Plaintiff's facility – an on-site review– was not initiated in a proper manner as the selection was not done pursuant to a neutral administrative plan. The record shows that Defendant OFCCP, in making its selection, used two documents, the EEDS list generated on June 27, 2002 and the Selection Order to schedule contractors for compliance evaluations. Administrative Record (Document No. 17-9) at 861.

The record reflects that Defendant OFCCP provided Plaintiff with a copy of its selection procedures. *Id.* at 860. In addition, the records reflects that the official who selected Plaintiff for the compliance review did not "single out" Plaintiff. *Id.* at 861. However, the record is also clear that Defendant OFCCP carries the burden of demonstrating that not only that there was a neutral administrative plan, but that said plan was applied. As to the application of the plan, the ALJ found that "[Defendant] OFCCP failed to document whether certain contractors listed above [Plaintiff] on the EEDS list had been selected or rejected for review prior to the date on which [Plaintiff] was selected." Administrative Record (Document No. 17-9) at 865. Although Defendant OFCCP is not required to produce written evidence to address this issue, Defendant failed to meet its burden to produce some evidence that the plan was applied in a neutral manner.

Regarding the conduct of the desk audit itself, the court views the request by Defendant in this instance equivalent to an administrative subpoena, as the court did in *United Space Alliance*; there, the court observed that "[u]nder *Oklahoma Press* and its progeny, 'when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *United Space Alliance*, 2011 WL 5520428, at *17 (quoting *Oklahoma Press*, 327 U.S. at 415).

Here, Defendant OFCCP requested that for the desk audit, Plaintiff "submit the following information: (1) a copy of your Executive Order Affirmative Action Program (AAP) prepared according to the requirements of 41 C.F.R. 60-1.49 and 60-2.1 through 60-2.17; (2) a copy of your Section 503/38 U.S.C. 4212 AAP(s) prepared according to the requirements of, respectively, 41 CFR Parts 60-471 and 60-250; and (3) the support data specified in the Enclosed

Itemized Listing." Administrative Record (Document No. 17-2) at 36. The court finds that the items requested by Defendant in the selection letter were limited in scope as the records requested pertain to whether or not an on-site review would be necessary. The court further finds that the requested records are relevant in purpose pursuant to the applicable provisions of the Code of Federal Regulations. The court also finds that the request for records was clearly articulated and was limited to the records needed to conduct the desk audit.

Based on the standards established in *Beverly Enterprises* and *Oklahoma Press*, and upon consideration of the administrative record herein, the undersigned finds that Defendant OFCCP did not comply with the Fourth Amendment requirements regarding the initial selection, but did so in requesting the records during the desk audit phase. Accordingly, this undersigned will turn its attention to whether Plaintiff voluntary consented to the desk audit.

Voluntary Consent to the Desk Audit Portion of Compliance Review

The undersigned applies the standard set forth in *Beverly Enterprises*, and finds that ARB's Final Order that Plaintiff's response to the desk audit was indicative of voluntary consent and neither arbitrary nor capricious. *See Beverly Enterprises*, 130 F. Supp. 2d at 15. Courts have long recognized the voluntary consent exception to the requirement of both a warrant and probable cause for a legal search under the Fourth Amendment. *Fraternal Order of Police/Department of Corrections Labor Committee v. Washington*, 394 F. Supp. 2d 7, 14 (D.D.C. 2005) (citations omitted). "Consent 'is a question of fact to be determined from the totality of all the circumstances.'" *United Space Alliance,* 2011 WL 5520428, at *19; *cf. Donovan v. A.A. Beiro Construction Company, Inc.*, 746 F.2d 894, 901 (D.C. Cir. 1984) ("[I]f under all the circumstances it has appeared that the consent was not given voluntarily – that it

was coerced by threats or force, or *granted only in submission to a claim of lawful authority* – then we have found the consent invalid and the search unreasonable.") (citations omitted) (emphasis in original). "The administrative law judge's finding of consent must therefore be affirmed if it is supported by substantial evidence." *United Space Alliance*, 2011 WL 5520428, at *19.

Here, the undersigned finds that the record contains evidence of Plaintiff's voluntary consent. The ALJ held that the selection letter was not coercive in nature, as Defendant OFCCP provided a contact name and telephone number to allow Plaintiff to readily contact OFCCP if Plaintiff had any questions about the compliance review. Recommended Order (Document No. 17-9) at 11. Furthermore, the ALJ found that "no evidence demonstrated [Plaintiff's] will was overborne." *Id*. The undersigned finds that the selection letter does not include any threatening language, or mention any penalties for failure to allow inspection; rather, the selection letter simply includes a citation to the statute which provides that there is a possibility of enforcement administrative proceedings should Plaintiff refuse to comply with the desk audit portion of the compliance review – proceedings which would only occur after Plaintiff had been given an administrative hearing. In addition, Ms. Bryant, the Senior Vice President for Workforce Compliance and Diversity at Bank of America, testified that the letter was "standard." Administrative Record (Document No. 17-6) at 543. The undersigned finds, as did the ALJ and ARB, that the selection was not coercive. Indeed, had Plaintiff refused to provide the documents, Defendant OFCCP would have been required to provide Plaintiff with an opportunity for an

administrative hearing before a neutral officer before sanctions could be imposed.[14]

With respect to the contention that Defendant OFCCP misrepresented itself by asserting it had lawful authority based upon a proper selection, the court finds no basis for such an argument. In the scheduling letter, Defendant OFCCP stated that Plaintiff was scheduled for a compliance review based on the order from the current EEDS random computer list. Administrative Record (Document No. 17-2) at 44. Although the Plaintiff did make inquiries into whether Defendant OFCCP had been selected as a result of a neutral administrative plan and not the result of the unreviewed discretion of an officer in the field, Plaintiff continued to make subsequent submissions of documents in response to Defendants request. Administrative Record (Document No. 17-8) at 755, 757. In the event Plaintiff had suspected that it had been selected unfairly under a misrepresentation of lawful authority, Plaintiff could have refused to submit the documents and would have a right to an administrative hearing to determine whether it had indeed been neutrally selected. This was not done. The ALJ and ARB found that the Defendant demonstrated no reluctance in submitting the requested information (Administrative Record (Document No. 17-9 at 868); (Document No. 17-10) at 959), and on two separate occasions, produced additional documents to Defendant OFCCP. Administrative Record (Document No. 17-8) at 755, 757. At any time, Plaintiff could have stopped submitting documents responsive to Defendant OFCCP's request.

In *Schneckcloth*, the Supreme Court held that the determination of whether a person's

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[14] "Administrative enforcement proceedings shall be conducted under the control and supervision of the Solicitor of Labor and under the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246 contained in part 60–30 of this chapter and the Rules of Evidence set out in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges contained in 29 CFR part 18[.]" 41 C.F.R. § 60-1.26(b)(2).

will has been overborne is to be made by assessing the totality of the surrounding circumstances. *Schneckcloth*, 412 U.S. at 226. In this case, the ALJ held that the Plaintiff was "no novice" when it came to challenging OFCCP's efforts to complete prior compliance reviews. *See* Administrative Record (Document No. 17-9) at 867. The findings by the ALJ and ARB show that the Plaintiff had full knowledge and awareness of its consent. Thus, the court affirms the ALJ and ARB's finding that Plaintiff gave voluntary consent to the desk audit portion of compliance review. Based on the totality of the circumstances, the court finds that the ALJ's conclusion that Plaintiff voluntarily consented to the desk audit portion of the compliance review was not arbitrary and capricious.

Specific Evidence of a Violation of Executive Order

The undersigned further finds that the ARB's Final Order providing that there is specific evidence of a violation of Executive Order No. 11246 is supported by substantial evidence. In order to find specific evidence of a violation, the OFCCP does not need to find that an actual violation has occurred but rather there must be a plausible basis for believing that a violation is likely to be found. *Cf. Donovan,* 746 F.2d at 903 ("Under *Marshall v. Barlow's*, . . . , probable cause for an administrative warrant may consist of either a showing that the inspection is pursuant to reasonable administrative standards . . . or specific evidence of an existing violation[.]").

Here, the ALJ and ARB's finding that there was a "reasonable basis for a belief that violations may be occurring[]" was supported by substantial evidence since the ALJ and ARB found that the raw desk audit data set – captured in the September 23 letter – provided the

likelihood of specific evidence of an existing violation regarding the Plaintiff's facility. Administrative Record (Document No. 17-9) at 869; *see* Administrative Record (Document No. 17-10) at 958 ("[The ALJ], however, [did] find evidence that created a reasonable suspicion of a violation in OFCCP's September 23, 2004 letter to [Plaintiff], which contained tables based on data from the desk audit."); *see also* Administrative Record (Document No. 17-5) at 381-83 (desk audit data). For this reason, the undersigned further finds Plaintiff's argument that the ALJ and ARB had to rely on the evidence proffered by Defendant OFCCP to justify its finding regarding the on-site review its unconvincing. Plaintiff's reliance on *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1159-60 (D.C. Cir. 1987) is misplaced. In *CNA Financial Corp.*, the OFCCP refused to produce an expert report for Plaintiff's examination and rebuttal. *Id*. at 1159. In that case, the plaintiff believed that the information contained in the report weighed heavily in the OFCCP's assessment, and that the plaintiff's inability to respond to the expert's conclusion constituted reversible error. *Id*. The court held that "[a] precept fundamental to the administrative process is that a party must have an opportunity to refute evidence utilized by the agency in decision-making affecting his or her rights." *Id*. at 1159-60. However, in the instant case, the undersigned finds that there was not an error in the administrative process, since Defendant OFCCP provided the raw desk audit data in the administrative record and gave Plaintiff ample opportunity to rebut the information. Thus, Plaintiff's argument that Defendant OFCCP never relied on the raw data rationale to justify its demand for an on-site review is unavailing.

Indeed, this court has established that "an agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the

facts found and the choice made." *Capital Area Immigrant's Rights Coalition v. United States Department of Justice*, 264 F. Supp. 2d 14, 25 (D.D.C. 2003) (citation omitted). Thus, the ARB's finding, based on data contained in the administrative record, is supported by substantial evidence, as the full extent of the administrative record is what the ALJ and ARB is to consider. While Defendant OFCCP argued that the on-site review was justified based on its regression analysis, which was found to be unreliable, the ALJ and ARB reached the same conclusion based on the results from the desk audit, to which Plaintiff consented. The ALJ plainly stated: "[t]hat the regression analysis lacks probative value does not mean that OFCCP lacked a reasonable basis to conduct such an on-site review." Administrative Record (Document No. 17-9) at 869. It is evident that the ALJ and the ARB examined the record and the data contained therein and both agreed that "[t]here is no evidence in the record that [Plaintiff] challenged the data contained in the September 23 letter." Administrative Record (Document No. 17-9) at 869; *see also* Administrative Record (Document No. 17-10) at 959 ("Like the ALJ, we find that there is no evidence in the record disputing this data"). In accordance with the APA, the undersigned finds that the record contains specific evidence of a violation of Executive Order No. 11246.

CONCLUSION

On the basis of the findings articulated by the undersigned herein, the undersigned concludes that the final decision that Plaintiff consented to the desk audit portion of the compliance review, and that there was specific evidence of a violation of Executive Order No. 11246 sufficient to warrant Defendant OFCCP to conduct an on-site review, are supported by substantial evidence and are fully in accord with all applicable constitutional and statutory

authorities. Therefore, it is **RECOMMENDED** that Plaintiff's Petition to Hold Unlawful and Set Aside the Final Order of the Administrative Review Board (Document No. 19) be **DENIED**, and that Defendants' Motion for Summary Judgment (Document No. 20) be **GRANTED**.

It is, this 13th day of December, 2011,

SO RECOMMENDED.

/s/
DEBORAH A. ROBINSON
United States Magistrate Judge

Within fourteen days, any party may file written objections to this report and recommendation. The objections shall specifically identify the findings and recommendations to which objection is made, and the basis of the objections. In the absence of timely objections, further review of the issues addressed herein may be deemed waived.