



IN THE MATTER OF

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

ARB CASE NO. 99-112

ALJ CASE NO. 99-OFC-11

PLAINTIFF

DATE: September 1, 1999

v.

BEVERLY ENTERPRISES, INC.,

DEFENDANT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:

Heidi Dalzell-Finger, Esq., James D. Henry, Esq., Henry L. Solano, Esq.,
U. S. Department of Labor
Washington, D.C.

For the Defendant:

Timothy J. O'Rourke, Esq., Raymond H. Hixson, Jr., Esq., John C. Fox, Esq.,
Fenwick and West LLP
Palo Alto, CA

DECISION AND ORDER

This case arises under Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; and the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act ("the Acts"). 43 Fed. Reg. 49240 (1978), 3 C.F.R. Part 230, *reprinted in* 42 U.S.C. §2000e note (1999); 29 U.S.C. §793 (1999); 38 U.S.C. §4212 (1999). Plaintiff Office of Federal Contract Compliance Programs ("OFCCP") filed a complaint alleging that Beverly Enterprises, Inc. ("Beverly" or the "Company") failed to comply with its contractual obligations by refusing to submit to OFCCP the written affirmative action programs

(“AAPs”) for the Company’s Fort Smith, Arkansas, headquarters. OFCCP had requested the documents in preparation for a compliance review of the facility. Beverly asserted that OFCCP violated the Fourth Amendment to the U. S. Constitution in selecting the Company’s facility for review. Following limited discovery and a hearing conducted pursuant to the expedited procedures contained in 41 C.F.R. §§60-30.31 *et seq.* (1999), the Administrative Law Judge (“ALJ”) issued a recommended decision concluding that OFCCP’s selection of Beverly for a compliance review satisfied constitutional requirements. For the reasons discussed below, we concur with the ALJ’s recommendation. However, we order relief different from the relief recommended by the ALJ.

BACKGROUND

I. Procedural History

In September 1998, OFCCP notified Beverly that its headquarters facility in Fort Smith, Arkansas, had been selected for a compliance review and requested that the Company forward its AAPs and supporting documentation to OFCCP within 30 days. Pl. Exh. 1.^{1/} The Company’s Vice President and Deputy General Counsel, Hugh Reilly, in correspondence and meetings with OFCCP officials inquired as to the process by which OFCCP had selected Beverly. Tr. 150-161, 188-189; Def. Exhs. J-O, Q-R. OFCCP’s responses failed to satisfy Mr. Reilly, and accordingly, the Company refused to submit the requested materials. Tr. 186; Answer ¶18.

OFCCP filed an Administrative Complaint against Beverly alleging that its failure to provide the requested documents violated its contractual obligations under the Acts and requesting, *inter alia*, that Beverly be enjoined from failing and refusing to comply with the requirements of the Acts. Adm. Compl. at p. 2-3. OFCCP filed its complaint pursuant to the expedited hearing procedures at 41 C.F.R. §§60-30.31 *et seq.* Beverly answered that OFCCP had failed to explain why the Company was selected for review and that the Company believed that it had not been selected pursuant to a neutral administrative plan, as constitutionally required. Beverly requested a hearing. Answer ¶¶31-32.

The hearing was held in Fort Smith, Arkansas, on July 7, 1999, and post-hearing briefs were filed by the parties. The ALJ issued a Recommended Decision and Order (“R. D. & O.”) on July 22, 1999. Beverly filed exceptions with this Board on August 2, 1999.

II. Statutory and Regulatory Framework

Executive Order No. 11246 prohibits Federal contractors from discriminating against employees or applicants for employment on the basis of race, color, sex, religion, or national

^{1/} References to the exhibits and hearing transcript are cited as follows: OFCCP’s exhibits as Pl. Exh. __; Beverly’s exhibits as Def. Exh. __; the ALJ’s exhibits as Ct. Exh. __; and the hearing transcript as Tr. __.

origin, and requires such contractors to take affirmative action to provide equal employment opportunities. Exec. Order No.11246 §201; 41 C.F.R. §§60-1.1 and 60-1.40 (1999). The two additional laws covered in this decision by the term “the Acts” impose similar requirements on Federal contractors but have different protected classes. Section 503 of the Rehabilitation Act requires Federal contractors to take affirmative action to employ and advance in employment qualified individuals with disabilities, and the affirmative action provisions of the Vietnam Era Veterans’ Readjustment Assistance Act (“VEVRAA”) require Federal contractors to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era. 29 U.S.C. §793(a), 41 C.F.R. §60-741.1 (1999); 38 U.S.C. §4212, 41 C.F.R. §60-250 (1999). OFCCP monitors compliance with these statutes by conducting reviews of the contractors’ facilities, and contractors agree to furnish OFCCP with all information required to enable the agency to determine whether the contractors have complied with the mandates of the Acts. 41 C.F.R. §§60-1.4(a)(5), 60-1.7, 60-1.12, 60-1.20, 60-1.43; 60-741.5(a)(2), 60-741.80, 60-741.81; 60-250.60, 60-250.40, 60-250.80, 60-250.81. If OFCCP determines that a contractor has failed to meet its obligations under the Acts, the agency will attempt to resolve the matter through conciliation and persuasion. 41 C.F.R. §§60-1.33; 60-741.62; 60-250.62. If conciliation efforts fail, OFCCP may initiate an administrative enforcement proceeding against the contractor. 41 C.F.R. §§60-1.26; 60-741.64; 60-250.65.

OFCCP may invoke expedited hearing procedures when the contractor has refused to give OFCCP access to records, has denied OFCCP access to its facility, or has violated the terms of a conciliation agreement. These expedited procedures restrict the types of discovery available to the parties and provide an accelerated timetable for the completion of the proceedings. 41 C.F.R. §§60-30.33, 60-35, 60-36, 60-37.

III. Facts

OFCCP’s Selection of Beverly for a Corporate Management Review -- The facts are well-summarized in the ALJ’s recommended decision and need not be repeated in detail here. R. D. & O. at 3-6. In July 1998, Joel Maltbia, OFCCP’s Little Rock area office director, was instructed by the OFCCP regional office in Dallas to examine the Little Rock area’s Corporate Management Review (“CMR”) list to determine whether it contained an establishment eligible for review.^{2/} R. D. & O. at 4. Three companies were listed on the Little Rock OFCCP’s CMR list, which Maltbia had received in October 1997 as an attachment to a memorandum titled “Interim Selection Procedures for Corporate Management Reviews.” *Id.*, Pl. Exh. 2, Def. Exh. F.

Beginning with the first name on the list, Maltbia examined each of the companies in order, as instructed in the Interim Selection Procedures memorandum. By checking the Federal Procurement Data System, Maltbia determined that the first company on the list did not have a

^{2/} A Corporate Management Review is a review of employment practices, including all personnel actions and pay practices at a corporate headquarters. Tr. 51-52.

current Government contract, and therefore was not subject to requirements of the Acts. R. D. & O. at 4. In accordance with the instructions contained in the Interim Selection Procedures memorandum, Maltbia completed a Contractor Rejection Documentation Form (Pl. Exh. 2), indicating the reason that the first company was being rejected for a CMR review. Maltbia then began an evaluation of the second company on the list. The second company already was a party to a consent decree with OFCCP, and thus under the terms of the Interim Selection Procedures memorandum also was ineligible for a compliance review. *Id.* After completing the rejection information form for the second company, Maltbia evaluated Beverly, the third company on the list. He determined that Beverly did not meet any of the criteria requiring rejection and therefore concluded that Beverly was eligible for a Corporate Management Review. R. D. & O. at 5. Maltbia completed the Contractor Selection Documentation Form, and notified the OFCCP regional office that Beverly was the company he was recommending for a CMR. Def. Exh. I.

OFCCP's regional office approved the recommendation and forwarded it to OFCCP's National Office for concurrence pursuant to the terms of the Interim Selection Procedures memorandum. Harold Busch, Director of Program Operations, reviewed the recommendation and also approved it. On receiving approval from the National Office, the Dallas regional office sent the scheduling letter requesting various documents to Beverly in September 1998. R. D. & O. at 5; Pl. Exh. 1.

OFCCP's Procedure for Compiling Lists of Contractors Eligible for Corporate Management Reviews -- OFCCP's Fiscal Year 1998 list of contractors potentially eligible for a CMR was compiled at the National Office. R. D. & O. at 4. The raw data from which the list is obtained is contained on forms -- Equal Employment Opportunity Employer Information Reports ("EEO-1s") -- that employers complete and submit annually to the Equal Employment Opportunity Commission ("EEOC"). R. D. & O. at 4; 41 C.F.R. §60-1.7. The EEOC transfers the EEO-1 data to computer tape and sends OFCCP a copy of the tape each year. The data which formed the basis of the tape involved in this case was based upon the 1996 EEO-1 submissions. Tr. 210.

In 1997, John Lawrence, Chief of the Branch of Program Management and Information Development at OFCCP's National Office, received the EEO-1 data tape from the EEOC, and had a program developed to extract from that data a list of companies which met the CMR criteria articulated in the Interim Selection Procedures memorandum: that is, all Federal contractors which employed 4000 or more people, had more than one establishment, and had a headquarters facility. Each Government contractor in this merged data set was assigned a random number. The companies were then sorted by random number according to the district offices in which their headquarters were located. Thus, to be included on the CMR list for the Little Rock area, a company had to be a Federal contractor, employ 4000 or more people, have more than one establishment, and be headquartered in the Little Rock geographic area. Maltbia was provided with this randomly ordered list of company names and used it, as described above, to choose Beverly as a candidate for a CMR.

DISCUSSION

Beverly excepts to the ALJ's recommended conclusion that OFCCP satisfied the reasonable search requirements of the Fourth Amendment when it selected the Company for a compliance review. Def. Except. at 5-28. Beverly also excepts to the recommended remedy. Based on the record and applicable case law, we concur with the ALJ's conclusion that OFCCP's selection of Beverly for a compliance review meets constitutional standards. However, we modify the remedy.

I. Fourth Amendment Standards

Fourth Amendment privacy interests are implicated in data compiled by commercial enterprises pursuant to federal reporting requirements, *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974), as well as in the premises where the data are kept, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). The privacy interest in data is diminished, however, when it was compiled pursuant to federal requirements. See, e.g., *Donovan v. Dewey*, 452 U.S. 594 (1981). Moreover, the reasonableness of an agency's demand for access to records is governed by much less stringent standards than an agency's demand to enter premises. *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984).

With respect to the decision to inspect the data of a particular commercial enterprise, the Fourth Amendment requires that the agency's selection be the product of a neutral administrative plan that is definite and regular, clearly limited in time, place and scope. *New York v. Burger*, 482 U.S. 691 (1987). The selection must not "be the product of unreviewed discretion of the enforcement officer in the field." *United States v. Mississippi Power & Light*, 638 F.2d 899, 907-908 (5th Cir.), cert. denied, 454 U.S. 892 (1981); *United States v. New Orleans Pub. Serv., Inc.* 723 F.2d 422 (5th Cir. 1984).

In *Mississippi Power and Light* the Fifth Circuit held that OFCCP's selection of a company for compliance review must meet the *Barlow's* standard. *Mississippi Power and Light*, 638 F.2d at 907. A warrantless inspection satisfies the Fourth Amendment if it is: (1) authorized by statute; (2) properly limited in scope; and (3) initiated in a neutral fashion. *Id.* An OFCCP search, as a matter of law, meets the first two elements; that is, it is statutorily authorized and is properly limited in scope. *Id.* at 908. As to the third element, OFCCP's decision to initiate a particular search is deemed reasonable if based either on: (1) specific evidence of an existing violation; or (2) a showing that the search was initiated pursuant to an administrative plan containing specific neutral criteria.^{3/} An agency must show not only that its selection plan is

^{3/} The *Mississippi Power and Light* court included an additional element in its reasonableness test, namely, "a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'" *Mississippi Power and Light*, 638 F.2d at 907 (internal citations omitted). This element is a duplication of the third element. An analysis of whether the selection is pursuant "to a plan containing neutral criteria" essentially is the same as a "determination of whether the Department of Labor followed 'reasonable legislative or administrative standards.'" *First Alabama Bank of Montgomery v. Donovan*, 692 F.2d 714 n.12 (11th Cir. (continued...))

neutral, but also that the plan is “actually applied neutrally.” *New Orleans Pub. Serv., Inc.*, 723 F.2d at 428.

II. Whether the Inspection Sought by OFCCP Comports with Fourth Amendment Standards of Reasonableness

In the instant case, the ALJ found that OFCCP procedures met the test for reasonableness, and that its selection of Beverly was “accomplished in a neutral manner.” Therefore the selection comported with Fourth Amendment Standards. R. D. & O. at 7. Beverly argues that the ALJ erred because (1) OFCCP failed to make an “actual showing” that it applied neutral criteria, and (2) the scope of the proposed search “exacerbates” OFCCP's failure to demonstrate its adherence to the neutrality requirement. Def. Excep. at 5-26, 26-27. As we discuss below, we conclude that Beverly’s contentions are without merit.

A. “Actual Showing”

Beverly contends that OFCCP failed to show either that its administrative selection plan was neutral or that it was applied neutrally. According to Beverly, OFCCP failed to produce evidence of the “totality of the computerized instructions producing the at-issue . . . CMR listing,” or evidence that Maltbia used neutral criteria when selecting Beverly from the list of potential CMR companies. *Id.* at 8-11, 6, 16. We consider these issues in turn.

1. *Computer System* - Beverly asserts that OFCCP's failure to show all the “program codes” embedded in the computerized selection system that generated the CMR list defeats OFCCP’s attempt to show a neutral administrative plan. *Id.* at 15. According to Beverly, the testimony of OFCCP witnesses Lawrence and Busch was inadequate on this subject because it did not prove that the computerized selection system was neutrally applied to all potentially eligible government contractors or that only the selection factors OFCCP identified were used in developing the CMR listing. *Id.* at 10-11. Citing Lawrence's deposition transcript, Beverly argues that his inability to recall the specific codes or adjustments he made to OFCCP's computer program at various times indicated that OFCCP’s selection plan was not neutral.^{4/} *Id.* at 11-14. We disagree.

The testimony of Lawrence and Busch is more than sufficient for the ALJ and for us to determine that OFCCP's administrative plan for preparing the CMR listing was neutral. Lawrence and Busch each testified that the electronic tape received each year from the EEOC was used to generate the various lists of Federal contractors used by OFCCP in carrying out its

(...continued)

1982)(applying the Fourth Amendment standards to OFCCP's selection of First Alabama Bank for compliance review).

^{4/} None of the Lawrence testimony cited in Beverly's exceptions (Def. Excep. at 10-14) addressed the production of the CMR list.

enforcement activities. Lawrence Dep. at 9-11, Tr. 210-211. To prepare the CMR listing for fiscal year 1998, Lawrence adjusted the computer program to incorporate the criteria he was given by the heads of the program operations and policy divisions in the National Office. Lawrence Dep. at 42. He testified, and Busch confirmed, that the computer was programmed to sort the Federal contractors using the criteria listed in the OFCCP memorandum entitled Interim Selection Procedures for Corporate Management Reviews. Lawrence Dep. at 42-43; Tr. 211-212; Pl. Exh. 2. Lawrence further testified that these were the only criteria used to produce the CMR listing. Lawrence Dep. at 43. Each year, after these adjustments were made to the computer data, Lawrence and his staff checked for accuracy by performing a test run, reviewing the results, and submitting the results to the divisions of program operations and policy for review and approval before the program was used. Lawrence Dep. at 43-44; *see also*, 35, 33, 38. These steps clearly show the neutrality of the plan used to produce the CMR listing.

However, Beverly argues that the above-discussed procedure failed to describe the “totality” of OFCCP’s administrative plan because it only addresses information which was “accreted” to the earlier computer program codes and not the underlying codes themselves. Def. Excep. at 6, 9. Because Lawrence testified that instead of rewriting all computer codes each year, he adjusted the codes to reflect the new requirements, Beverly argues that aspects of the program codes used in earlier years, including earlier programs targeting certain employer groups, may have infected the computer runs in subsequent years, therefore corrupting the neutrality of the screening process.^{5/} Lawrence Dep. at 28. These concerns are unwarranted because Lawrence testified that each year he reviewed all the computer codes to ensure that the resulting program is consistent with the new year’s requirements. Lawrence Dep. at 31. Furthermore, Busch testified that the criteria used to produce the CMR list for fiscal year 1998 replaced all prior systems for selecting contractors for corporate management reviews.^{6/} Tr. 228.

Without citing authority for its position, Beverly also argues that OFCCP is required to produce documentary evidence or testimony from an official with personal knowledge of every

^{5/} Beverly produced evidence that in the 1994-1996 period OFCCP had targeted specific industries for review, including the health care industry of which Beverly is a part. Def. Exh. A, D, E; Def. Excep. at 15. Beverly argues that the computer codes used to sort companies by their industry codes may have remained in the computer program and tainted the computer sort of contractors for the CMR listing by “targeting” specific industries. Def. Excep. at 15. There is no evidence to support Beverly’s supposition that industry targeting was “imbedded” in the computer program used to create the CMR listing. In any event, Beverly’s implied assertion – that industry targeting is constitutionally suspect – is contrary to prevailing case law going back to *Barlow’s*. *See Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 321; *First Alabama Bank v. Donovan*, 692 F.2d 714, 721 (11th Cir. 1982)(enforcement plan focused on banking industry); *Donovan v. Wollaston Alloys, Inc.*, 695 F.2d 1, 3 (1st Cir. 1983)(approving an OSHA targeting project which ranked industries by SIC number, in descending order according to their injury frequency rate); *Industrial Steel Products Co. v. OSHA*, 845 F.2d 1330, 1337 (5th Cir. 1988) (same).

^{6/} Busch testified that he did not participate in creating the computer code that is used to produce the CMR listing but did participate in establishing the criteria that the code writers use. Tr. 248.

aspect of the operation of OFCCP selection system. Def. Excep. at 9. The Fourth Amendment does not impose such stringent requirements. See *Industrial Steel Products Co. v. OSHA*, 845 F.2d 1330, 1337 (5th Cir. 1988). In *Industrial Steel*, the company moved to quash two administrative search warrants authorizing OSHA inspections, arguing that OSHA's failure to produce encoded establishment lists was fatal to its case. *Id.* at 1336. The company argued that without the encoded lists, the magistrate could not determine if the list containing its name had been compiled by a correct application of the neutral criteria. *Id.* at 1337. The Fifth Circuit ruled that the absence of an encoded establishment list was not fatal, and would only be fatal to a warrant application where the target company makes a factual showing that it was placed on the list for reasons other than the application of specific, neutral criteria. *Id.* Industrial made no such showing in its case, and neither has Beverly here. *Id.* See also *Donovan v. Trinity Industries, Inc.*, 824 F.2d 634, 637 (8th Cir. 1987), *cert. denied*, 488 U.S. 993 (1988) (the Fourth Amendment is satisfied when an applicant for an administrative search warrant submits either the establishment list *or a description* of the procedures used to create the list). As the First Circuit once said, it could not agree “that the magistrate must review in detail and trace every determination and computation of the Secretary; we do not see the magistrate as the Secretary’s auditor.” *Donovan v. Wollaston Alloys, Inc.*, 695 F.2d 695 F.2d 1, 5 (1st Cir. 1982).

2. *Maltbia's Actions* - Beverly further asserts that its selection was not valid because OFCCP failed to produce evidence that its neutral administrative plan was applied in a neutral way. Specifically, Beverly contends that OFCCP failed to show that its program was applied in a neutral manner because Maltbia's testimony was not credible and documentary evidence was not produced. Def. Excep. at 6-8, 16-18. As we discuss below, the former argument is specious, and the latter is irrelevant in light of the testimonial evidence presented.

The ALJ specifically found “the witnesses that testified concerning the OFCCP selection procedures to be very credible.” R. D. & O. at 7. Beverly asserts that it finds Maltbia's testimony “wholly lacking . . . in credibility.” Def. Excep. at 8. However, the Company offers no adequate support for this contention. For example, Beverly contends that Maltbia failed to follow proper procedure when he did not contact the first company on the CMR list to determine contractor status. Def. Excep. at 8 n.2. According to Beverly, OFCCP Deputy Regional Director Brenda Joyce “testified emphatically that OFCCP practice was to check further with the employer to determine its status . . . as a contractor.” *Id.* In truth, Ms. Joyce *actually* testified that OFCCP's staff “sometimes” contacts the company for contract verification, but in most instances such contractor contact is made when the OFCCP officials “believe that *there is* a contract but they can't tie it to any ready evidence.” Tr. 119-120 (emphasis added). In addition, National Office Program Operations Director Harold Burch, confirmed that it “is only common practice to call [a contractor] if, *in fact, we have other information or intelligence that indicates they are a [federal] contractor.*” Tr. 214-215 (emphasis added). Thus, Beverly’s implication that Maltbia was either incompetent or acting out of some illicit motive when he

struck the first company from the list without attempting to call it to confirm its non-contractor status is contradicted by two entirely credible witnesses.^{7/}

To the ALJ's general credibility determination, we add our own, based upon our analysis of the testimony and the documentary evidence. Maltbia's testimony was clear and consistent with the documents presented. Moreover, a government official is presumed to be telling the truth when making a sworn statement. *United States v. Ventresca*, 380 U.S. 102 (1965). We find no reason in the record to doubt that Maltbia did precisely what he testified to: relying on instructions contained in the Interim Selection Procedures for Corporate Management Reviews, he rejected the first two companies on the CMR list. Because the Company did not qualify for rejection, Maltbia recommended that Beverly -- the only company remaining on the Little Rock area list -- be selected for the review.^{8/} For these reasons we reject Beverly's challenges to Maltbia's testimony.

Beverly further asserts that it was necessary for OFCCP to produce *documentary* evidence to show that the administrative plan was applied in a neutral manner. Therefore, Beverly argues that by refusing to produce the contractor rejection forms completed by Maltbia, OFCCP has failed to show that the administrative plan was applied in a neutral manner. Def. Excep. at 16- 20. We reject this argument as well.

^{7/} Beverly also argues that the ALJ should not have credited Maltbia's stated reason for rejecting the second company on the CMR list; namely that the company was a party to a consent decree. Def. Excep. at n.2 and 16. According to Beverly, "this claim . . . seems entirely unreliable" because OFCCP allegedly took a contrary position in a 1982 case. Def. Excep. 8 at n.2. This argument fails, for three reasons. First, whatever happened in 1982, in 1998 OFCCP had a written policy, reflected on the Contractor Rejection Documentation Form attached to the Interim Selection Procedures for Corporate Management Reviews (Pl. Exh. 2), that required rejection of a company if it was "[s]ignatory to [a] consent decree."

Second, in the case which Beverly cites, *First Alabama Bank v. Donovan*, 692 F.2d 714 (11th Cir. 1982), OFCCP argued that it should not be foreclosed from reviewing the bank simply because it was subject to a federal court consent decree in private litigation relating to employment discrimination. In this case, Maltbia testified that the consent decree was between the second company on the CMR list and OFCCP, and that the Little Rock area office was receiving regular progress reports from the contractor. Thus, the two circumstances are entirely different.

Third, it would appear to go without saying that, by asserting a position in a 1982 case, the agency did not tie its hands for all time.

^{8/} We also decline to rule that the ALJ erred when he refused to apply in Beverly's favor the regulatory presumptions available under 41 C.F.R. §60-30.11(c). Def. Excep. at 20-26. Refusal to answer a question in a deposition can create a presumption that the answer, if given, would be unfavorable to the controlling party unless the ALJ "rules that there was valid justification for a witnesses' failure or refusal to answer." 41 C.F.R. §60-30.11. Here, the ALJ ruled that there was justification. R. D. & O. at 8. We find no error in that ruling.

Citing *New Orleans Pub. Serv.* and *United States v. Harris Methodist Fort Worth*, 970 F.2d 94 (5th Cir. 1992), Beverly contends that the courts require the production of such documentary evidence. Def. Excep. at 17. However, neither of these cases supports Beverly's proposition that documentary evidence is required to prove that neutral criteria were applied.^{2/} The *New Orleans Pub. Serv.* court, while encouraging the making and maintaining of proper records, expressly stated that "oral testimony of the officials involved [in the selection] can prove that neutral criteria were used." 723 F.2d at 428 (emphasis added). The *Harris* court makes no statement regarding a requirement that written records be kept or presented at hearing, but merely quotes the *New Orleans Pub. Serv.* court's statement regarding the keeping of written records. *Harris*, 970 F.2d at 102. We decline to hold that documentary evidence such as the rejection slips here in question is required to prove that the criteria were neutrally applied. Maltbia's credible testimony is sufficient to satisfy this part of the Fourth Amendment standard.

B. Scope of Search

Beverly argues that the ALJ erred in not considering the "relevance" of the scope of the proposed compliance review of the Company's headquarters. Def. Excep. at 26-27. The *Mississippi Power & Light* court held that the reasonableness of a proposed administrative search depended, in part, on whether the "proposed search is properly limited in scope," and that OFCCP's searches, because they are "restricted to an inspection solely of business records to test compliance with the affirmative action program, [] are properly limited in scope." 638 F.2d at 908. Beverly argues that the ALJ's application of the *Mississippi Power & Light* ruling in this case was error, because the Fifth Circuit did not apply it in the *Harris* case. Def. Excep. at 27.

In *Harris*, the Department of Health and Human Services ("HHS") appealed from a ruling that its proposed Title VI compliance review of physician staff privileges at Harris Methodist Hospital did not comport with the Fourth Amendment's standards of reasonableness. *Harris*, 970 F.2d at 95. HHS sought to search the hospital's peer review records, upon which physician staff privileges are, in part, premised. The Fifth Circuit ruled that the scope of the proposed search was too broad because it could not be conducted without chilling the peer review process, breaching confidentiality, and intrusively second-guessing medical judgments in staff privilege and peer review decisions. *Id.* at 101-102. By citing to bits and pieces of testimony, Beverly concludes that the scope of an OFCCP Corporate Management Review pursuant to the Acts is so broad and intrusive that it is equal to HHS's Title VI request for privileged peer review data discussed in *Harris*. Therefore, Beverly seems to be arguing, the

^{2/} Beverly also repeatedly, and erroneously, refers to the *NationsBank* case in its pleading before the Board. Def. Except. 25, 26, 30. *NationsBank v. Herman*, 174 F.3d 424 (4th Cir. 1999). For example Beverly states that "[a] federal district court found that OFCCP unconstitutionally selected NationsBank for audit . . .," citing the Fourth Circuit decision. Neither *NationsBank* nor any other case known to us holds OFCCP's selection processes violative of the Fourth Amendment.

ALJ erred by not specifically examining the scope of the proposed search and requiring a higher level of proof of its reasonableness.

We are not persuaded by Beverly's argument. There has been no showing that the scope of the review contemplated here is similar to that in *Harris*. Moreover, in *Harris* there was overwhelming evidence that the process by which Harris was selected involved just the kind of unbridled discretion that the Supreme Court warned against in *Barlow's*. The Fifth Circuit found that there was "no administrative plan promulgating selection criteria," the decision maker could not even recall the full list of the criteria he used, and "the selection criteria were developed and followed -- if indeed followed --" in a "slipshod manner." *Harris*, 970 F.2d at 102-103. We do not think that *Harris* requires us to depart from the *Mississippi Power & Light* standard regarding the reasonableness of the scope of OFCCP's inspection.

III. Remedy

The ALJ recommended that Beverly's contracts be immediately canceled, and that it be declared ineligible for further contracts until such time as it can satisfy the Director of OFCCP that it is in compliance with the Acts. R. D. & O. at 9. Beverly suggests, and OFCCP agrees, that the immediate imposition of sanctions is not appropriate. Def. Excep. at 32; Gov. Excep. at 35. We agree.

The Board's authority to order debarment under the Acts is clear. *See, e.g., First Alabama*, 692 F.2d at 722; *Uniroyal, Inc. v. Marshall*, 482 F. Supp. 364, 375 (D. D.C. 1979). In an Executive Order case, for example, the Board has authority, after finding noncompliance, to order any of the sanctions listed in the Order, including debarment and cancellation of contracts. E.O. 11246, Section 209(a). However, as the Secretary stated:

The usual practice in cases under the Executive Order where a violation has been found, has been to give the defendant a reasonable period of time to come into compliance on the specific violation(s), and to order cancellation of contracts and debarment if the defendant has not demonstrated compliance within that time. . . . When so framed, the final administrative order encourages compliance and is not punitive or draconian.

OFCCP v. Disposable Safety Wear, Inc., Case No. 92-OFC-11, Sec. Dec., Sept. 29, 1992, slip op. at 5, citing *OFCCP v. Lasko Metal Products, Inc.*, Case No. 87-OFC-00009, Sec. Dec., Aug. 31, 1992, slip op. at 11-12 (citations omitted).

Accordingly, Beverly and its subsidiaries^{10/} shall be permanently enjoined from failing to comply with the requirements of the Acts. Should the Company fail to comply with this Board's order within 30 days, immediate contract cancellation and debarment shall be imposed. *OFCCP v. Trinity Industries, Inc.*, ARB Case No. 98-003, slip op. at 7 (ARB Final D. & O. Nov. 14, 1997).

CONCLUSION

For the reasons discussed above, we find that Beverly Enterprises, Inc. violated the Acts by failing to provide the records requested by OFCCP and by failing to permit access to its premises and employees.

ORDER

1. Beverly Enterprises, Inc., and its subsidiaries are **ORDERED** to cease and desist from violating Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act.

2. Beverly Enterprises, Inc., and its subsidiaries are **ORDERED**, no later than 30 days from the issuance of this Order, to cease and desist from denying the Office of Federal Contract Compliance Programs, U. S. Department of Labor, access to its AAPs and supporting documentation and its premises at Fort Smith, Arkansas, to conduct an on-site corporate management review, including interviews and inspection of records and other materials as may be relevant and material to verifying Beverly's compliance status.

3. Should Beverly Enterprises, Inc., and its subsidiaries fail to comply with this Order within thirty days of its issuance, it is further **ORDERED** that the present government contracts and subcontracts of Beverly Enterprises, Inc., and its subsidiaries, be canceled, terminated, or suspended, and that Beverly Enterprises, Inc., and its subsidiaries be declared ineligible for further contracts and subcontracts, and from extension or modification of any existing contracts and subcontracts, until such time that it can satisfy the Secretary of Labor or her designee the

^{10/} Beverly contends that sanctions should not be extended to its subsidiaries because: (1) “no evidence in the record supports a theory that would permit” such sanctions; (2) OFCCP did not name any subsidiary in its Complaint; and (3) none was at bar to protect its legal interests. Def. Excep. at 35. Beverly has failed to provide this Board with any authority indicating that these are sufficient reasons for excluding subsidiaries from sanctions. All subsidiaries of a covered contractor that have not received a facility waiver are included within the contract compliance provisions. See *OFCCP v. Trinity Industries, Inc.*, ARB Case No. 98-003 (ARB Final D. & O., Nov. 14, 1997). Under these circumstances we hold that the sanctions ordered here apply to Beverly and its subsidiaries.

Deputy Assistant Secretary for OFCCP, that it is in compliance with the provisions of Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act, and the regulations issued pursuant thereto, which have been found here to have been violated.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member