



In the Matter of:

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

**ARB CASE NO. 01-028  
(Formerly ARB CASE NO. 99-112)**

**ALJ CASE NO. 99-OFC-11**

**PLAINTIFF,**

**v.**

**DATE: January 31, 2001**

**BEVERLY ENTERPRISES, INC.,**

**DEFENDANT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Plaintiff:*

Rolando N. Valdez, Esq., Richard L. Gilman, Esq., Gary M. Buff, Esq.,  
Henry L. Solano, Esq., *U. S. Department of Labor, Washington, D.C.*

*For the Defendant:*

Timothy J. O'Rourke, Esq., Christopher T. Scanlan, Esq., John C. Fox, Esq.,  
*Fenwick and West LLP, Palo Alto, California*

**ORDER OF REMAND**

On January 12, 2001, the Office of Federal Contract Compliance Programs ("OFCCP") filed with the Administrative Review Board three motions in this case which the U. S. District Court for the District of Columbia has remanded. Specifically, OFCCP moved this Board (1) to permit the filing of a brief, (2) to apply expedited hearing time frames to the briefing schedule, and (3) alternatively, to limit the scope of any remand to the Administrative Law Judge. Defendant Beverly Enterprises, Inc., filed its opposition to these motions on January 17, 2001. The Board denies OFCCP's motions and remands this matter to the Administrative Law Judge for proceedings consistent with this Order.

## PROCEDURAL HISTORY

OFCCP originally brought this action against Beverly Enterprises, Inc. (“Beverly”), to enforce the contractual obligations imposed by Executive Order 11246, as amended;<sup>1/</sup> Section 503 of the Rehabilitation Act of 1973, as amended;<sup>2/</sup> and the affirmative action provisions of the Vietnam Era Veterans’ Readjustment Assistance Act<sup>3/</sup> (collectively “the Acts”). OFCCP notified Beverly that it had been selected for a corporate management review and requested copies of Beverly’s affirmative action plans, etc. Beverly refused to provide the data, asserting that OFCCP’s selection of the company for review was legally and constitutionally infirm. In 1999, OFCCP filed an administrative complaint under its expedited hearing regulations. After a one-day hearing, the ALJ issued a decision holding that OFCCP’s selection of Beverly was valid and recommending that the Board sanction Beverly by immediately canceling the government contracts Beverly and its subsidiaries held.

On September 1, 1999, the Board issued its final decision adopting the ALJ’s determination that the selection was valid and ordering Beverly and its subsidiaries to comply with the Acts within 30 days or be debarred from further government contracts. Beverly appealed to the U. S. District Court for the District of Columbia challenging the Board’s decision as contrary to Beverly’s constitutional and procedural rights and seeking to limit the remedy.

The district court affirmed the Board’s decision upholding OFCCP’s procedures, but remanded the matter to the agency for further findings on the scope of the remedy. *Beverly Enterprises, Inc. v. Herman*, No. 99-2408 (D.D.C. August 24, 2000). Specifically, the district court ordered the agency to determine whether Beverly and its subsidiaries are a single entity so that the subsidiaries can be sanctioned for the actions of the corporation. After setting out guidelines for determining whether a parent and subsidiary are a single entity, the court held:

[T]hat if the plaintiff and its subsidiaries are considered one entity under the five-factor test established by the Secretary of Labor, the subsidiaries would have been adequately represented by the plaintiff in the hearing. If the subsidiaries were adequately represented at the hearing, they may be punished by the sanction levied against the plaintiff.

*Id.* slip op. at 29. After ruling that the record contains insufficient evidence to make the necessary determination, the district court ordered the agency to resolve the facts surrounding the relationship between Beverly and its subsidiaries and to apply the five-factor guidelines. *Id.* slip op. at 27, 29.

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<sup>1/</sup> 43 Fed. Reg. 49240 (1978), 3 C.F.R. Part 230, *reprinted in* 42 U.S.C.A. § 2000e note (West 1994).

<sup>2/</sup> 29 U.S.C.A. § 793 (West 1998).

<sup>3/</sup> 38 U.S.C.A. § 4212 (West 1994 & Supp. 2000).

## MOTIONS

OFCCP, in its motion to this Board, argues that the Board should not remand the case to the ALJ, but instead should decide the “single entity” issue by applying collateral estoppel. According to OFCCP, additional proceedings involving discovery and the taking of evidence are neither necessary nor appropriate because the NLRB has already settled the issue in cases brought against Beverly and its subsidiaries, and the NLRB’s finding that Beverly and its subsidiaries are a single employer should be applied to the present case through the doctrine of collateral estoppel. Without expressing a view on OFCCP’s position, we deny the motion and remand the matter to the ALJ.<sup>4/</sup>

In the alternative, OFCCP requests that, if the Board remands the unresolved issue to the ALJ, we instruct the ALJ (1) to permit the parties to brief and argue the appropriateness of applying the collateral estoppel doctrine to the case, and (2) to restrict Beverly from attempting to relitigate matters outside the scope of the remanded “single entity” issue. The Board declines to make such rulings. OFCCP may make all arguments regarding the applicability of collateral estoppel to the ALJ directly, and should he wish to entertain such arguments, he is free to do so. Furthermore, the nature and scope of the remand is set out in the district court’s Order; thus, more explicit or restrictive instructions to the ALJ are unnecessary.

Accordingly, we **DENY** OFCCP’s motions and **REMAND** this case to the ALJ.

**SO ORDERED.**

**PAUL GREENBERG**  
Chair

**E. COOPER BROWN**  
Member

**CYNTHIA L. ATTWOOD**  
Member

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<sup>4/</sup> OFCCP also moved for leave to file a brief on the collateral estoppel issue. This motion is denied. Additionally, OFCCP requests that, if the collateral estoppel brief is accepted, the Board apply the briefing time frames set out in the expedited hearing regulations. As the Board has denied OFCCP’s motion to accept the brief, this issue is moot.