

## Affirmative Action Compliance Newsletter™

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### Litigation

## Challenges to OFCCP Audits Baffle Some, Inspire Others



By Lydell C. Bridgeford

Jan. 29— The recent legal outcomes obtained by the Office of Federal Contract Compliance Programs in Fourth Amendment denial-of-access cases beg the question, should employers presume the agency invariably will prevail in disputes over obtaining certain employment records and accessing the company's premises?

The OFCCP, so far, either has settled or prevailed in a series of Fourth Amendment lawsuits in which government contractors, such as United Space Alliance LLC, Frito-Lay Inc., Entergy Corp., and Bank of America, have argued that they have the constitutional right to refuse providing requested documentation, or allowing compliance officers to conduct on-site reviews (see News and Developments, 11/30/11, p. 100, 4/30/14, p. 24, 12/31/14, p. 81). During litigation, the contractors had asserted the agency failed to establish probable cause to conduct a compliance audit, thus violating their Fourth Amendment rights against unreasonable searches and seizures.

### Future Results May Vary

"Although the OFCCP has won some rounds [on Fourth Amendment denial-of-access cases], its successes have not been uniform or complete," Dean Sparlin, Jr. of Sparlin Law Office, PLLC told Bloomberg BNA in a Jan. 27 e-mail.

He cautioned against generalizing the results as a sign that the agency always will reign in Fourth Amendment litigation. On-site and off-site audits are governed by separate Fourth Amendment criteria (see News and Developments, 10/31/12, p. 64).

"The facts of each case are unique. A fact-driven result in one case does not preordain future outcomes, particularly if the matter is ultimately resolved in a settlement that lacks precedential value in federal court, as happened with Bank of America," Sparlin said.

### Appeals Case Tied to 12-Year-Old Audit

Bank of America was one of the last holdouts to settle with the agency in a string of Fourth Amendment litigation. The lawsuit arose from a 2009 final order by the Department of Labor's Administrative Review Board (see News and Developments, 10/30/09, p. 51), ruling that the compensation documents submitted by the bank for a 2004 desk audit established administrative probable cause for the OFCCP to conduct a following on-site audit without violating the Fourth Amendment's prohibition against unreasonable searches and seizures. The OFCCP had claimed a statistical analysis of the data suggested pay disparities based on gender and race.

In January 2015, the parties agreed to dismiss with prejudice the bank's appeal in the U.S. Court of Appeals for the District of Columbia Circuit of a district court decision upholding OFCCP's authority to conduct the on-site audit of the bank undergoing the compliance evaluation ( *Bank of Am. v. Solis*, 2014 BL 188121, D.D.C., No. 09-02009, 7/2/14; see News and Developments, 7/31/14, p. 47).

The district court also found that the bank had waived its Fourth Amendment objections to an on-site audit when it voluntarily consented to the desk audit by submitting its affirmative action plan and other supporting documents to the agency.

Contractors that reach the Fourth Amendment litigation stage with the agency must also "overcome the substantial judicial deference that is granted to agency decisions," Sparlin said.

### Fourth Amendment Disputes Will Continue

He predicted that the current OFCCP regulatory environment may spur another large contractor to engage in a protracted legal fight with the agency over access to employment data and an employer's establishment.

"A new and special set of circumstances will have to arise before another contractor will be willing to pursue a Fourth Amendment challenge for more than a decade. Even so, I would not be surprised if it happens again. It would take another contractor that feels just as strongly that the agency has overreached and that has the resources and the resolve to sustain the battle," he said.

It's too soon, however, to determine if Convergys Corp., a Cincinnati-based customer services provider, will engage in a long battle with the agency over providing employment data. The OFCCP recently filed an administrative complaint against a subsidiary of the company, claiming that the employer failed to submit employment information and other supporting records for scheduled compliance reviews (see News and Developments, 12/31/15, p. 60)).

### **Administrative Action Is Rare**

Still, Fourth Amendment cases are not a major factor driving the agency's overall enforcement strategy, according to Sparlin. "Of the thousands of audits that are launched each year, only a relative handful reach even the initial stages of administrative enforcement. The threat is always there, but just as contractors are hesitant to get pulled into expensive legal battles, the agency also must realize that it is not well-served by spending too much of its finite resources in drawn-out administrative proceedings involving individual contractors," he added.

The agency, however, will likely cite the resolutions to its Fourth Amendment litigation "to back up its threat to pursue remedies if contractors refuse to cooperate," Sparlin said. "In the end, however, the scope of enforcement authority in the vast majority of audits will continue to be worked out on a case-by-case basis without the need for formal administrative action."

### **Enforcement Includes Access to Data**

Fourth Amendment objections to audits perplex former OFCCP Director Jaime Ramón.

"It's been interesting to watch the recent cases filed against the OFCCP raising Fourth Amendment rights against unreasonable search and seizures. However, this issue is not a novel one," Ramón, the agency director during the George H.W. Bush administration and an attorney at Dykema Cox Smith PLLC's Dallas office, told Bloomberg BNA in a Jan. 27 e-mail.

He said the agency will continue to seek immediate enforcement when it is denied access and prevail in Fourth Amendment denial-of-access cases. "It's clear from Section 202 of Executive Order 11246 itself that a contractor agrees to be bound by the requirements of the [executive order], which makes access to records a term and condition," Ramón added. "The integrity of the OFCCP's administrative and enforcement programs" rests on conducting compliance audits and on-site evaluations.

"However, the constitutionality of requiring [written affirmative action programs] as part of the terms and conditions of a federal contract is still an open question, and, in my opinion, a better constitutional argument, given the Supreme Court latest cases on when it is appropriate and legal to have a valid affirmative action program," Ramón said.

### **Transparency, Communication May Resolve Disputes**

The agency needs to ensure that government contractors are adhering to their regulatory equal employment opportunity obligations and accessing employment data through compliance audits fulfills the objective, Matthew Camardella, a management attorney in the Long Island, N.Y., office of Jackson Lewis P.C., told Bloomberg BNA in a Jan. 28 e-mail.

The agency "must have the authority to conduct effective and thorough compliance evaluations," he said. "To the extent the OFCCP does not abuse its exercise of this authority, the agency should continue to prevail in Fourth Amendment challenges."

Lack of transparency and communication underscores many audit-related disputes, according to Camardella. "The OFCCP would benefit by helping contractors understand how they came to be selected or the basis for any information requests when asked. Contractors that receive scheduling letters at numerous facilities in a short period of time or get seemingly unnecessary demands for massive amounts of data ... are likely to feel that their rights have been violated," he said.

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To contact the reporter on this story: Lydell C. Bridgeford in Washington at [lbridgeford@bna.com](mailto:lbridgeford@bna.com)