



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

ARB CASE NO. 11-011

ALJ CASE NO. 2009-OFC-002

COMPLAINANT,

DATE:

OCT 19 2012

v.

FLORIDA HOSPITAL OF ORLANDO,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:

M. Patricia Smith, Esq.; Katherine E. Bissell, Esq.; Christopher Wilkinson, Esq.; Beverly I. Dankowitz, Esq.; Consuela A. Pinto, Esq.; and Theresa Schneider Fromm, Esq.; *United States Department of Labor*, Washington, District of Columbia

For the Defendant:

Leslie Selig Byrd, Esq. and Judy K. Jetelina, Esq.; *Bracewell & Giuliani LLP*, San Antonio, Texas

For the American Hospital Association, as Amicus Curiae:

Melinda Reid Hatton, Esq. and Lawrence Hughes, Esq.; *American Hospital Association*, Washington, District of Columbia; F. Curt Kirschner, Esq. and Christopher T. Scanlon, Esq.; *Jones Day*, San Francisco, California; and Alison B. Marshall, Esq. and R. Scott Medsker, Esq.; *Jones Day*, Washington, District of Columbia

For the Humana Military Health Services, Inc., and Health Net Federal Services, LLC, as Amicus Curiae:

Arthur N. Lerner, Esq.; Christopher Flynn, Esq.; and J. Catherine Kunz, Esq.; *Crowell & Moring LLP*, Washington, District of Columbia

For the TriWest Healthcare Alliance Corporation, as Amicus Curiae:

Janet E. Kornblatt, Esq.; Phoenix, Arizona

For the National Association of Chain Drug Stores, as Amicus Curiae:

Mary Ellen Kleiman, Esq. and Don L. Bell, II, Esq.; *National Association of Chain Drug Stores*, Alexandria, Virginia

For the National Women's Law Center, as Amicus Curiae:

Fatima Goss Graves, Esq. and Devi Rao, Esq.; *National Women's Law Center*, Washington, District of Columbia, and Jennifer Mathis, Esq.; *Bazelon Center for Mental Health Law*, Washington, District of Columbia

For the Leadership Conference on Civil and Human Rights, as Amicus Curiae:

Lisa M. Bornstein, Esq.; *The Leadership Conference on Civil and Human Rights*, Washington, District of Columbia

For the Lawyer's Committee for Civil Rights Under Law, as Amicus Curiae:

Ray P. McClain, Esq. and Jane Dolkart, Esq.; *Employment Discrimination Project, Lawyer's Committee for Civil Rights Under Law*, Washington, District of Columbia

For the National Partnership for Women & Families, as Amicus Curiae:

Sarah Crawford, Esq.; *National Partnership for Women & Families*, Washington, District of Columbia

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*, presiding en banc. Judge E. Cooper Brown, *concurring, in part, and dissenting, in part*. Judge Luis A. Corchado, with whom Judge Joanne Royce joins, *concurring, in part, and dissenting, in part*.

FINAL DECISION AND ORDER

This case arises under Executive Order 11246, as amended,¹ Section 503 of the Rehabilitation Act, 29 U.S.C.A. § 793, and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C.A. § 4212 (Veterans' Act), which gives the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) authority to ensure that Federal contractors and subcontractors doing business with the Federal government comply with the laws and regulations requiring nondiscrimination and equal opportunity in employment. These provisions are implemented through 41

¹ Executive Order 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965), was amended by Executive Order 11375, 32 Fed. Reg. 14303 (Oct. 13, 1967) (adding gender to list of protected characteristics), and Executive Order 12086, 43 Fed. Reg. 46,501 (Oct. 5, 1978) (consolidating enforcement function in the Department of Labor).

C.F.R. Parts 60-30 (Executive Order 11246), 60-741 (Rehabilitation Act), and 60-250 (Veterans' Act).

On December 18, 2008, OFCCP filed an administrative complaint with the Department of Labor's Office of Administrative Law Judges (OALJ) against Respondent Florida Hospital when the Hospital refused to comply with a request for a compliance review under Executive Order 11246, Section 503 of the Rehabilitation Act, and Section 404 of the Veterans' Act. Florida Hospital objected, arguing that it did not qualify as a federal contractor or subcontractor and that OFCCP lacked jurisdiction. After the parties filed cross-motions for summary judgment, the Administrative Law Judge (ALJ) issued a Summary Decision and Order on October 18, 2010 (D. & O.), granting OFCCP's motion for summary decision and ordering Florida Hospital to comply with OFCCP's compliance review request.

On November 1, 2010, Florida Hospital filed timely exceptions to the ALJ's decision with the Administrative Review Board (ARB or the Board). On December 31, 2011, while the case was pending before the ARB, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2012 (NDAA), authorizing, inter alia, appropriations for military activities for the Department of Defense. The new legislation included Section 715 entitled "Maintenance Of The Adequacy Of Provider Networks Under The TRICARE Program," amending 10 U.S.C.A. § 1097b(a) (2011) (TRICARE program: financial management). On January 9, 2012, Florida Hospital moved to dismiss the case as moot pursuant to Section 715, the amendment to the TRICARE Program.

On January 13, 2012, the Board ordered further briefing by the parties on the impact of Section 715 of the NDAA, if any, on the resolution of this case, specifically OFCCP's authority to engage in a compliance review of Florida Hospital under Executive Order 11246, Section 503 of the Rehabilitation Act, and Section 402 of the Veterans' Act. Following further briefing by the parties and various interested amici, we reverse the ALJ's decision and dismiss OFCCP's administrative complaint against Florida Hospital.

BACKGROUND

A. Facts

The following facts are taken from the parties' Joint Stipulated Facts filed with the ALJ on May 17, 2010.

1. Prime contract requires that HMHS provide a network of medical providers to serve TRICARE beneficiaries

The case stems from a contractual arrangement between TRICARE Management Activity (TRICARE), a Department of Defense Field Activity, and Humana Military

Healthcare Services (HMHS). TRICARE is the Defense Department's world-wide health care program for active-duty and retired military and their families.² TRICARE contracts for managed care support. The managed care contractors' responsibilities include enrollment, referral management, medical management, claims processing and customer service. Additionally, contractors underwrite healthcare costs and establish networks of providers who agree to follow rules and procedures of the TRICARE program when treating TRICARE patients, but who remain independent and do not operate under direction and control of the Defense Department.³ Patients under TRICARE can still obtain care from any healthcare provider of their choice, whether network or non-network, subject to varying co-pays and deductibles depending on which provider they use.⁴

Since August 2003, HMHS has contracted with TRICARE to provide networks of healthcare providers to TRICARE patients.⁵ Section C of the addendum to the contract sets out the Description or Work Statement.⁶ The Technical Requirements of the contract center on the provision of a stable network of healthcare providers for TRICARE beneficiaries.⁷ Under the prime contract, the "[contractor] HMHS 'shall provide a managed, stable high-quality network or networks of individuals and institutional health care providers which complements the clinical services provided to [Military Health Service (MHS)] beneficiaries in [Military Treatment Facility (MTF)] and promotes access, quality, beneficiary satisfaction, and best value health care for the Government.'"⁸ Under the Agreement, the "contractor's network shall be accredited by a nationally recognized accrediting organization . . . in all geographic areas covered by th[e] contract."⁹ The contractor "shall inform the Government within 24 hours of any instance of network inadequacy relative to the prime and/or extra service areas and shall submit a corrective action plan with each notice of network inadequacy."¹⁰ The HMHS-TRICARE contract provides that HMHS must "establish provider networks through

² Stipulated Facts (SF) ¶ 5.

³ SF ¶ 7.

⁴ SF ¶ 8.

⁵ SF ¶ 9.

⁶ Stipulated Facts, Joint Exhibit (JX) A (Section C, Description/Specifications/Work Statement).

⁷ JX A, Section C, C-7.1.

⁸ SF ¶ 10.

⁹ JX A, Section C, C-7.1.1.

¹⁰ *Id.* at C-7.1.4.

contractual arrangements” that “include[s] 49,000 physicians and behavioral health professionals in the categories of primary care, medical specialists, surgical, and shall include a sufficient number, mix and geographic distribution of providers to provide the full scope of benefits to enrollees.”¹¹

TRICARE annually issues provider handbooks describing TRICARE programs and requirements. The TRICARE Provider Handbook – South Region 2009 describes the TRICARE program and requirements for healthcare providers in the HMHS network; the handbook in the administrative record covers providers in the South Region, which includes Florida.¹² TRICARE defines a provider “as a person, business, or institution that provides or gives health care.”¹³ By example, the Handbook states that “a doctor is a provider. A hospital is a provider. An ambulance company is a provider.”¹⁴ The Handbook states that “[t]here are many other provider types. A provider must be authorized under the TRICARE regulation and must have their authorized status verified (*certified*) by Humana Military.”¹⁵ The Handbook describes TRICARE-Authorized Providers as:

those who meet TRICARE’s licensing and certification requirements and have been certified by TRICARE to provide care to TRICARE beneficiaries. These include doctors, hospitals, ancillary providers (such as laboratory and radiology providers) and pharmacies. There are two types of TRICARE-authorized providers: Network and Non-network.¹⁶

The Handbook states that Network Providers “[h]ave a signed agreement with Humana Military to provide care” and “[a]gree to file claims and handle other paperwork for

¹¹ SF ¶¶ 11, 15.

¹² JX C (2009 TRICARE South Region Handbook (Handbook) at 6 states that the South Region includes Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Oklahoma, South Carolina, Tennessee, and a major portion of Texas.).

¹³ JX C, Handbook at 20.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 21. The Handbook states that TRICARE “added a health care provider category to its roster of authorized TRICARE provider types [:] The Corporate Services Provider class consists of institutional-based or freestanding corporations and foundations that render professional, ambulatory, or in-home care, and technical diagnostic procedures.” *Id.* at 20.

TRICARE beneficiaries.”¹⁷ Among provider responsibilities set out in the Handbook, “[n]etwork providers (both professional and institutional) must maintain medical malpractice insurance coverage as required in the state in which services are provided.”¹⁸ The Handbook further obligates HMHS to ensure that medical professionals and institutions in the network maintain proper credentials. The Handbook reads:

Humana Military and its subcontractors ensure that physicians, licensed independent practitioners, facilities, and other health care professionals within the TRICARE network meet credentialing criteria. Adherence to credentialing criteria that meet or exceed DoD requirements ensures a quality health care delivery system for TRICARE. . . . Once approved for participation, each provider is monitored for quality of care and adherence to DoD and Humana Military standards.^[19]

2. Subcontract between HMHS and Florida Hospital requires Hospital to provide health care services to TRICARE beneficiaries as part of the network of providers set out in the prime contract

Respondent Florida Hospital is a not for profit hospital owned and operated by Adventist Health System.²⁰ Around April 2005, Florida Hospital entered into a sub-agreement with HMHS (Hospital Agreement) to be a HMHS Participating Hospital and a part of the network of providers that HMHS agreed to make available to TRICARE under the prime contract for the provision of network provider services.²¹ As to the “services to be provided,” the Agreement states:

Hospital desires to become a Participating Hospital of HMHS under the terms and conditions of this Agreement and agrees to provide health care services for Beneficiaries in accordance with the TRICARE regulations, policies and procedures.^[22]

¹⁷ *Id.* Handbook states that non-network providers “[d]o not have a signed agreement with Humana Military.” *Id.*

¹⁸ *Id.* at 22.

¹⁹ *Id.*

²⁰ SF ¶ 1.

²¹ SF ¶ 16; *see also* JX B (Hospital Agreement between HMHS and Florida Hospital).

²² JX B, Hospital Agreement at ¶ 2.

The Hospital Agreement “applies to all services provided by Florida Hospital for all persons designated by HMHS as eligible members, including active duty military personnel (Beneficiaries) to receive benefits under an agreement between HMHS and TRICARE Management Activity (TMA).”²³ Under the Agreement, Florida Hospital “receive[s] and review[s] applications for qualified physicians in accordance with Hospital’s Medical staff and governing body credentialing policies and procedures and agrees not to deny staff privileges to any qualified physicians,” and will provide “documentation regarding physicians with privileges at Hospital” to HMHS.²⁴

Florida Hospitals is on the listing of providers to the HMHS network that HMHS has provided pursuant to the HMHS/TRICARE prime contract to TRICARE beneficiaries.²⁵

B. Proceedings Below

Around August 14, 2007, OFCCP sent Florida Hospital a Scheduling Letter notifying the Hospital that it was selected for a compliance review pursuant to OFCCP’s investigative authority under Executive Order 11246, the Rehabilitation Act, and the Veterans’ Act, and the implementing regulations.²⁶ The Office of Management and Budget (OMB NO. 1215-0072) approved the Scheduling Letter.²⁷ The compliance review, which would be taken in the form of a desk audit, required that Florida Hospital provide certain information pertaining to its affirmative action plans and supporting data. Two weeks later, Florida Hospital notified OFCCP that it would not participate in the desk audit, stating that it was not a federal contractor or subcontractor within OFCCP’s jurisdiction.²⁸ OFCCP issued a Notice to Show Cause on December 3, 2007, why enforcement proceedings should not be commenced because Florida Hospital failed to comply with OFCCP’s Scheduling Letter.²⁹

On December 18, 2008, when Florida Hospital continued to refuse to comply, OFCCP filed an Administrative Complaint with the Office of Administrative Law Judges, requesting that Florida Hospital be permanently enjoined from failing and refusing to comply with the requirements of Executive Order 11246, the Rehabilitation

²³ *Id.* at ¶ 1.

²⁴ *Id.* at ¶ 6; *see also* SF ¶ 20.

²⁵ *See* SF ¶ 16; *see also* JX B, Handbook at 6.

²⁶ *See* SF ¶ 33; *see also* Administrative Complaint (filed Dec. 18, 2008), at ¶ 9.

²⁷ Administrative Complaint at ¶ 9.

²⁸ *Id.* at ¶ 11.

²⁹ SF ¶ 37; *see also* Administrative Complaint at ¶ 14.

Act, and the Veterans' Act, and that it be directed to permit OFCCP access to its facilities and otherwise complete its compliance review.³⁰ The parties filed cross-motions for summary decision.

C. ALJ Decision

On October 18, 2010, the ALJ entered a Summary Decision and Order in OFCCP's favor ordering Florida Hospital to adhere to the compliance review. The ALJ determined that Florida Hospital is a covered subcontractor within the regulatory definition pursuant to Executive Order 11246 because "[u]nder the Hospital Agreement, Defendant agrees to provide medical services to TRICARE's beneficiaries under the agreement between HMHS and TRICARE."³¹ The ALJ determined that "Defendant is a subcontractor under HMHS's contract with TRICARE" because "Defendant performs 'a portion of the contractor's obligations' by providing some of the medical services to TRICARE's beneficiaries which HMHS has contracted to provide," citing *OFCCP v. UPMC Braddock*, ARB No. 08-048, ALJ Nos. 2007-OFC-001, -002, -003 (ARB May 29, 2009).³²

The ALJ rejected Florida Hospital's argument that TRICARE was a federal financial assistance program that fell outside the scope of OFCCP's investigatory authority.³³ The ALJ held that Florida Hospital "is subject to the affirmative action provisions"³⁴ enforced by OFCCP, granted its motion for summary decision, and denied Florida Hospital's motion.

D. Proceedings before the Administrative Review Board

Florida Hospital filed exceptions to the ALJ's Summary Decision with the ARB on November 1, 2010. Florida Hospital alleged, among other things, that the ALJ erred in holding that Florida Hospital was a federal subcontractor under 41 C.F.R. Part 60.

On January 9, 2012, following briefing by the parties on the issues raised by Florida Hospital's exceptions, Florida Hospital moved to dismiss the case as moot pursuant to the enactment of Section 715 of the National Defense Authorization Act for Fiscal Year 2012 (NDAA) on December 31, 2011, which amended 10 U.S.C.A. § 1097b(a). On January 12, 2012, the Board entered an order requesting further briefing

³⁰ Administrative Complaint (filed Dec. 18, 2008).

³¹ D. & O. at 4.

³² *Id.*

³³ See D. & O. at 6.

³⁴ D. & O. at 7.

addressing the amendment's impact, if any, on the resolution of this case and the requirements of Executive Order 11246, Section 503 of the Rehabilitation Act, and Section 402 of the Veterans' Act, and the applicable regulations.

Florida Hospital contends that in light of Section 715, it is not a subcontractor subject to OFCCP's jurisdiction and that the case must be dismissed as moot. OFCCP argues that Section 715 removes one basis for its jurisdiction over TRICARE network providers: OFCCP states that it "can no longer assert, as it did in its Response to Exceptions at 14-15 . . . that HMHS's obligation to create a network of healthcare providers encompasses the obligation to deliver medical services and that by providing such medical services as a subcontractor to HMHS, Florida Hospital performed, undertook or assumed HMHS's obligations under the prime contract."³⁵ OFCCP contends, however, that Section 715 does not address the first prong of the subcontract (41 C.F.R. § 60-1.3) definition that "TRICARE contracted with HMHS to set up a network of providers and ensure access to care for TRICARE beneficiaries [and] HMHS discharged this obligation in part by contracting with Florida Hospital to become a network provider."³⁶ OFCCP argues that Florida Hospital's services as a participant in the network were "necessary to the performance" of the TRICARE-HMHS prime contract and met the first prong of the subcontractor definition at 41 C.F.R. § 60-1.3."³⁷ OFCCP argues that the legislative history of Section 715 supports a narrow interpretation "given the marked difference between the initial bill and the bill that was ultimately enacted."³⁸ OFCCP finally argues that Section 715 has no impact because the provision cannot be applied retroactively.³⁹ Various interested amici filed additional briefs addressing these issues.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review exceptions to an ALJ's D. & O. and to issue the Department's final decision in cases arising under Executive Order 11246, the Rehabilitation Act, and the Veterans' Act.⁴⁰ The ARB reviews an ALJ's grant of

³⁵ Plaintiff OFCCP's Response to ARB's Request for Briefing at 6 (filed with ARB Mar. 13, 2012).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 7.

³⁹ *Id.* at 9-11.

⁴⁰ *See* 41 C.F.R. §§ 60-30.30, 60-250.65(b)(1), and 60-741.65(b)(1).

summary decision de novo.⁴¹ The standard for granting summary decision is patterned after that for Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts.⁴² Under 29 C.F.R. § 18.40(d), an ALJ's grant of summary decision will be affirmed where it is determined upon de novo review that the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law.⁴³

ISSUES PRESENTED

1. Whether Section 715 of the NDAA applies retroactively to the pending administrative proceeding.
2. Whether, in light of Section 715 of the NDAA, OFCCP has jurisdiction to conduct a compliance review of Florida Hospital pursuant to Executive Order 11246, Section 503 of the Rehabilitation Act, and Section 402 of the Veterans' Act.

DISCUSSION

I. Executive Order, Statutory and Regulatory Framework

OFCCP is responsible for ensuring that Federal contractors and subcontractors doing business with the Federal government comply with the laws and regulations requiring nondiscrimination and equal employment opportunity (EEO). Three legal authorities govern OFCCP's administration and enforcement of its EEO and affirmative action compliance responsibilities, and these legal authorities are administered through identical regulatory processes.

A. Executive Order and Statutory Framework

Executive Order 11246⁴⁴ prohibits Federal contractors from discriminating on the basis of race, color, religion, sex or national origin. The Executive Order also requires

⁴¹ *Charles v. Profit Inv. Mgmt.*, ARB No. 10-071, ALJ No. 2009-SOX-040 (ARB Dec. 16, 2011); *Reamer v. Ford Motor Co.*, ARB No. 09-053, ALJ No. 2009-SOX-003, slip op. at 3 (ARB July 21, 2011).

⁴² *Moldauer v. Canandaigua Wine Co.*, ARB No. 04-022, ALJ No. 2003-SOX-026, slip op. at 3 (ARB Dec. 30, 2005).

⁴³ *Charles*, ARB No. 10-071, slip op. at 3; *see also Gonzales v. J.C. Penney Corp., Inc.*, ARB No. 10-148, ALJ No. 2010-SOX-045, slip op. at 6-7 (ARB Sept. 28, 2012).

⁴⁴ 30 Fed. Reg. 12319 (Sept. 24, 1965), as amended (*see supra* at 2, n.1).

government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of employment, including upgrading, demotion, transfer, recruitment, layoff or termination, rates of pay or other forms of compensation, and selection for training.⁴⁵ The Order gives the Secretary of Labor authority to investigate the employment practices of any government contractor.⁴⁶

Section 503 of the Rehabilitation Act, 29 U.S.C.A. § 793, requires that Federal contractors and subcontractors (with respect to contracts greater than \$10,000) act affirmatively to employ and advance in employment qualified individuals with disabilities.

Section 402 of the Veterans' Act, 38 U.S.C.A. § 4212, requires that Federal contractors and subcontractors (with respect to contracts greater than \$100,000) take affirmative acts to employ, and advance in employment, qualified special disabled veterans, veterans of the Vietnam era and any other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized.

These provisions require that Federal government contracts contain language prohibiting contractors from discriminating against any employee or applicant for employment, and to take affirmative action to ensure that employees and applicants for employment are treated without regard to race, creed, color, sex or national origin.⁴⁷ These provisions also obligate Federal contractors and subcontractors to take affirmative action and advance equal employment opportunities without regard to race, creed, color, sex, or national origin, and to advance employment opportunities for individuals with disabilities and veterans.⁴⁸ The EEO and affirmative action clause required for Government contracts is set out at Section 202 of Executive Order 11246.

B. Regulatory provisions enforcing OFCCP's compliance review authority under Executive Order 11246, Section 503 of the Rehabilitation Act, and Section 402 of the Veterans' Act

The regulations enforcing OFCCP's authority to conduct compliance reviews of Federal government contractors and subcontractors under Executive Order 11246, Section 503 of the Rehabilitation Act, and Section 402 of the Veterans' Act are set out at 41 C.F.R. Chap. 60 (Office of Federal Contract Compliance Programs, Equal Employment Opportunity), and apply to all contracting agencies of the Government and

⁴⁵ See Executive Order 11246, Subpart B, Sec. 202.

⁴⁶ See Executive Order 11246, Subpart B, Sec. 206(a).

⁴⁷ Executive Order 11246.

⁴⁸ *Id.*; see also 29 U.S.C.A. § 793; 38 U.S.C.A. § 4212.

to contractors and subcontractors who perform under Government contracts.⁴⁹ The term “contract” for purposes of Federal government contracting is broadly worded. Under the regulations, a “contract” is “any “Government contract or subcontract.”⁵⁰ A “Government contract” means any “agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services,”⁵¹ and the term “Contractor” means “a prime contractor or subcontractor.”⁵²

Subpart B of 41 C.F.R., Chapter 60, is the portion of the regulations setting out OFCCP’s enforcement authority.⁵³ These regulations define “Prime contractor” as “any person holding a contract and, for the purposes of Subpart B of this part, any person who had held a contract subject to the Order.”⁵⁴ A “Subcontract” is “any agreement or arrangement between a contractor and any person (in which the parties *do not* stand in the relationship of an employer and an employee): (1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or (2) Under which any portion of the contractor’s obligations under any one or more contracts is performed or undertaken or

⁴⁹ See 41 C.F.R. § 60-1.1. Chapter 60 of Title 41 of the Code of Federal Regulations sets out OFCCP’s regulatory authority to conduct compliance reviews pursuant to the Rehabilitation Act at 41 C.F.R. Part 60-741 (Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities), and the Veterans’ Act at 41 C.F.R. 60-250 (Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Special Disabled Veterans, Veterans of the Vietnam Era, Recently Separated Veterans, and Other Protected Veterans). These Sections set out the same compliance review authority as that pursuant to Executive Order 11246.

⁵⁰ 41 C.F.R. § 60-1.3.

⁵¹ Under the section defining “Government contract,” the term “personal property” includes “supplies, and contracts for the use of real property (such as lease agreements), unless the contract for the use of real property itself constitutes real property (such as easements).” 41 C.F.R. § 60-1.3 (Definition for “Government contract”). The term “nonpersonal services” as used in this section includes, but is not limited to, the following services: Utilities, contraction, transportation, research, insurance, and fund depository.” *Id.* The regulations state that the term “Government contract does not include: (1) Agreements in which the parties stand in the relationship of employer and employee; and (2) Federally assisted construction contracts.” *Id.*

⁵² *Id.*

⁵³ See 41 C.F.R. 61-1, Subpart B (General Enforcement; Compliance Review and Complaint Procedure).

⁵⁴ 41 C.F.R. § 60.1.3.

assumed.”⁵⁵ The term “subcontractor” means “any person holding a subcontract and, for the purpose of Subpart B of this part, any person who had held a subcontract subject to the Order.”⁵⁶ The regulations state that “each contracting agency shall include the . . . equal opportunity clause contained in Section 202 of the [Executive] [O]rder in each of its Government contracts.”⁵⁷ The regulations state that the EEO clause is “incorporated by reference in all Government contracts and subcontracts,” and “by operation of the [Executive] Order” is “considered to be a part of every contract and subcontract required by the Order and the regulations . . . whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.”⁵⁸

Subpart B of 41 C.F.R. 60-1 authorizes OFCCP to “conduct compliance evaluations to determine if the contractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and employees are . . . treated during employment without regard to race, color, religion, sex, or national origin.”⁵⁹ 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.”⁶⁰ The compliance review may take place as a desk audit, an on-site review, or an off-site analysis of information provided by the contractor.⁶¹

Administrative or judicial enforcement proceedings may be instituted where OFCCP determines violations of the Executive Order, the EEO contract clause, or the regulations.⁶² OFCCP can refer matters to the Solicitor of Labor and recommend that “administrative enforcement proceedings . . . be brought to enjoin violations.”⁶³ Where “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

⁵⁵ *Id.* (emphasis added).

⁵⁶ *Id.*

⁵⁷ 41 C.F.R. § 60-1.4 (equal opportunity clause).

⁵⁸ 41 C.F.R. § 60-1.4(d), (e).

⁵⁹ 41 C.F.R. § 60-1.20(a).

⁶⁰ 41 C.F.R. § 60-1.20(a)(1).

⁶¹ 41 C.F.R. § 60-1.20(a)(1)(i)-(iii).

⁶² 41 C.F.R. § 60-1.26(a)(i)-(x).

⁶³ 41 C.F.R. § 60-1.26(b)(1).

for an on-site review . . . OFCCP may immediately refer the matter to the Solicitor . . .⁶⁴

C. Office of Federal Contract Compliance Program Policy Directive 293

On December 16, 2010, the OFCCP issued Directive 293 on “Coverage of Health Care Providers and Insurers” to provide guidance on “assessing when health care providers and insurers are federal contractors and subcontractors based on their relationship with a Federal health care program and/or participants in a Federal health care program” for purposes of OFCCP jurisdiction.⁶⁵ Directive 293 addressed coverage questions pertaining to Medicare, TRICARE, and Federal Employee’s Health Benefit Plan (FEHBP).⁶⁶ OFCCP jurisdiction is driven by the existence of a “federal contractor or subcontractor relationship.”⁶⁷ The Directive states: “If a company holds a covered Government contract or is a subcontractor to a Government contract, then all of the company’s establishments and facilities are subject to OFCCP regulatory requirements, regardless of where the contract is to be performed.”⁶⁸ The Directive states:

Under each of the Federal Programs, a company may enter into a direct (prime) contract with a Government agency, and/or a prime contractor may subcontract elements of its contractual obligations to provide health care services, insurance, administrative support or other supplies and services. It is these contractual relationships over which OFCCP has enforcement authority.^{69]}

The Directive states that subcontract relationships may be covered where, as set out in OFCCP regulations, there is as follows:

[A]n underlying prime contract between a Federal Program and/or its contracting agency and a company, insurer, or health care provider, and if so, what the obligations are under that contract. . . .

⁶⁴ 41 C.F.R. § 60.1.26(b).

⁶⁵ See Coverage of Health Care Providers and Insurers, Directive 293, Department of Labor, Office of Federal Contract Compliance Programs Order, No. ADM Notice/JUR (Dec. 16, 2010) (Directive 293).

⁶⁶ Directive 293 at 1, 3-4.

⁶⁷ *Id.* at 5.

⁶⁸ *Id.*

⁶⁹ *Id.* at 6.

[And where] there is also an agreement between the prime contractor and the subcontracting company (1) for the purchase sale, or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of the underlying contract, or (2) under which any portion of the prime contractor's contractual obligation is performed.

To assess whether there is a subcontract within OFCCP's jurisdiction, the nature and purpose of BOTH the prime contract AND the subcontract at issue will be examined. If the subcontract satisfies at least one of the two prongs discussed above, then a subcontract within OFCCP jurisdiction exists.^[70]

The Directive sets out as an example the provision of Florida Hospital's healthcare services to TRICARE beneficiaries pursuant to the TRICARE/HMHS prime contract, and the HMHS/Florida Hospital (subcontract) Agreement. Directive 293 at 9 ("In this case, an ALJ determined that a prime contract existed between TRICARE and Humana in which Humana was obligated to establish provider networks through contractual arrangements. Florida Hospital had an agreement with Humana to provide health care services for TRICARE beneficiaries. The ALJ thus determined that Florida Hospital performed a portion of Humana's obligations by providing some of the medical services to TRICARE beneficiaries that Humana had contracted to provide. For this reason, the ALJ concluded that Florida Hospital was a covered subcontractor.").

II. Section 715 of the National Defense Authorization Act of 2012 (NDAA)

While this case was pending before the ARB, and a year after OFCCP issued Policy Directive 293, President Obama, on December 11, 2011, signed the National Defense Authorization Act (NDAA) authorizing, inter alia, appropriations for military activities for the Department of Defense. The legislation included Section 715, entitled "Maintenance Of The Adequacy Of Provider Networks Under The Tricare Program." This provision amended 10 U.S.C.A. § 1097b, which addressed the TRICARE program, by adding the following new paragraph:

(3) In establishing rates and procedures for reimbursement of providers and other administrative requirements, including those contained in provider network agreements, the Secretary shall, to the extent practicable, maintain adequate networks of providers, including institutional, professional, and pharmacy. For the purpose of determining whether network providers under such provider network agreements are subcontractors for

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Id. at 7-8.

purposes of the Federal Acquisition Regulation or any other law, a TRICARE managed care support contract that includes the requirement to establish, manage, or maintain a network of providers may not be considered to be a contract for the performance of health care services or supplies on the basis of such requirement.

See 10 U.S.C.A. § 1097b(a)(3) (Dec. 31, 2011).

On April 25, 2012, four months after enactment of Section 715, the OFCCP rescinded Policy Directive 293, effective immediately, in light of questions raised with respect to OFCCP's jurisdiction over health care providers. OFCCP's rescission Notice states: "[R]ecent legislation and related developments in pending litigation warrant rescission of the Directive at this time."⁷¹

III. Section 715 of the NDAA applies to the case pending before the ARB because its application imposes no retroactive effect

While a court is to "apply the law in effect at the time it renders its decision," *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711 (1974), the Supreme Court has recognized a "presumption against retroactive legislation [that] is deeply rooted in our jurisprudence" and "[t]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place," *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997). In this case, OFCCP sought a compliance review of Florida Hospital in 2007, about four years before the enactment of NDAA Section 715 in 2011. This case was presented to us for review in 2010, when Florida Hospital filed exceptions to the ALJ's recommended decision. NDAA Section 715 could apply to the pending case if we find that Congress has clearly indicated its intent to do so, or if we find that Section 715 has no retroactive effect. *Lindh v. Murphy*, 521 U.S. 320, 325-326 (1997) ("When . . . the statute contains no such express [congressional] command, the court must determine whether the new statute would have retroactive effect.").

In *Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244 (1994), the Supreme Court set out an analysis for courts to determine when new legislation may apply retroactively to a pending case. First, courts examine "whether Congress has expressly prescribed the statute's proper reach."⁷² When the legislature expresses a "clear intent" that the legislation is to be retroactively applied to pending cases, the presumption against retroactive legislation is rebutted.⁷³ In this case, it is undisputed that Section 715 contains

⁷¹ Notice of Rescission, Department of Labor, OFCCP ADM Notice/Rescission No. 301 (Apr. 25, 2012).

⁷² *Landgraf*, 511 U.S. at 280.

⁷³ *Id.* at 273, 280.

no congressional intent as to its retroactive application.⁷⁴ Notwithstanding Congress's silence on the retroactive application of Section 715, applying the statute to the case pending before us does not violate the presumption against retroactivity where the statute in question has no retroactive effect.⁷⁵

In determining whether a new statute would have "retroactive effect," the Court in *Landgraf* instructs that courts must examine whether the new statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."⁷⁶ "If the statute would operate retroactively [e.g., have retroactive effects], [the Court's] traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."⁷⁷ None of these circumstances are implicated in this case.

First, Section 715 creates no new liabilities, nor does it impair rights of any party to this administrative proceeding. Rather, Section 715 appears to remove from the definition of "subcontract" for purposes of 40 C.F.R. Part 60 (as it relates specifically to this case), the subcontract/sub-agreement between HMHS and Florida Hospital establishing Florida Hospital as a medical network provider for TRICARE beneficiaries pursuant to the prime contract between TRICARE and HMHS. OFCCP argues that Section 715 has retroactive effects because it impairs its right to undertake a compliance review of Florida Hospital. However, OFCCP fails to cite any legal support for the contention that this is the kind of impairment or burden of rights that would preclude retroactive application of a new statute to a pending case. A "great majority of [the court's] decisions relying upon the antiretroactivity presumption have involved intervening statutes burdening private parties." *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004), citing *Landgraf*, 511 U.S. at 271, n.25. The rights that OFCCP asserts are not private rights, and indeed do not even involve any new monetary obligations that purportedly fell on the government.⁷⁸ OFCCP's administrative complaint did not seek monetary relief for the agency or for any purported victims of discrimination. The Complaint instead specifically seeks prospective, injunctive relief to require Florida

⁷⁴ See, e.g., Plaintiff OFCCP's Response to ARB's Request for Briefing at 10 ("Congress did not express any intent to apply § 715 retroactively. The statute is silent as to this point.").

⁷⁵ *Landgraf*, 511 U.S. at 269-270; see also *Patel v. Gonzales*, 432 F.3d 685, 691 (6th Cir. 2005) ("Courts should apply the law in effect at the time of the decision, unless such law has a retroactive effect on the parties[.]" citing *Landgraf*, 511 U.S. at 273); *Mitchell v. Farcass*, 112 F.3d 1483, 1486-1487 (11th Cir. 1997) (holding that applying Section 1915(e)(2) of Prison Litigation Reform Act, 28 U.S.C.A. § 1915(e)(2), to pending cases "raises no retroactivity concerns under *Landgraf*.").

⁷⁶ 511 U.S. at 280.

⁷⁷ *Id.*

⁷⁸ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 582 n.13 (2006).

Hospital to comply with the agency's EEO and nondiscrimination data request and "permit OFCCP access to its facilities and otherwise to permit OFCCP to conduct and complete its . . . review."⁷⁹

It is well established that when the intervening statute authorizes or affects the propriety of *prospective* relief, application of the new provision does not have retroactive effect. For instance, in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 201 (1921), the Supreme Court held that § 20 of the Clayton Act, enacted while the case was pending on appeal, governed the propriety of injunctive relief against labor picketing. In remanding the suit for application of the intervening statute, the Court observed that "relief by injunction operates *in futuro*," and that the plaintiff had no "vested right" in the decree entered by the trial court.⁸⁰ Since OFCCP's complaint in this case seeks injunctive relief to compel future conduct by Florida Hospital, i.e., granting OFCCP access to Florida Hospital's facilities and records so that the agency can complete its compliance review, applying Section 715 has no retroactive effect.

Second, Section 715 does not increase any party's liability for past conduct.⁸¹ Applying Section 715 to the pending case would at most remove Florida Hospital's obligations to comply with OFCCP's compliance review request (given the terms of the prime and subcontracts in dispute in this case) because Section 715 removes the Federal government subcontract agreement involving TRICARE's provision of network provider services from within the definition of Subcontract under 41 C.F.R. Part 60.

Finally, no party contends that applying Section 715 to the pending case imposes any new duties to prior completed transactions. Again, at best it removes OFCCP's authority to conduct a compliance review of Florida Hospital given the specific terms of the subcontract with HMHS and prime contract for the provision of a network of medical providers between HMHS and TRICARE.

Because Section 715 does not increase any party's liability, impair any rights, or impose new duties on any party, the Act does not create an impermissible retroactive effect if applied to the compliance review sought before Section 715 was enacted, and

⁷⁹ Administrative Complaint at 4-5.

⁸⁰ *Id.*; see also *Landgraf*, 511 U.S. at 273 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464 (1921) (Court holding that insofar as an intervening statute "(a) provided for relief by injunction to private suitors, (b) imposed conditions upon granting such relief under particular circumstances, and (c) otherwise modified the Sherman Act, it was effective from the time of its passage, and applicable to pending suits for injunction. Obviously, this form of relief operates only in *futuro*, and the right to it must be determined as of the time of the hearing."); *Viacom, Inc. v. Ingram Enters., Inc.*, 141 F.3d 886, 890 (8th Cir. 1998).

⁸¹ *Landgraf*, 511 U.S. at 280.

while the case was pending before the ARB. Accordingly, Section 715 imposes no retroactive effects in this case and may be applied in determining whether OFCCP has authority to conduct a compliance review of Florida Hospital based on the terms of the Hospital Agreement before us.

IV. Section 715 of the NDAA precludes OFCCP's jurisdiction to engage in a compliance review of Florida Hospital

OFCCP analyzes this case under the subcontract definition taken from its regulations.⁸² While OFCCP concedes that the enactment of Section 715 “removes one basis for OFCCP’s jurisdiction over TRICARE network providers, as articulated in the second prong of the OFCCP’s subcontract definition,” OFCCP argues that Section 715 “does not address the first prong of OFCCP’s subcontract definition.”⁸³ OFCCP contends that “Florida Hospital’s services as a participant in the network were ‘necessary to the performance’ of the TRICARE-HMHS prime contract and met the first prong of the subcontractor definition.”⁸⁴ OFCCP argues that “Section 715 is entirely silent on this prong of the definition and thus cannot affect it.”⁸⁵ We disagree. Given the specific terms of the contracts at issue here – both the TRICARE/HMHS prime contract, and the HMHS/Florida Hospital subcontract – Section 715, in this specific case, precludes OFCCP’s jurisdiction to engage in a compliance review of Florida Hospital under 41 C.F.R. Part 60.

A. The TRICARE/HMHS prime contract requires HMHS to develop a network of health care providers that will serve TRICARE beneficiaries

To determine whether the terms of the contract fall within the scope of Section 715, we first must look at the contractual language as set out by the appropriate regulations. As explained, *supra* at 11-13, the regulations that pertain to OFCCP are set out at 41 C.F.R. Chap. 60. The regulations define a government contract as an agreement between any contracting agency (in this case TRICARE Management Activity) and any person (in this case HMHS) for the “purchase, sale or use of personal property or nonpersonal services.”⁸⁶ The regulations state that a contractor means “a prime contractor or subcontractor.”

⁸² See Plaintiff OFCCP’s Response to ARB’s Request for Briefing at OFCCP at 5-7; see also 41 C.F.R. § 60-1.3 (see definition for “Subcontractor”).

⁸³ Plaintiff OFCCP’s Response to ARB’s Request for Briefing at OFCCP at 6.

⁸⁴ *Id.*

⁸⁵ *Id.* OFCCP apparently further concedes that “Sec. 715 of the NDAA effectively nullifies [the] jurisdictional basis” of OFCCP’s coverage afforded under the second prong of the subcontractor definition. OFCCP Response, *supra*, at 7, n.9.

⁸⁶ 41 C.F.R. § 60-1.3.

In this case, the nature of the prime contract between TRICARE (the government agency) and HMHS (the private entity/prime contractor) involves an agreement between the parties that HMHS will provide a “managed, stable high-quality network or networks of individuals and institutional health care providers.”⁸⁷ The prime TRICARE/HMHS contract agreement indeed is replete with the terms under which HMHS will provide a network of health care providers to TRICARE and its beneficiaries, including the requirement that the provider network “be established in 100% of the South Region,” at HMHS inform the “government within 24 hours of any instances of network inadequacy,” that HMHS “maintain the provider network size of 49,000 physicians and behavioral health professionals as measured on a monthly basis,” and that “network providers and their support staff gain sufficient understanding of applicable TRICARE program requirements, policies, and procedures.”⁸⁸ Thus, the prime contract constitutes an agreement by HMHS to provide a network of health care service providers to TRICARE beneficiaries in TRICARE’s designated South Region.⁸⁹

B. The agreement between HMHS and Florida Hospital constitutes a subcontract designed to provide health care services to TRICARE beneficiaries pursuant to the terms of the prime contract

The regulations define a “Subcontract” as “any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):”

(1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts;
or

(2) Under which any portion of the contractor’s obligations under any one or more contracts is performed or undertaken or assumed.⁹⁰

A “subcontractor” is “any person holding a subcontract.”⁹¹

While OFCCP concedes that Section 715 removes its jurisdiction over Florida Hospital under prong two, the agency argues that the Hospital Agreement is a subcontract

⁸⁷ SF ¶ 10.

⁸⁸ See JX A, Section C Description/Specifications/Work Statement.

⁸⁹ See JX A, TRICARE/HMHS Award/Contract.

⁹⁰ 40 C.F.R. § 60-1.3.

⁹¹ *Id.*

under the definition set out at prong one because “Florida Hospital’s services as a participant in the network were ‘necessary to the performance’ of the TRICARE/HMHS prime contract, meeting the first prong of the subcontractor definition.”⁹² The ALJ, however, decided OFCCP’s jurisdiction under prong two, and in doing so did not address the applicability of prong one to the contract(s) at issue.⁹³

Nevertheless, the terms of the subcontract agreement (Hospital Agreement) between HMHS and Florida Hospital are designed to effectuate the terms of the prime TRICARE/HMHS contract. Under the subcontract Florida Hospital agrees to be a provider of health care services to TRICARE beneficiaries.⁹⁴ Like the prime contract, the impetus of the terms of the subcontract is for Florida Hospital to provide health care services to TRICARE beneficiaries and be part of the network of provider services pursuant to the prime TRICARE/HMHS contract. Indeed, the TRICARE South Region includes the state of Florida, and Florida Hospital is included among the health care services providers available to TRICARE beneficiaries in that region.⁹⁵

⁹² Plaintiff OFCCP’s Response to ARB’s Request for Briefing at OFCCP at 4.

⁹³ See D. & O. at 4.

⁹⁴ See JX B, Hospital Agreement at ¶ 1 (Scope of Agreement: This Agreement shall apply to all services provided by Hospital to all persons designated by HMHS as eligible members, including active duty military personnel (Beneficiaries), to receive benefits under an agreement between HMHS and TRICARE Management Activity.”); see also *id* at ¶ 2 (“Hospital desires to become a participating Hospital of HMHS under the terms and conditions of this Agreement and agrees to provide health care services for Beneficiaries in accordance with TRICARE regulations, policies, and procedures.”).

⁹⁵ See JX C, Handbook at 6; see also SF ¶ 16. Florida Hospital argued below (*see* D. & O. at 4) that the provision of health care services does not constitute services under prong one because they are not providing personal property or nonpersonal services. While addressing this argument is not necessary for purposes of resolving this case under Section 715, we briefly address it to make clear that we find this contention without merit. Under the terms of the subcontract, as further defined and clarified under the Provider Handbook, there is a wide range of provider services, including provision of services by institutional providers. Florida Hospital falls within the definition of an institutional provider. See TRICARE -Authorized Providers, 32 C.F.R. § 199.6(b) (Institutional providers – (1) General. Institutional providers are those providers who bill for services in the name of an organizational entity (such as hospital and skilled nursing facility), rather than in the name of a person. . . . Institutional providers may provide medical services and supplies on either an inpatient or outpatient basis.). Moreover, the services provided are indeed nonpersonal services for purposes of government contracting; a Personal Services Contract is a contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, to be, Government employees, i.e., contractor personnel are subject to the relatively continuous supervision of a Government official. See 48 C.F.R. § 237.104 (Personal Services Contracts); see also Federal Acquisitions Regulation 48 C.F.R. § 37.104(a) (“A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor’s personnel.”). The facts presented in this case would not substantiate such a

C. Section 715 of the NDAA precludes OFCCP's jurisdiction over Florida Hospital based on the terms of the subcontract with HMHS, which effectuates the TRICARE prime contract for the provision of a provider network

The recently enacted NDAA Section 715 contains language that modifies the definition of contract in contract agreements involving DoD entities. The new Section 715 reads:

(3) In establishing rates and procedures for reimbursement of providers and other administrative requirements, including those contained in provider network agreements, the Secretary shall, to the extent practicable, maintain adequate networks of providers, including institutional, professional, and pharmacy. For the purpose of determining whether network providers under such provider network agreements are subcontractors for purposes of the Federal Acquisition Regulation or any other law, a TRICARE managed care support contract that includes the requirement to establish, manage, or maintain a network of providers may not be considered to be a contract for the performance of health care services or supplies on the basis of such requirement.^[96]

The HMHS/Florida Hospital subcontract falls within the scope of Section 715's language.

Section 715 states that the Secretary will "maintain adequate networks of providers including institutional" providers. The undisputed facts in this case establish that institutional providers encompass "hospital[s]" and Florida Hospital is a hospital that entered into a Hospital Agreement with Government Contractor HMHS. The statute further reads that in determining whether "network providers [Florida Hospital] under such provider network agreements [Florida Hospital/HMHS subcontract] are subcontractors for purposes of the Federal Acquisition Regulation or any other law [40 C.F.R. § 60-1.3], a TRICARE managed care support contract [TRICARE/HMHS prime contract] that includes the requirement to establish, manage, or maintain a network of

claim, since there is no indication under the terms of the Agreement that health care providers providing care to TRICARE beneficiaries are government employees pursuant to a personal service contract. The services provided are pursuant to a subcontract agreement, not a personal services agreement as specified under FAR 37.104(a) or (c)(1); *see also Braddock*, ARB No. 08-048, slip op. at 9-10 (upholding an ALJ's determination that defendants provided "nonpersonal services" because they were neither in an employer-employee relationship nor under the supervision and control that an employer would exercise over its employees.).

⁹⁶ See 10 U.S.C.A. § 1097b(a)(3).

providers [JX A, at Section C ¶ 1 and *supra* at 4, 19-20] may not be considered to be a contract [or subcontract, *see* 41 C.F.R. § 60-1.3 – a contract is any “Government contract or subcontract”] for the performance of health care services or supplies on the basis of such requirement.” Applying Section 715 to the subcontract in this case, and under the definition of “subcontract” as set out under 41 C.F.R. § 60-1.3, the fact that the Hospital Agreement (subcontract) involves the provision of health care providers pursuant to a managed care prime contract between TRICARE and HMHS that includes the requirement to maintain a network of providers, OFCCP’s jurisdiction is removed. Under Section 715, the subcontract is no longer a “subcontract” under Section 60-1.3 because the element of the contract that is “necessary to the performance of any one or more contracts” involves the provision of health care network provider services to TRICARE beneficiaries.

OFCCP argues that the statute should be interpreted narrowly because the Conference Report did not adopt the Senate’s earlier version of this provision that expressly excluded health care providers under the TRICARE network qualifying as Federal government contractors.⁹⁷ That provision, NDAA Section 702, expressly stated that TRICARE “[n]etwork providers under such provider network agreements are not considered subcontractors for purposes of the Federal Acquisition Regulation (FAR) or any other law.” The Administration undertook a “review with relevant agencies, including the Departments of Defense, Labor, and Justice, to clarify the coverage of health care providers under federal statutes applicable to contractors and subcontractors.”⁹⁸ The conferees agreed that “this is a complex issue [that merited] continued review from the Committees on Armed Services of the Senate and the House of Representatives and other committees of jurisdiction in the Senate and the House of Representatives.”⁹⁹

A Conference Report was drafted that apparently resolved discrepancies between the two measures.¹⁰⁰ This negotiated agreement between the House and Senate versions of the language became the final legislation. Although the language of Section 715 is less explicit than the prior Section 702, applying Section 715 at least with respect to the contracts at issue in this case (the prime TRICARE/HMHS contract and the resulting subcontract between HMHS/Florida Hospital) still renders the same result; the express language of the HMHS/Florida Hospital subcontract designed to incorporate Florida Hospital as a part of the network of provider services renders it as “not a contract” in

⁹⁷ See National Defense Authorization Act for Fiscal Year 2012, Senate Report 1253, Rep. No. 112-26, 112th Cong., 1st Sess. (June 22, 2011), at p. 221, Sec. 702.

⁹⁸ Cong. Rec. H8592 (Dec. 12, 2011).

⁹⁹ *Id.*

¹⁰⁰ See Conference Report on H.R. 1540, National Defense Authorization Act for Fiscal Year 2012, 112th Cong. 1st Sess., Sec. 715 (at p. 4310 (Dec. 12, 2011)).

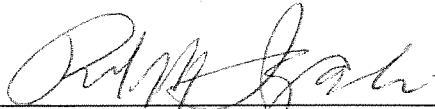
light of Section 715 because it involves the provision of network provider services to beneficiaries of TRICARE.

After Section 715's enactment, OFCCP rescinded Directive 293 (Coverage of Healthcare Providers and Insurers) on April 25, 2012. *See supra* at 16. OFCCP stated in the rescission Notice that it would "continue to use a case-by-case approach to make coverage determinations in keeping with its regulatory principles applicable to contract and subcontract relationships and OFCCP case law."¹⁰¹ The particular contract language at issue here, and the contract relationship that formed under the contract(s) in light of the recent enactment of Section 715, precludes OFCCP from asserting jurisdiction over Florida Hospital in this specific case.¹⁰²


CONCLUSION

For the foregoing reasons, the ALJ's Summary Decision and Order is **REVERSED**, and OFCCP's administrative complaint is **DISMISSED**.

SO ORDERED.



PAUL M. IGASAKI
Chief Administrative Appeals Judge



LISA WILSON EDWARDS
Administrative Appeals Judge

¹⁰¹ Notice of Rescission, Department of Labor, OFCCP ADM Notice/Rescission No. 301 (Apr. 25, 2012) at 1.

¹⁰² Florida Hospital argued (Defendant's Exceptions at 24-30) that TRICARE is a federal financial assistance program, which precludes OFCCP's jurisdiction to conduct a compliance review. The ALJ below held, however, that TRICARE is not a federal financial assistance program. D. & O. at 5-6. Because we hold that NDAA Section 715 precludes OFCCP's jurisdiction to conduct a compliance review of Florida Hospital based on the terms of the contracts at issue in this case, we do not address this argument raised by Florida Hospital on appeal.

E. Cooper Brown, Deputy Chief Administrative Appeals Judge, concurring in part and dissenting in part:

I concur with my colleagues in concluding that OFCCP does not have jurisdiction over Florida Hospital as a subcontractor of Humana under Prong Two of OFCCP's regulatory definition of subcontractor. I dissent with respect to the conclusions my colleagues have reached with respect to OFCCP jurisdiction under Prong One of the regulatory definition of a covered subcontractor as I do not consider that issue properly before the Board.

“Prong Two” – jurisdiction of subcontracts “under which any portion of the contractor’s obligation under any one or more contracts is performed, undertaken or assumed” --

I concur with my colleagues in holding that Section 715 of the National Defense Authorization Act for Fiscal Year 2012, 10 U.S.C.A. § 1097b(a)(3), resolves in Florida Hospital's favor the issue of OFCCP's jurisdiction over Florida Hospital as a subcontractor of Humana under Prong Two of OFCCP's regulatory definition of subcontractor.¹⁰³ Florida Hospital's agreement with Humana to provide medical services would constitute a subcontract within OFCCP's jurisdiction only if, as the ALJ concluded, Humana's prime contract with TRICARE is similarly construed as a contract to provide medical services. However, Congress has clearly indicated in its adoption of Section 715 that Humana's contract with TRICARE cannot be construed as a contract to provide medical services on the basis employed by the ALJ. In light of Section 715, the language contained in the prime contract upon which the ALJ relied, requiring Humana to establish, manage, and maintain a network of providers, cannot as a matter of law be construed as establishing a contract for the provision of health care services on the basis of such requirement. Consequently, Florida Hospital's contract with Humana, by which it agreed to provide health care and medical services to TRICARE beneficiaries, cannot be construed as a subcontract under Prong Two of OFCCP's definition of covered subcontracts for purposes of the Federal Acquisition Regulation.

It is conceivable that Humana's contract with TRICARE could be construed as a contract for the provision of health care and medical services because of other language contained in the prime contract.¹⁰⁴ However, looking to other possible constructions of

¹⁰³ 41 C.F.R. § 60-1.3 (“*Subcontract* means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee): . . . (2) Under which any portion of the contractor’s obligation under any one or more contracts is performed, undertaken or assumed.”) *See also* §§ 60-250.2, 60-741.2.

¹⁰⁴ The last clause of Section 715, which provides “*on the basis of such requirement,*” is critical to a proper construction of Section 715 because it narrows the impact of the provision. If Congress had left this clause out of Section 715, the provision would have categorically prohibited referring to any TRICARE contract as a contract to perform health care services where the contract contains the “network of providers” clause. But Congress’s

the prime contract that might, in turn, afford OFCCP jurisdiction over Florida Hospital's contract with Humana under the second prong of OFCCP's definition of covered subcontracts is rendered moot in the instant case in light of OFCCP's concession that Section 715 overturns its assertion of jurisdiction under the second prong of the regulations defining a covered subcontract.¹⁰⁵ Consequently, I join in holding that Florida Hospital's contract with Humana to provide health care and medical services as part of a network of health care and medical services providers does not constitute a subcontract within the meaning of the second prong of OFCCP's definition of covered subcontracts.

“Prong One” – jurisdiction of subcontracts “for the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts” --

Despite the applicability of Section 715 to the second prong of OFCCP's regulatory definition of covered subcontracts, OFCCP argues on appeal that Section 715 does not address or affect whether OFCCP can nevertheless assert jurisdiction over Florida Hospital or a TRICARE network medical service provider pursuant to the first prong of OFCCP's regulations defining a subcontract covered by the anti-discrimination provisions of the statutes.¹⁰⁶ OFCCP contends that if the prime contract between TRICARE and Humana is construed solely as a contract obligating Humana to establish a network of medical service providers, the hospital agreement between Florida Hospital and Humana nevertheless constitutes a covered subcontract because it is “necessary to the

addition of the controlling phrase “*on the basis of such requirement*” necessarily limits the prohibition expressed in Section 715. In the end, Congress prohibited only the use of the “network of providers” clause as a basis for interpreting the contract as requiring the delivery of health care services. On its face, Section 715 does not prohibit finding another basis for determining that a particular TRICARE contract requires the performance of medical services.

¹⁰⁵ See OFCCP's Response to ARB's Request for Briefing On the Impact of Section 715 of the National Defense Authorization Act, at page 6 (“[Section 715] removes one basis for OFCCP's jurisdiction over TRICARE network providers, as articulated in the *second prong* of the OFCCP's subcontract definition. . . . OFCCP can no longer assert . . . that [Humana's] obligation to create a network of health care providers encompasses the obligation to deliver medical services and that by providing such medical services as a subcontractor to [Humana], Florida Hospital performed, undertook or assumed [Humana's] obligations under the prime contract.”).

¹⁰⁶ “*Subcontract* means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of the employer and an employee): (1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts;” 41 C.F.R. § 60-1.3. See also §§ 60-250.2, 60-741.2.

performance” of the TRICARE-Humana prime contract under the first prong of the regulatory definition of a covered subcontract.

Florida Hospital contends that OFCCP is barred from asserting jurisdiction before the ARB under the first prong of OFCCP’s regulatory definition of covered subcontracts because OFCCP’s argument based on a reinterpretation of the prime contract is raised for the first time on appeal. Cited by Florida Hospital is ARB case authority wherein the Board has refused to consider arguments raised by a party for the first time on appeal. *E.g., Administrator, Wage & Hour v. Lung Assocs.*, ARB No. 09-029, ALJ No. 2007-LCA-013 (ARB Mar. 24, 2011); *Carter v. Champion Bus*, ARB No. 05-076, ALJ No. 2005-SOX-023 (ARB Sept. 29, 2006).

OFCCP did assert jurisdictional coverage under Prong One of the regulatory definition before the ALJ. Consequently, if this was merely a matter of an issue having been raised and argued below by OFCCP but not addressed in the ALJ’s Decision and Order, the jurisprudentially appropriate response on appeal would be, in my estimation, remand of the issue to the ALJ for disposition in the first instance. However, OFCCP’s assertion of jurisdiction under Prong One before the ALJ was premised upon its construction of the TRICARE-Humana prime contract as a contract for the delivery of health care services.¹⁰⁷ OFCCP’s argument before the ARB that the prime contract is a contract for the establishment of a *network* of health and medical service providers, with Florida Hospital’s contract with Humana being a contract “for the purchase, sale or use of personal property or nonpersonal services” that are “necessary to the performance” of the prime contract, is a completely different argument, and one raised for the first time on appeal. The argument OFCCP now asserts as a basis for jurisdiction under Prong One is not properly before the Board, nor was it argued before the ALJ. Therefore, consistent with ARB precedent,¹⁰⁸ the Board may neither entertain OFCCP’s argument now raised for the first time on appeal, nor order that his matter be remanded for consideration of the argument by the ALJ.¹⁰⁹ Consequently, I dissent from my colleagues with respect to the

¹⁰⁷ See *e.g.*, OFCCP’s Motion for Summary Judgment, filed with the ALJ May 17, 2010, at pages 8-13.

¹⁰⁸ *Administrator, Wage & Hour v. Lung Assocs.*, ARB No. 09-029; *Lewandowski v. Viacom, Inc.*, ARB No. 08-026, ALJ No. 2007-SOX-088, slip op. at 10 (ARB Oct. 30, 2009); *Cante v. N.Y. City Dep’t of Educ.*, ARB No. 08-012, ALJ No. 2007-CAA-004, slip op. at 9 (ARB July 31, 2009); *Rollins v. Am. Airlines, Inc.*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 4 n.11 (ARB Apr. 3, 2007 (corrected)) ; *Carter* , ARB No. 05-076; *Harris v. Allstates Freight Sys.*, ARB No. 05-146, ALJ No. 2004-STA-017, slip op. at 3 (ARB Dec. 29, 2005); *Farmer v. Alaska Dep’t of Trans. & Pub. Facilities*, ARB No. 04-002, ALJ No. 2003-ERA-011, slip op. at 6 (ARB Dec. 17, 2004); *Honardoost v. PECO Energy Co.*, ARB No. 01-030, ALJ No. 2000-ERA-036, slip op. at 6 n.3 (ARB Mar. 25, 2003).

¹⁰⁹ In reaching this conclusion, I wish to make it clear that I am not suggesting a ruling, nor implying any view, on the merits of OFCCP’s argument that the Florida Hospital contract constitutes a subcontract necessary to Humana’s obligation to establish a network of health


conclusions they have reached concerning OFCCP's jurisdiction under Prong One of the regulatory definition of a covered subcontractor.

Federal Financial Assistance

In holding that Florida Hospital was subject to OFCCP jurisdiction under Executive Order 11246, Section 503 of the Rehabilitation Act, and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act, the ALJ concluded that the TRICARE program was not a federal financial assistance program that would preclude OFCCP jurisdiction. On appeal the ALJ's ruling on this issue has been raised and fully briefed by the parties and amici. Obviously however, in light of the Board's disposition with respect to the question of OFCCP jurisdiction to pursue a compliance review against Florida Hospital under the three laws, the question of whether the TRICARE program is a federal financial assistance program has been rendered moot. I mention this only to bring into focus *Shotz v. American Airlines*, 420 F.3d 1332 (11th Cir. 2005), and relevant case authority therein cited, that escaped the ALJ's notice which, in my estimation, provides a proper legal basis for analysis and resolution of whether the TRICARE program constituted a federal financial assistance program had it been necessary to decide the issue.

CONCLUSION

For the foregoing reasons, I thus concur in holding that OFCCP does not have jurisdiction over Florida Hospital under Prong Two of OFCCP's regulatory definition of subcontractor, and dissent with respect to my colleagues' conclusions regarding OFCCP's jurisdiction under Prong One to the extent that I do not consider that issue properly before the Board at this time.



E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

Judge Corchado, concurring in part, dissenting in part:

In its Administrative Complaint, OFCCP asserted jurisdiction over Florida Hospital as a subcontractor on two different bases defined at 41 C.F.R. §§ 60-1.3(1) and

care and medical service providers such that OFCCP would have jurisdiction over Florida Hospital under Prong One of OFCCP's regulatory definition.

(2) (Prong One and Two, respectively).¹¹⁰ The ALJ relied only on Prong Two to find by summary decision that OFCCP had jurisdiction over Florida Hospital and, understandably, declined to address Prong One. The ALJ also found that TRICARE was not a federal financial assistance program and, therefore, not excluded from OFCCP's jurisdictional reach on such basis. Pursuant to Section 715 of the National Defense Authorization Act for Fiscal Year 2012 (NDAA), passed after the ALJ's decision,¹¹¹ the Board unanimously reverses the ALJ's summary decision for OFCCP on Prong Two. However, three judges expressly or implicitly find that OFCCP's alternative basis for jurisdiction, Prong One, remains open as an option under Section 715.¹¹² Only two judges (the plurality opinion) find that Section 715 completely bars OFCCP from exercising jurisdiction over Florida Hospital. I believe that the plurality opinion overstates the reach of Section 715. I agree that Section 715 clarifies OFCCP's reach over TRICARE network providers through subcontractor coverage, but it does not eradicate it.¹¹³ I respectfully dissent from the plurality's opinion that Section 715 precludes OFCCP from asserting jurisdiction under Prong One. Beginning with its

¹¹⁰ Administrative Complaint ¶¶ 5, 12 (OFCCP did not cite the regulations in its Complaint but did track the regulatory language defining "subcontract"). *See also* 41 C.F.R. §§ 60-741.2, 60-250.2(l).

¹¹¹ Signed into law by President Barack Obama on December 31, 2011.

¹¹² Judge Joanne Royce and I expressly find that Prong One survives Section 715 and that the Board should have addressed OFCCP's jurisdictional claim on that basis. Writing separately, Deputy Chief Judge E. Cooper Brown agreed with the plurality decision *only* as to Prong Two when he wrote, "OFCCP does not have jurisdiction over Florida Hospital as a subcontractor of Humana under Prong Two . . ." *See infra*, p. 25. Judge Brown implicitly rejected the plurality's broad interpretation of Section 715 when he wrote "Congress prohibited only the use of the 'network of providers' clause as a basis for interpreting the contract as requiring the delivery of health care services." *See infra*, p. 25, n.104. Judge Brown noted that OFCCP "did assert jurisdictional coverage under Prong One of the regulatory definition before the ALJ." *See infra*, p. 27. He voted to dismiss Prong One on the grounds that OFCCP was raising a "completely different argument" for Prong One jurisdiction. *Id.* Had OFCCP raised in the ALJ Proceedings its allegedly new legal theory under Prong One, Judge Brown wrote that "the jurisprudentially appropriate response on appeal would be, in my estimation, remand of the issue to the ALJ for disposition in the first instance." *Id.* In the final analysis, a majority opinion exists only as to overturning the ALJ's summary judgment for OFCCP on Prong Two.

¹¹³ In my view, Section 715 merely clarifies the law and, therefore, is not retroactive. *See, e.g., Middleton v. City of Chicago*, 578 F.3d 655, 663 (7th Cir. 2009) (clarifying amendment not typically subject to a presumption against retroactivity). I disagree with the plurality's suggestion that the presumption against retroactivity only protects "private rights." Plurality, p. 17. *See Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244, 271, n.25 (1994) ("we have applied the presumption in cases involving new monetary obligations that fell only on the government"). However, I take no position on whether OFCCP has sufficient standing to assert unfair retroactive effects.

complaint, OFCCP has repeatedly asserted an independent basis for jurisdiction under Prong One in this case warranting consideration by the ARB or the ALJ on a remand.¹¹⁴ Lastly, even if jurisdiction existed under Prong One, I find that the issue of federal financial assistance requires further consideration because the ALJ's reasons and bases were insufficient. Because the plurality opinion rests entirely on Section 715, I begin with Section 715.

Background

For necessary context, I restate briefly some of the background covered in the plurality opinion. TRICARE Management Activity (TRICARE or TMA), a United States Department of Defense Field Activity, administers the Defense Department's worldwide healthcare program for active-duty and retired military and their families. Stipulated Facts (SF) ¶ 5. "To assist with the administration of this *Government paid healthcare entitlement*, referred to as the TRICARE program, TMA contracts for managed care support." SF ¶ 7 (emphasis added). Since August 27, 2003, HMHS has contracted with TMA to provide networks of healthcare providers to TRICARE patients (the TRICARE/HMHS Contract or Prime Contract). SF ¶ 9. Pursuant to Section C of the Prime Contract, HMHS "shall assist the [Department of Defense's] Regional Director and Military Treatment Facility Commander in operating an *integrated* healthcare delivery system combining resources of the military's direct medical care system and the contractor's managed care support to provide health, medical, and administrative support services to eligible beneficiaries."¹¹⁵ Among numerous requirements, the Prime Contract requires HMHS to: (1) provide a managed, stable high-quality network or networks of healthcare providers that complement the clinical services provided to TRICARE beneficiaries and (2) include in such networks "49,000 physicians and behavioral health professionals in the categories of primary care, medical specialists, surgical" in a manner that will "provide the full scope of benefits to enrollees." SF at ¶¶ 10, 11, 15.

Since at least April 2005, Florida Hospital has had an agreement with HMHS (Hospital Agreement) to be a Participating Hospital of HMHS "under the terms and conditions of this Agreement and agrees to provide healthcare services for Beneficiaries in accordance with the TRICARE regulations, policies and procedures." Hospital Agreement at ¶ 2. The Hospital Agreement "applies to all services provided by Florida Hospital for all persons designated by HMHS as eligible members, including active duty

¹¹⁴ Arguably, the plurality implicitly agreed that OFCCP preserved other legal theories under Prong One. Plurality at p. 19 (noting OFCCP's Prong One arguments). It addressed some of the substantive issues of Prong One. Plurality at p. 21, n. 95. The ALJ deliberately chose not to address all the issues when he granted OFCCP's motion for summary decision, making it unclear what issues he thought were before him. Given this setting, and rather than dismiss this complex case on a hypertechnical basis, we should err on the side of caution and let the ALJ determine what issues were pending before him. The ALJ's procedural decisions would then be properly reviewed for abuse of discretion.

¹¹⁵ See Section C-1 (General), Description/Specifications/Work Statement. (Emphasis added.)

military personnel (Beneficiaries) to receive benefits under an agreement between HMHS and TRICARE Management Activity (TMA).” *Id.* at ¶ 1.

Stated simply, TRICARE (the government), HMHS (the prime government contractor), and Florida Hospital (the network provider), along with other network providers, form an integrated healthcare delivery system for government paid healthcare services. The plurality finds that Section 715 categorically exempts the network provider aspect of this integrated healthcare system from OFCCP’s reach.

Section 715 and Prong Two

In my view, a straightforward reading of Section 715 reveals that Section 715 has limited impact. Section 715 of the NDAA amends 10 U.S.C.A. § 1097b(a) (2011) by adding subsection 1097b(a)(3), which provides as follows in relevant part:

For the purpose of determining whether network providers under such provider network agreements are subcontractors for purposes of the Federal Acquisition Regulation or any other law, a TRICARE managed care support contract that includes the requirement to establish, manage, or maintain a network of providers may not be considered to be a contract for the performance of health care services or supplies *on the basis of such requirement*.

(Emphasis added.) This portion of the new subsection 1097b(a)(3) awkwardly joins two clauses. The first clause (Clause One) sets up the issue: determining whether a network provider is a subcontractor for federal acquisition regulations (FAR) or any other law. Then, to resolve that issue, the second clause (Clause Two) establishes a *singular* and *narrow* limitation that applies to certain language found in TRICARE-managed care support contracts. Clause Two merely prohibits the government from using contract requirements related to *establishing, managing, and maintaining a network of providers as the basis* for labeling a managed care support contract as a contract to *perform* healthcare services. Contrary to the plurality opinion, *no language* in Section 715 categorically bans the ability to label a TRICARE network provider as a “subcontract.” In fact, in Section 715, there is no prohibition directed at network providers.

The legislative history to Section 715 removes any doubt of Congress’ deliberate intent to substantially limit the reach of Section 715. The Senate proposed the original amendment to 10 U.S.C.A. § 1097b(a) on June 22, 2011, as Section 702, that provided as follows: “Network providers under such provider network agreements are not considered subcontractors for purposes of the Federal Acquisition Regulation or any other law.”¹¹⁶ There is no question that this initial version categorically and clearly declared that no “network providers” were “subcontractors.” On November 17, 2011, the White House Administration objected to the categorical exclusion of TRICARE network providers

¹¹⁶ See S. 1867, 112th Cong. § 702 (2011).

from being considered subcontractors.¹¹⁷ Following a conference committee to resolve the differences between the Senate and House, Congress made Section 702 the first clause in a new Section 715 but deleted one critical phrase, “*not considered*,” and added an introductory phrase.¹¹⁸ Removing the phrase “not considered” converted Section 702 from a complete ban against the “subcontractor” label to a permissive clause, implicitly allowing for network providers to be considered subcontractors in some instances. In addition to removing the phrase “not considered,” Congress added a clause to Section 702 that fundamentally changed the primary focus of the amendment away from network provider agreements and toward the prime contract. By adding the last phrase “on the basis of such requirement,” Congress substantially limited the prohibitive language in Section 715. Contrary to the plurality’s characterization, the Senate’s proposed Section 702 was not simply more “explicit”; it fundamentally differed from Section 715. While Section 702 was a free- standing and unconditional ban applying to all network provider contracts, the new Section 715 is a condition-laden prohibition applying only to a few words of TRICARE-managed care support contracts. In the end, the new Section 715 simply clarifies, as a matter of law, the interpretation of certain words in TRICARE-managed care support contracts.

Despite its limited effect, Section 715 by itself may require reversal of the ALJ’s decision. It is critical to recall that Section 715 limits only those instances where a managed care support contract can be considered a contract for the “performance” of healthcare services. To “perform” healthcare services means “to do or carry out”¹¹⁹ the healthcare services. But the ALJ twice used the term “provide” in finding that Florida Hospital was “providing” some of the medical services that HMHS contracted to “provide.” D. & O. at 4. The term “provide” differs in that it means “to give what is needed, to supply or furnish.”¹²⁰ The term “provide” could also mean “to get ready ahead of time”¹²¹ or even “to make available.”¹²² Consequently, the ALJ’s use of the more fungible term “provide” creates some ambiguity. In finding that the TRICARE/HMHS Contract required HMHS to “provide” medical services, the ALJ relied on several clauses

¹¹⁷ See Statement of Administration Policy, S. 1867 - National Defense Authorization Act for FY 2012, Nov. 17, 2011, at 4;

http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf.

¹¹⁸ See 157 Cong. Rec. H8356, H8411, H8592 (daily ed. Dec. 12, 2011)(Conference report on H.R. 1540, - National Defense Authorization Act for Fiscal Year 2012).

¹¹⁹ WEBSTER’S NEW WORLD BASIC DICTIONARY OF AMERICAN ENGLISH (1998), Michael Agnes, Editor-in-Chief, Wiley Publishing, Inc.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² WEBSTER’S NEW WORLD DICTIONARY, 3RD COLLEGE EDITION (1988).

in the TRICARE/HMHS Contract related to *establishing, maintaining, and managing a network of medical providers*. If the ALJ meant “perform,” then Section 715 requires that his opinion be reversed. Such a ruling is precisely what Section 715 intended to foreclose, interpreting the words “establishing a network” and similar words to mean “perform” healthcare services. But, as I explain below, even if the ALJ used the term “provide” to mean “to get ready, obtain in advance, or make available,” Prong Two does not apply.

Prong Two applies when prime contractors retain a subcontractor to perform all or part of the prime contract duties. Prong Two provides as follows:

Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of the employer and an employee):

* * *

(2) Under which any portion of the contractor’s obligation under any one or more contracts is performed, undertaken or assumed.

In plain terms, Prong Two covers subcontracts where the prime contractor shares or transfers any of its contractual duties to the subcontractor. Obviously, a prime contractor cannot transfer duties it does not have under the prime contract. OFCCP jurisdiction over such duty-transfer and duty-sharing subcontracts makes sense because the subcontractor ultimately performs part of and benefits from the federal government’s contract with the prime contractor. Prong Two applies only if Florida Hospital performed duties also required of HMHS under the TRICARE/HMHS Contract.

The contracts and stipulated facts demonstrate that Florida Hospital and HMHS did not share the same duties. Under the TRICARE/HMHS Contract, HMHS agreed to establish, maintain, and manage a network of medical providers. It did not agree to *be* a network provider. In describing HMHS’s duties, the ALJ misunderstood Stipulated Fact 9. D. & O. at 4. HMHS did not “admit that HMHS provides medical services to TRICARE beneficiaries;” it admitted that it “contracted with TRICARE to *provide networks* of healthcare providers.” D. & O. at 4; SF ¶ 9 (emphasis added.) In contrast, under the Hospital Agreement, Florida Hospital agreed to *be* a medical network provider. It would provide healthcare services at its facilities as well as actually perform them through its medical staff. OFCCP pointed to no contractual provision where Florida Hospital agreed to assist HMHS to establish, maintain, or manage a network of medical providers. The obligation to “establish, manage, and maintain *networks* of medical providers” is simply not the same as the obligation to actually *perform* the healthcare services directly for the beneficiaries. Therefore, no duties overlapped between the prime contract and the subcontract, making Prong Two inapplicable.

On first blush, one contractual duty HMHS and Florida Hospital seemed to share was the duty to ensure that TRICARE beneficiaries received the “best value

healthcare.”¹²³ However, HMHS’s role as a network manager, not as a provider, meant that HMHS had a duty to *demand* best value healthcare services from the network providers, while Florida Hospital had to actually *provide* the best value healthcare. Ultimately, these duties remained on opposite sides of the wall of contractual duties between HMHS and Florida Hospital but did not overlap. Therefore, the ALJ erred in finding jurisdiction under Prong Two regardless of Section 715. But eliminating Prong Two does not end this case.

Section 715 and Prong One

Reversing the ALJ’s decision on Prong Two does not address the alternative basis upon which OFCCP asserted jurisdiction over Florida Hospital. OFCCP also relies on Prong One of its regulatory definition of covered subcontracts.¹²⁴ OFCCP contends it has jurisdiction over Florida Hospital because Florida Hospital’s role as a network provider fulfilled a necessary part of the HMHS’s obligations under the TRICARE/HMHS Contract.¹²⁵ Florida Hospital disagrees and argues that (1) Section 715 removes OFCCP’s jurisdiction under Prong One and, alternatively, (2) its contract with HMHS does not qualify as a purchase contract for nonpersonal services necessary for the TRICARE/HMHS Contract.¹²⁶ As previously stated, the ALJ did not address this alternative basis. D. & O. at 4. On appeal, the Board may consider any alternative ground asserted by the moving party and supported by the record.¹²⁷ Of course, the Board must be sure that the parties had a fair opportunity to address the alternative theory.¹²⁸ I believe the parties sufficiently addressed OFCCP’s alternative basis for jurisdiction under Prong One and that issue was squarely before us.

¹²³ See JX A, Section C-7.1.1 (TRICARE-HMHS Contract); JX B (Hospital Agreement ¶¶ 2 and 4) (Florida Hospital agreed to provide healthcare services pursuant to TRICARE regulations, policies and procedures, and the TRICARE/HMHS quality assurance standards).

¹²⁴ See Administrative Complaint ¶¶ 5, 12 (Dec. 18, 2008); OFCCP’s Memorandum in Support of Motion for Summary Judgment, p. 6 (OFCCP MSJ Brief); SF 9-11; 41 C.F.R. §§ 60-1.3, 60-741.2, 60-250.2(l).

¹²⁵ SF 9-11.

¹²⁶ See Defendant’s Motion for Summary Judgment and Supporting Brief, p. 9 (filed May 7, 2010); Defendant’s Motion to Dismiss Case as Moot Pursuant to Amendment to TRICARE, pp. 4-5 (filed Jan. 9, 2012).

¹²⁷ See, e.g., *AquaTex Indus., Inc. v. Techniche Solutions*, 479 F.3d 1320, 1328 (Fed. Cir. 2007); *Perez v. Volvo Car Corp.*, 247 F.3d 303, 310 (1st Cir. 2001).

¹²⁸ See, e.g., *Andersen v. Chrysler Corp.*, 99 F.3d 846, 855, n.5 (7th Cir. 1996)(may consider alternative grounds if nonmoving party had fair opportunity to submit evidence and contest the issue).

First, it is important to emphasize that Prong One complements but fundamentally differs from Prong Two. The difference matters in this case. As previously stated, under Prong Two, the prime contractor shares or transfers some of its contract duties to the subcontractor. In contrast, under Prong One, the prime contractor “purchases” or “uses” supplies or nonpersonal services (a Purchase/Use Subcontract) needed for the prime contract. Prong One expressly provides:

Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of the employer and an employee):
(1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts;

On its face, and relevant to this case, Prong One applies to *any kind* of Purchase/Use Subcontract for nonpersonal services if the nonpersonal services are necessary to perform the prime government contract.¹²⁹ As OFCCP argued, such necessary subcontractors implicitly or expressly accept the quid pro quo obligations of a federal contract when they accept the financial benefit of selling a certain amount of supplies or nonpersonal services to a federal government contractor.¹³⁰

Because Prong One applies to any kind of a government contract, Section 715 does not resolve the relevant question under Prong One. As explained earlier, Section 715 prevents the OFCCP from using certain words in a TRICARE managed care support contract to label the TRICARE/HMHS Contract as a contract to perform healthcare services. But the relevant question under Prong One is whether Florida Hospital provides supplies or nonpersonal services that HMHS needs to be able to perform its contract with TRICARE.¹³¹

¹²⁹ See, e.g., *Dep't of Labor v. Coldwell Banker & Co.*, No. 1978-OFC-012, slip op. at 4, 1987 WL 774229 (Sec'y Aug. 14, 1987)(property management contract with the building owner was a subcontract because it was necessary to the government lease agreement); *OFCCP v. Monongahela R.R. Co.*, No. 1985-OFC-002, slip op. at 2-3 (ALJ Apr. 2, 1986), 1986 WL 802025, *aff'd* No. 1985-OFC-002, 1987 WL 967412 (Sec'y Mar. 11, 1987)(company that transported coal was a subcontractor because the coal was necessary to the government contract for electricity).

¹³⁰ See OFCCP MSJ Brief, pp. 13-14 (filed May 17, 2010). In discussing retroactivity, the plurality narrowly defines the concern in this case as OFCCP's future enforcement rights, which fails to appreciate the quid pro quo created at the inception of the contract. When a contractor meets the minimum threshold requirements for coverage (i.e., a minimum number of employees and/or minimum contract value), the obligation to abide by federal law exists. OFCCP attempts to enforce this existing obligation.

¹³¹ See Plaintiff OFCCP's Rebuttal (Surreply) to Defendant Florida Hospital's Reply, p. 1 (filed Feb. 28, 2011)(arguing the same and before Section 715 was passed).

Florida Hospital argues that the Board's decision in *OFCCP v. Bridgeport Hospital*¹³² limits the focus in this case to the "single and dispositive question" of whether "HMHS agree[d] to provide medical services in its agreement with TRICARE."¹³³ First, I disagree that *Bridgeport* mandates such a narrow question in this case. The ARB in *Bridgeport* agreed with the ALJ, for several reasons, that the prime contractor committed only to provide health insurance and reimbursement, and "made no commitment to assure hospital care or services to enrollees."¹³⁴ Consequently, the ARB simply concluded that questions about Prong One "do not arise in this appeal."¹³⁵ Moreover, from the limited record before us, it appears that this case materially differs from the facts in *Bridgeport*. In *Bridgeport*, the Office of Personnel Management contracted with Blue Cross and Blue Shield (Blue Cross) to provide healthcare insurance, and then Blue Cross contracted with Bridgeport Hospital to provide medical services. OPM was a human resources office securing health insurance, not running a government funded healthcare program. In this case, TMA administers a "worldwide healthcare program" seeking to create an "integrated healthcare delivery program" for its beneficiaries. SF ¶ 5 and Section C-1 of the Prime Contract (General), Description/Specifications/Work Statement. TMA ultimately desires to obtain healthcare for its beneficiaries, not simply insurance, and HMHS serves as an intermediary for that goal. The limited facts before us do not demonstrate that this case sufficiently parallels the case in *Bridgeport*. Therefore, to the extent that Florida Hospital correctly read the Board's holding in *Bridgeport*, it is not binding in this case.

OFCCP Preserved an Independent Basis for Jurisdiction under Prong One

In the ALJ proceedings, OFCCP asserted Prong One jurisdiction on a basis that had nothing to do with Section 715. In its Complaint, citing Prong One, OFCCP asserted that Florida Hospital provided "nonpersonal services, which, in whole or in part, were necessary to the performance of Humana's contract or contracts with TRICARE."¹³⁶ Nowhere in its Complaint did OFCCP tether Prong One jurisdiction to one theory nor did it expressly say it was based on exactly the same theory as Prong Two jurisdiction. OFCCP repeatedly asserted Prong One jurisdiction in "Plaintiff's Memorandum in Support of its Motion for Summary Judgment" (OFCCP MSJ Brief).¹³⁷ In its summary judgment memorandum, OFCCP argued that Florida Hospital's services were necessary to the TRICARE/HMHS Contract because of a number of HMHS contractual obligations

¹³² ARB No. 00-034, ALJ No. 1997-OFC-001, slip. op. at 6 (ARB Jan. 31, 2003).

¹³³ See "Defendant's Reply to Plaintiff's Response to Defendant's Exceptions," p. 3.

¹³⁴ *Bridgeport*, ARB No. 00-034, slip op. at 6.

¹³⁵ *Id.*

¹³⁶ See Administrative Complaint ¶¶ 5, 12.

¹³⁷ OFCCP MSJ Brief, p. 2, 3, 6-8, 18.

and duties that were separate from any allegation that HMHS was required to provide medical services.¹³⁸ The following quote from its summary judgment memorandum succinctly spells out the independent basis for Prong One jurisdiction:

The Prime Contract between HMHS and TRICARE states that HMHS “shall provide a managed, stable, high-quality network or networks, of individual and institutional health care providers” and shall “establish [these] provider networks through contractual arrangements.” (JSF ¶¶ 10-11). Defendant was and is one of the healthcare providers that HMHS has contracted with to fulfill its obligations to TRICARE. (JSF ¶ 22).^[139]

When Florida Hospital filed a cross-motion, OFCCP expressly relied on its summary judgment memorandum as part of its response, further preserving its independent basis for Prong One jurisdiction.¹⁴⁰

After the ALJ’s ruling, and long before Section 715 was passed, OFCCP continued to assert an alternative basis and legal theory for jurisdiction under Prong One and denied that it had waived this claim. In its response to Florida Hospital’s exceptions, OFCCP reiterated that HMHS was required to establish a network of providers, Florida Hospital was such a network provider and thereby provided services and supplies necessary to HMHS’s obligations under the TRICARE/HMHS Contract.¹⁴¹ Florida Hospital then accused OFCCP of switching its Prong One argument to rely solely on Florida Hospital’s “status” as a network provider.¹⁴² OFCCP disagreed and pointed back to its motion for summary decision where it expressly discussed Florida Hospital’s provision of services as the necessary service, not merely its “status” as a network provider.¹⁴³ All this semantic fencing seems unnecessary given that relying on Prong

¹³⁸ *Id.* at 6-7.

¹³⁹ *Id.* at 8.

¹⁴⁰ See Plaintiff’s Memorandum of Law in Response to Defendant’s Motion for Summary Judgment and in Further Support of Plaintiff’s Motion for Summary Judgment, p. 1.

¹⁴¹ See Plaintiff OFCCP’s Response to Defendant’s Exceptions to the ALJ’s Summary Decision and Order, pp. 4, 10-11 (filed Dec. 3, 2010)(“the relevant question is whether the *services* that Defendant contracted with HMHS to provide are necessary”)(emphasis added.)

¹⁴² See Defendant’s Reply to Plaintiff’s Response to Defendant’s Exceptions, p. 2 (dated Feb. 7, 2011).

¹⁴³ See Plaintiff OFCCP’s Rebuttal (Surreply) to Defendant Florida Hospital’s Reply, p. 3 (dated Feb. 28, 2011)(“Plaintiff has never argued that Defendant was paid merely for its

One necessarily requires the provision of nonpersonal “services” not nonpersonal “status.” OFCCP reiterated its alternative legal basis for Prong One jurisdiction in its February 28, 2011 rebuttal to Florida Hospital’s reply, where it argued that HMHS was obligated to “contract with hospitals like Defendant to join [the network] and provide such medical services” and thereby making Defendant’s role necessary for HMHS to fulfill its TRICARE/HMHS Contract.

To wrap up the issue of Prong One, it is important to note that the parties present a legitimate dispute that has been left unsolved in this case. OFCCP raises compelling arguments that Florida Hospital’s medical services are necessary for HMHS to fulfill its obligations under the TRICARE/HMHS Contract. Indeed, it is hard to understand how HMHS could fulfill its contract to create an integrated health delivery system without the services provided by the network providers like Florida Hospital. Florida Hospital counters by suggesting that HMHS merely provides administrative support service.¹⁴⁴ The parties further dispute what the OFCCP regulations mean by requiring that the subcontract be for “nonpersonal” services. The parties debated which regulations governed the meaning of “nonpersonal services.” Regardless of which regulation is used, it seems clear that the term “nonpersonal” is an archaic federal government term of art focusing more on the legal relationship of the contracting parties rather than the common usage of that term.¹⁴⁵ Nevertheless, these issues are not ripe and resolution of these issues must await another day.

Federal Financial Assistance Program

The final reason for my dissent stems from the ALJ’s conclusion that TRICARE is not a federal financial assistance program. In a cross-motion for summary judgment, Florida Hospital argues that TRICARE is a federally subsidized health program like Medicare Part A and Part B. Thus, according to Florida Hospital, both programs constitute a federal subsidy and not a government contract subject to OFCCP’s regulations.¹⁴⁶ OFCCP argues that TRICARE was established to ensure or optimize the delivery of quality medical services to military personnel (or uniformed services) and, therefore, it is different from Medicare and not a federal financial assistance program.

“status” as a network provider”). See also OFCCP MSJ Brief, p. 3 (“Defendant has provided and continues to provide *services* which are necessary to the performance of HMHS’s Prime Contract with TRICARE . . .”).

¹⁴⁴ See Defendant’s Motion for Summary Judgment and Supporting Brief, p. 2.

¹⁴⁵ The use of the term “nonpersonal services” can be found as far back as the “Federal Property and Administrative Services Act of 1949.” (Section 2) (the intent of this act included the creation of an efficient system of procuring “nonpersonal services, including related functions such as contracting, inspection, storage,” among other things).

¹⁴⁶ See Defendant’s Motion for Summary Judgment and Supporting Brief, pp. 14-24.

The ALJ concluded that, unlike Medicare, TRICARE is not a federal financial assistance program. He reasoned that Medicare is merely an insurance program that “does not *provide* medical services to its beneficiaries, it simply pays for such services,” whereas the purpose of TRICARE is to ensure or “optimize the *delivery* of health care services” or, apparently, to provide medical services.¹⁴⁷ Thus, he concluded that Medicare and TRICARE “are totally different programs.”¹⁴⁸ Relying on *OFCCP v. UPMC Braddock*, ARB No. 08-048, ALJ Nos. 2007-ALJ-001, -002, -003, slip op. at 8-9 (ARB May 29, 2009), the ALJ held that he was not obligated to apply a regulatory definition of “subcontractor” under the Federal Acquisition Regulations if it conflicts with the Secretary’s OFCCP regulations implementing the anti-discrimination provisions of the laws enforced by OFCCP. Finally, the ALJ rejected as inapposite the cases Florida Hospital cited to support its argument that TRICARE is like Medicare and, therefore, constitutes federal financial assistance.¹⁴⁹

In the end, the ALJ’s reasoning failed to focus on the critical issue. The ALJ should have focused on whether Congress intended for the TRICARE program to be a federal financial assistance program. *See, e.g., Shotz v. American Airlines, Inc.*, 420 F.3d 1332, 1335-1336 (11th Cir. 2005)(providing helpful guidance but from a different perspective where, unlike this case, the defendant argued it was *not* a federal financial assistance program). This requires the ALJ and ARB to examine the relevant statutes governing the TRICARE program as it relates to TRICARE-managed care support contracts and network providers. In *Shotz*, the United States Court of Appeals for the 11th Circuit emphasized that the focus must be on the Congressional intent behind the federal statutes, beginning with the intent expressed in the text of the federal statutes. *See Shotz*, 420 F.3d at 1335-1336.¹⁵⁰

The requisite analysis of Congressional intent and statutory analysis in this case must begin with the statutes connected to the TRICARE program. The TRICARE/HMHS Contract expressly incorporates Title 10, Chapter 55 (Chapter 55), of the United States Code, arguably making Chapter 55 the starting point for deciphering Congressional intent. Chapter 55 begins with the following stated purpose:

¹⁴⁷ D. & O. at 5 (emphasis added).

¹⁴⁸ D. & O. at 6.

¹⁴⁹ *Id.*

¹⁵⁰ *See also U.S. Dep’t of Trans. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 604 (1986)(the Supreme Court emphasized that to determine who is a recipient of federal financial assistance under Section 504, “[w]e look to the terms of the underlying grant statute.”); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1382 (10th Cir.1990)(in a case where the defendant resisted the label of federal financial assistance, the Tenth Circuit Court stated that the focus must be on the government’s intent).

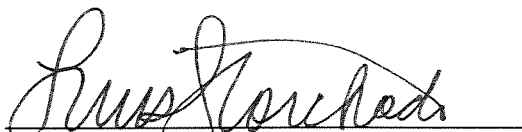
The purpose of this chapter is to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents.

10 U.S.C.A. § 1071 (2010). Chapter 55 also includes a definition section that defines the term “TRICARE program” as:

the managed health care program that is established by the Department of Defense under the authority of this chapter, principally section 1097 of this title, and includes the competitive selection of contractors to financially underwrite the delivery of health care services under the Civilian Health and Medical Program of the Uniformed Services.

10 U.S.C.A. § 1072(7). After considering the expressed statutory purpose, the definition of the TRICARE program, and other relevant indicia of Congressional intent, one can conclude whether the integrated healthcare delivery system created in this case constitutes a federal financial assistance program. But, again, the ultimate conclusion on this question must await another day.

To sum up, I agree that the ALJ’s summary decision for OFCCP on Prong Two must be reversed. I believe that Prong One survived Section 715 and that the Board should have analyzed the merits of OFCCP’s jurisdictional claim under that prong. Finally, if jurisdiction existed, I believe that a remand was inevitable on the issue of federal financial assistance.

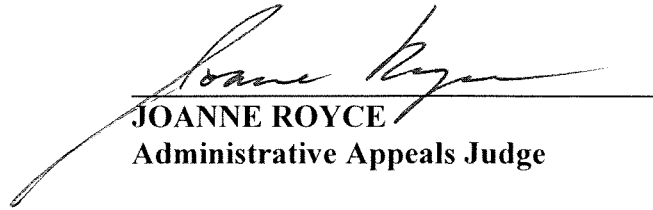


LUIS A. CORCHADO
Administrative Appeals Judge

Judge Royce, concurring in part, dissenting in part:

I join in Judge Corchado’s opinion, concurring in part, dissenting in part, except that I reserve judgment on the interpretation of Prong Two of the definition of

subcontractor, 41 C.F.R. §§ 60-1.3(2), and whether OFCCP may assert jurisdiction over Florida Hospital under Prong Two for reasons other than those prohibited by Section 715.



JOANNE ROYCE
Administrative Appeals Judge

ADMINISTRATIVE REVIEW BOARD
Certificate of Service

ARB CASE NAME: *Office of Federal Contract Compliance Programs,
United States Department of Labor v. v. Florida Hospital
of Orlando*

ARB CASE NO. : **11-011**

ALJ CASE NO. : **2009-OFC-002**

DOCUMENT : **ORDER**

A copy of the above referenced document was sent to the following persons on

OCT 19 2012



CERTIFIED MAIL AND INTER OFFICE:

Leslie Selig Byrd, Esq.
Bracewell & Giuliani LLP
106 S. St. Mary's Street
Suite 800
San Antonio, TX 78205

T.L. Trimble, Esq.
Vice President Legal Services
Adventist Health System
11 N. Orlando Avenue
Winter Park, FL 32789-3675

Alan M. Gerlach, Jr.
Adventist Health System
111 N. Orlando Avenue
Winter Park, FL 32789-3675

Christopher Flynn
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595

F. Curt Kirschner, Jr.
555 California Street, 26th Floor
San Francisco, CA 94104

R. Scott Medsker
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001

Mary Ellen Kleiman
Associate General Counsel
National Association of Chain Drug Stores
413 North Lee Street
P.O. Box 1417-D49
Alexandria, VA 22313-1480

Associate Solicitor
Civil Rights Division
U.S. Department of Labor
Suite N-2464, FPB
200 Constitution Avenue, N.W.
Washington, DC 20210

Office of Federal Contract
Compliance Programs
200 Constitution Avenue, N.W.
Room C-3325, FPB
Washington, DC 20210

Consuela A. Pinto
Office of the Solicitor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-2474
Washington, DC 20210

Hon. Stephen L. Purcell
Chief Administrative Law Judge
Office of Administrative Law Judges
800 K Street, NW, Suite 400
Washington, DC 20001-8002

Hon. Jeffrey Tureck
Administrative Law Judge
Office of Administrative Law Judges
800 K Street, NW, Suite 400
Washington, DC 20001-8002

