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Office of Administrative Law Judges
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Issue Date: 13 November 2007

CASE NO.: 2007 WIA 10

In the Matter of

**COMMONWEALTH OF PUERTO RICO,
DEPT. OF LABOR AND HUMAN RESOURCES,
RIGHT TO EMPLOYMENT ADMINISTRATION (“REA”)**
Complainant

v.

U.S. DEPARTMENT OF LABOR (“DOL”)
Respondent

and

RURAL OPPORTUNITIES, INC. (“ROI”)
Party-in-Interest

Appearances: Mr. Steven D. Cundra, Attorney
For the Complainant

Mr. Gary M. Buff, Attorney
Mr. Stephen R. Jones, Attorney
For the Respondent

Mr. Thomas A. Fink, Attorney
Mr. Dennis Annechino, Attorney
For the Party-in-Interest

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**SUMMARY JUDGMENT VACATING:
SECOND REVIEW PANEL DISQUALIFICATION OF REA &
GRANT AWARD TO ROI AS SOLE QUALIFIED APPLICANT**

DENIAL OF MOTION FOR SUMMARY DECISION AWARDED GRANT TO REA

This case is before me to conduct a hearing and render a decision under the provisions of the Workforce Investment Act, 29 U.S.C. § 2801 *et seq.* and 20 C.F.R. Part 667 Subpart H. During the discovery portion of the proceeding, in response to several motions, on October 15,

2007, I approved ROI's Motion to Intervene, denied the Respondent's Motion for Remand, denied the Complainant's various motions for additional relief, and issued a Show Cause Order on whether I should issue a summary judgment. By October 31, 2007, all parties provided a response to the show cause order. Additionally, as a response, the Complainant included a Motion for Summary Decision to award the subject grant to REA.

Background

Solicitation

On April 20, 2007, the Respondent issued a solicitation for grant applications ("SGA") for operating the National Farmworkers Jobs Program for the state service area of the Commonwealth of Puerto Rico for the Program Years 2007 and 2008 ("NFJP") under section 167 of the Workforce Investment Act ("WIA"), 72 Fed. Reg. 19972-19980. According to the solicitation, the application evaluation involves a two-step process. First, an advisory review panel scores an application under specific criteria set out in the SGA. An application receiving a review panel score of less than 80 would not be recommended for an award. Second, the grant officer makes a final selection among the qualified applications based on the panel review findings and other performance-based information.

First Review Panel

REA and ROI submitted the only two grant applications. In mid-June 2007, a review panel scored REA's application less than 80 and ROI's application higher than 80. Based on these ratings, the Grant Officer ("GO") notified REA on July 1, 2007 that it was excluded from further consideration. At the same time, the GO awarded the NFJP grant to ROI. On July 2, 2007, REA appealed the disqualification determination.

During the subsequent proceeding before an administrative law judge, and upon review of staff statements to review panel members, the Respondent submitted a Motion for Remand. On August 14, 2007, absent an objection from the Complainant, the administrative law judge approved the Respondent's Motion for Remand, *Commonwealth of Puerto Rico, Dept. of Labor and Human Resources, Right to Employment Administration v. USDOL*, ALJ No. 2007-WIA-3 (Aug. 14, 2007). During this period, ROI administered NFJP grant funds in Puerto Rico.

Second Review Panel

On August 16, 2007, a second review panel considered both applications and again scored REA below 80 and ROI above 80. On August 29, 2007, the GO advised the Complainant that its application received "a score of 79 or below" from the second review panel and ROI, which received a score higher than 80, was again designated the grantee for the NFJP grant. In response, REA filed another complaint on August 30, 2007, seeking administrative review under 20 C.F.R. §§ 667.800(a) and 667.825(a) "to determine that there was no basis in the record for the decision to deny REA's application for funding as a grantee under WIA § 167."

At the beginning of September 2007, I received REA's complaint for adjudication. Since then and through my mid-October 2007 order, the Complainant and Respondent engaged in discovery. Meanwhile, although its expenditures are now being more closely audited pending resolution of this litigation, ROI continues to administer the NFJP program in Puerto Rico.

Issues

1. Whether a rational record exists to support the grant officer's decisions to: a) disqualify REA's grant application due to the second review panel's score of less than 80, and b) award the Puerto Rico NFJP grant under WIA to RIO as the sole grant applicant with a qualifying score of greater than 80.
2. Whether REA should be awarded the NFJP grant by summary decision.

Parties' Positions

Complainant

In light of the GO's October 2007 deposition testimony, the second review panel's scoring which disqualified REA's application and lead to the grant award to ROI as the sole qualified applicant was not based on a rational and legitimate record. Specifically, the GO admitted the second review panel misapplied the SGA criterion to both the detriment of REA and benefit of ROI. Since the GO only used the second review panel's scores to disqualify REA and in turn award the grant to ROI, the second review panel's invalid scoring undermines the validity of REA's disqualification and the grant award to ROI. As a consequence, and for the reasons noted in the Motion for Summary Decision, the REA should receive the NFJP grant.

In addition to the invalid scoring, a summary decision awarding the NFJP grant to REA is independently warranted because ROI engaged in misconduct and ROI's grant application contains numerous misrepresentations concerning the nature and extent of its qualifications and experience.¹ Had ROI's application not contained misrepresentations, it would have suffered a mandatory point reduction which would have lead to a non-qualifying score. Due to these actions, ROI's grant application should be disqualified and REA should be awarded the NFJP grant.

Respondent

Because the second review panel gave REA a disqualifying score and ROI a score above the disqualification level, "the GO simply passed the scoring information to the parties" and made no further decision, which in effect left "nothing changed" and ROI remained the functioning grantee. However, the GO has subsequently determined the second review panel misapplied the SGA scoring criteria in evaluating REA's grant application, which reduced

¹On November 2, 2007, I denied a request from ROI's counsel to specifically respond to REA's allegations. My show cause order concerned the validity of the second review panel's scoring process rather than the respective contents of the grant applications.

REA's score below the qualifying level. Consequently, REA's application should have received further consideration and ROI was not the sole qualified grant applicant.

Under these circumstances, for two reasons, a remand continues to be the most appropriate action at this point. First, due to the second review panel's misapplication of the scoring criteria, the GO concluded it would be appropriate to treat REA's application as if it had received a score greater than 80. As a result, REA's application would now be eligible for consideration for receiving the NFJP grant. Second, because ROI was the only applicant to have a qualifying score and received the grant on that basis, only a "first tier" administrative review has been conducted regarding this grant. Since REA's application would be considered qualifying, the GO may now conduct a "second tier" administrative review of the relative merits of the two applications, as well as consider other performance-based information.

The Respondent objects to an outright award of the NFJP grant to REA at this point because only a first tier administrative review has been conducted. If both REA and ROI applications are deemed to be qualifying, then an award of the grant to REA rather than ROI is not warranted absent a second tier administrative review by the GO on the applications' relative merits.

Finally, while maintaining that a remand is the most appropriate and effective relief which will permit the GO to conduct a second tier administrative review, the Respondent does not object to a summary judgment on the basis that a rational record does not exist for the second review panel's scoring which lead to the exclusion of REA for consideration of the grant award and treatment of ROI as the only qualified grant applicant.

Party-in-Interest

REA is not entitled to a summary judgment because the disqualification of its application for the NFJP grant has a rational and legitimate basis in the record. Similarly, the grant award to ROI was based on a rational and legitimate record.

The GO's acknowledgement of mistakes by the second review panel are inaccurate and not supported by the SGA criteria. The few scoring errors were harmless because a) ROI received an above average rating, and b) even if the SGA criteria had been correctly applied to REA, its application would still be disqualified.

ROI stresses that the first review panel scores for both REA and ROI were valid. The record did not establish any error in the scoring process. Instead, the first administrative law judge approved the Respondent's remand motion on the basis of the GO's concern that a staff statement may have been misinterpreted. At most, the staff comment about "consensus" was harmless since the divergent score sheets from the first review panel show the panel members did not rely on consensus.

For several reasons, the second review panel evaluation was also valid and reflects proper evaluation under the SGA criteria. Consequently, any alleged errors in that process were "minimal in number and harmless as a matter of law." First, although one review panel member

misapplied one SGA factor in one evaluation area, the panelist also identified four other proper weaknesses in REA's application in the same area that provide a sufficient basis for the assessed point reduction. Second, while a review panel member may have deducted points under the wrong evaluation factor, the deduction was nevertheless warranted under another SGA evaluation area. Third, the review panel's other low scores for REA are clearly supported by the multiple weaknesses and deficiencies in its application based on the SGA criteria. Fourth, no basis exists in the record to support the proposition that absent the alleged errors REA's application would have received a qualifying score.

The NFJP grant award to ROI was based on a legitimate and rational record. Both review panels properly evaluated its application under the SGA criteria and rendered consistent scores well above the qualification threshold. The purported deficiencies in its application noted by REA are without merit and certainly the SGA was not designed to preclude non-incumbent applicants.

REA's claim to an award of the NFJP grant based on other allegations has no foundation. The Respondent did not violate its regulations by continuing to fund the grant to ROI during the appeals by REA. ROI did not engage in misconduct while operating the grant in Puerto Rico. And, ROI's application does not contain misrepresentations.

Issue No. 1 – Summary Judgment

Under the provisions of 20 C.F.R. § 667.825(a), administrative review of a WIA grant decision involves a determination "whether there is a basis in the record to support the decision." The Administrative Review Board ("ARB") further stated that a decision by a grant officer "must be affirmed unless the party challenging the decision can demonstrate that the decision lacked any rational basis." *United Tribes of Kansas v. USDOL*, ARB No. 01-026, ALJ No. 2000-WIA-3 (ARB Aug. 6, 2001) (slip op. p. 5).

According to 20 C.F.R. § 667.810, the rules of practice and procedural for a hearing before the Office of Administrative Law Judges, 29 C.F.R. part 18, are applicable. Under 29 C.F.R. §§18.40 (d) and 18.41 (a), an administrative law judge may enter a summary judgment for either party "if 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 that a party is entitled to summary decision."

As noted by the Respondent and Complainant, no genuine issue as to material fact exists regarding the second review panel's misapplication of the SGA evaluation criteria, the disqualification of REA's grant application, and the award of the NFJP grant to ROI as the sole qualified applicant.

In his October 3, 2007 deposition, the GO made the following statements and acknowledgments:

-- If the review panel did not correctly apply the SGA criteria, the resulting decision would not be legally valid (TR, p.29-30, and 92).

-- The sole basis for REA's grant application being excluded from further consideration was because it received a score of less than 80 (TR, p.24, 46, and 91).

-- By default, because ROI was the only applicant to receive a score greater than 80, it was automatically the winner of the grant (TR, p.91). In other words, because REA was disqualified and ROI qualified, ROI was selected for the grant (TR, p.92).

-- Under certain review areas, the SGA established two distinct sets of evaluation criterion, one for state applicants, such as REA, and the other for non-state entities, like ROI (TR, p.135 and 141).

-- In its summary, the review panel identified key weaknesses in REA's grant application that were based on factors listed in the non-state criterion section of the SGA, which were not applicable to REA (TR, p. 162-63).

-- In referencing the basis for reducing REA's score in two separate areas, two review panel members used inapplicable, non-state entity criteria (TR, p.166-70).

-- The panel members' use of the inapplicable non-state criterion in their scoring of REA's application had a negative impact on REA's score (TR, p.176).

-- Because the non-state criterion applied to ROI and ROI's application addressed that criterion, the panel members boosted ROI's score. (TR, p.176-77).

Having considered the parties' responses to the show cause order, and based on the GO's deposition testimony, I find the second review panel's misapplication of SGA criteria to REA's application precludes a determination that the disqualification of REA's application was based on a rational and legitimate record. The misapplication of the solicitation criteria by the second review panel undermines the validity of its disqualifying score for REA's grant application and impeaches the legitimacy of their scoring process. Accordingly, I conclude the second review panel's disqualifying score for REA's application was not based on a rational record and must be vacated.

As a consequence of REA's disqualification, the GO concluded that ROI should continue to receive the NFJP grant as the sole qualified applicant without any further consideration. Since REA's disqualification was not based on a rational and legitimate record and yet effectively served as the basis for the GO's decision, his determination that ROI should remain the grant holder likewise does not rest on a rational and legitimate record. Accordingly, the award of the NFJP grant as the sole qualified applicant must be vacated.²

²Since the remand and second review panel evaluations served as the basis for the present disqualification of REA and continued grant award to ROI, I need not address the validity of the first review panel's scoring.

Issue No. 2 – Summary Decision for Grant Award to REA

Applying the principles for Summary Decision/Judgment under 29 C.F.R. §§ 18.40 and 18.41(a), I conclude the Complainant's Motion for Summary Decision for award of NFJP grant to REA must be denied. In seeking the grant award through summary decision, REA asserts ROI has engaged in misconduct, ROI's grant application contains misrepresentations, and absent misrepresentations, ROI's application would be disqualified. In its show cause brief, ROI denies any misconduct and the inclusion of any misrepresentations in its grant application. These respective assertions obviously raise genuine issues of material fact which preclude a summary decision.

Final Comments

My sole role in this case is to determine whether the GO had a rational basis for this two determinations in August 2007. I have no authority to direct the Respondent's future action in regards to the NFJP grant for Puerto Rico for Program Years 2007 and 2008. Nevertheless, based on the Respondent's stated intention to have the GO proceed with a second tier administrative review at this point, I have two observations. First, although the SGA indicates the review panel's report is advisory, it is still set out an integral part of the application evaluation process and represents one of the factors a GO will consider during a second tier administrative review. Since I am vacating the second review panel's score for REA's application, no valid first tier administrative review exists for REA, which seems to be a prerequisite for a second tier administrative review. Second, since no valid review panel score exists for REA following the vacation order, the GO's proposal to proceed to a second tier administrative review on the basis that the applications of REA and ROI are roughly equivalent arguably is not based on a rational record.

ORDER

1. The second review panel's disqualifying score for REA's grant application is **VACATED**.
2. The award of the NFJP grant for Puerto Rico for Program Year 2007 to ROI as the sole qualified applicant is **VACATED**.
3. The Complainant's Motion for Summary Decision awarding NFJP grant for Puerto Rico for Program Year 2007 to REA is **DENIED**.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: November 9, 2007
Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file exceptions ("Exception") with the Administrative Review Board ("Board") within twenty (20) days of the date of issuance of the administrative law judge's decision. See 20 C.F.R. § 667.830. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Exception must specifically identify the procedure, fact, law, or policy to which exception is taken. You waive any exceptions that are not specifically stated. Any request for an extension of time to file the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the Exception is due. See 20 C.F.R. § 667.830; Secretary's Order 1-2002, ¶4.c.(42), 67 Fed. Reg. 64272 (2002).

A copy of the Exception must be served on the opposing party. See 20 C.F.R. § 667.830(b). Within forty-five (45) days of the date of an Exception by a party, the opposing party may submit a reply to the Exception with the Board. Any request for an extension of time to file a reply to the Exception must be filed with the Board, and a copy served on the other party, no later than three (3) days before the reply is due. See 20 C.F.R. § 667.830(b).

If no Exception is timely filed, the administrative law judge's decision becomes the Final Decision and Order of the Secretary of Labor pursuant to 20 C.F.R. § 667.830(b) unless the Board notifies the parties within thirty (30) days of the date of issuance of the administrative law judge's decision that it will review the decision. Even if an Exception is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the filing of the Petition notifying the parties that it has accepted the case for review. See 20 C.F.R. § 667.830(b).