

U.S. Department of Labor

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Issue Date: 26 September 2008

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**COMMONWEALTH OF PUERTO RICO,
DEPARTMENT OF LABOR AND HUMAN
RESOURCES, RIGHT TO EMPLOYMENT
ADMINISTRATION,**

Complainant,

v.

Case No.: 2008-WIA-0004

UNITED STATES DEPARTMENT OF LABOR,

Respondent, and

RURAL OPPORTUNITIES, INC.

Intervenor

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Appearances:

Steven D. Cundra, Esq., Roetzel & Andress, LPA
For the Complainant

Stephen R. Jones, Esq., United States Department of Labor,
For the Respondent

Thomas A. Fink, Esq., and Dennis J. Annechino, Esq., Davidson Fink LLP
For the Intervenor

Before:

Edward Terhune Miller,
Administrative Law Judge

DECISION AND ORDER

This case involves a dispute regarding the award of a grant under the provisions of the Workforce Investment Act, 29 U.S.C. § 2801-2945 (WIA or the Act) and applicable regulations at 20 C.F.R. Part 669, and appeal pursuant to 20 C.F.R. Part 667, Subpart H (2007). WIA provides funding for job training and employment programs for migrant and seasonal farm workers under the National Farm Workers Jobs Program (NFWJP). Applications for such grants

are made to the U.S. Department of Labor (DOL) pursuant to Solicitations for Grant Application (SGAs) published in the Federal Register. Grants are made to specified geographic areas, and the grant recipients operate the program in the designated geographic areas. Competition for these grants is by individual state service area. The grants are formula grants, with an amount appropriate by Congress proportionately allocated by DOL among the designated state service areas.

Complainant, Commonwealth of Puerto Rico, Department of Labor and Human Resources, Right to Employment Administration (REA) appeals Grant Officer Luetkenhaus's decision dated June 11, 2008, not to select REA as a grantee under WIA § 167 to operate the NFJP for the State service area of the Commonwealth of Puerto Rico for the grant year beginning July 1, 2007, and designating Intervenor, Rural Opportunities, Inc. (ROI), as the grant recipient. For the reasons that follow, this tribunal has determined that Grant Officer Luetkenhaus's decision to select ROI is not reasonable, is arbitrary, an abuse of discretion, and not in accordance with the law, and accordingly must be vacated and nullified. His non-selection of REA has not been proved to be unreasonable, arbitrary, an abuse of discretion, or not in accordance with the law.

The case has a convoluted history. After an initial decision by prior Grant Officer Stockton not to select REA as grantee in the Puerto Rico service area for the grant year beginning July 1, 2007, which was appealed by REA, Judge Sarno granted DOL's and the Grant Officer's motion to remand the case to the Grant Officer for expedited rescoring, alleging that the selection process may have been flawed. Judge Sarno noted:

Specifically, Complainant states that it "does not object to Respondents' motion to the extent that it restores the parties to their positions *status quo ante*" and "does not object to the relief sought, without prejudice to its right to inquire into and question the grant competition and selection process after the designation decision is announced on or before August 30, 2007." (Resp. at 2). Under the circumstances of this case, the Presiding Judge notes that the Grant Officer's award of the grant, based on the recommendations of a newly convened panel, will constitute a new decision, for which any party, as permitted under Section 185(a) of the Act (29 U.S.C. § 2936) and Section 667.800 of the regulations (20 C.F.R. § 667.800), may appeal pursuant to the procedures set forth therein.

(August 14, 2007, Order, n.2).

Following remand and a new determination by the Grant Officer, Judge Stansell-Gamm issued a Summary Judgment Vacating: Second Review Panel Disqualification of REA & Grant Award to ROI as Sole Qualified Applicant and Denial of Motion for Summary Decision Awarding Grant to REA on November 13, 2007. He approved ROI's motion to intervene, denied Respondent's motion for remand, and issued a show cause order regarding whether he should issue a summary judgment. He subsequently determined that the misapplication of the solicitation criteria by the second review panel invalidated its disqualifying score for REA's grant application and the determination that ROI should continue to receive the NFJP grant as the sole qualified applicant, so that neither determination by the Grant Officer rested on a

rational and legitimate record, and both had to be vacated. Judge Stansell-Gamm ruled that a summary decision awarding the grant to REA was precluded by factual disputes regarding ROI's grant application. Judge Stansell-Gamm determined that he had no authority to direct Respondent's future action in regards to the NFJP grant for Puerto Rico from Program Years 2007 and 2008, but suggested a need for another administrative review, at least of the application of REA. ROI appealed, but subsequently withdrew the appeal, requesting that DOL proceed with a third panel review process, and the appeal was dismissed by order of the Administrative Review Board dated February 6, 2008.

Thereafter, Eric D. Luetkenhaus was appointed to serve as Grant Officer and undertook an entirely new review of the applications of REA and ROI under the applicable SGA. Grant Officer Luetkenhaus selected a review panel and supervised its review of the applications. Since neither of the applicants received a qualifying score of 80 or above as prescribed by the SGA, Grant Officer Luetkenhaus proceeded to make his determination under Section II of the SGA. He selected ROI as best able to provide the requisite services to the subject population in accordance with his memorandum dated June 10, 2008, and the letters so advising REA and ROI dated June 11, 2008. REA appealed and requested a hearing, which was conducted before this tribunal on August 12-14, 2008, in Washington, D.C. ROI was permitted to intervene by order issued July 9, 2008. All parties were represented by counsel. Grant Officer Luetkenhaus and Radames Lamenza testified. The Administrative File submitted by the Grant Officer was admitted in evidence as RX 1, certain e-mails identified as DOL 2 were moved into evidence by ROI and received in evidence, and Complainant REA's exhibits 8, 12, and 14 were received in evidence.¹

ISSUE

Whether the decision of the grant officer was reasonable, and not arbitrary or capricious, an abuse of discretion, or not in accordance with the law.

Complainant REA contends that the Grant Officer's failure to award the grant to REA and designation of ROI as grantee was arbitrary and capricious, irrational, and not in accordance with law. REA complains that the Grant Officer did not review the applications to ensure compliance with the rating criteria. REA contends that there is no evidence of failure by REA to meet performance goals and the Administrative File contains no documentation of REA's performance standards, and the REA was the only applicant which met certain of the requisite criteria, such as established one stop network and WIA partners in the service area of Puerto Rico. REA asserts that the incumbency status of ROI is entitled to no weight under WIA, especially where it was being funded without a valid appointment, and that ROI had actually failed to perform as shown by the Administrative File and emails contained in Respondent's Exhibit 2. REA asserts that there is no evidence to support the Grant Officer's decision; that the Grant Officer's Responsibility Review was an unlawful circumvention of regulatory requirements, including a review by the Department independent of the competitive process and appropriate consideration of program performance. REA contends that conduct of the responsibility review by the Grant Officer, as opposed to the Special Program Services Unit, was

¹ For clarity and consistency, the administrative file is cited as "AF," followed by the section and page number on which the cited material appears.

improper. REA alleges that the Grant Officer's selection of purportedly unqualified panelists, who had "general employment and training administrative experience" but who did not qualify as technical experts in employment processes to review the applications of REA and ROI, was not in compliance with applicable legal requirements. REA asserts that the review panel misapplied the requisite criteria, so that disqualification of REA solely on the panel's misapplication of scoring criteria was improper. REA complains that one panelist scored low because REA had not provided past performance statistics which were not required by the SGA scoring criteria.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The process by which the award grantee is selected under WIA is delineated in Section V of the SGA. The SGA requires that a panel first review the applications and then score each on a one-hundred-point scale, based on four specified criteria. The review panel's evaluations are advisory, and they are not binding on the Grant Officer, who is charged with making the final award. The Grant Officer has broad latitude in making his decision, which is the final award determination. The selection is based on what "best meets the needs of eligible migrants and seasonal farmworkers in the area to be served." 72 Fed. Reg. 19979 (April 20, 2007). In so determining, the Grant Officer may consider "any information that comes to his or her attention" Although the SGA provides a broad grant of decision-making authority to the Grant Officer, the decision must have a rational basis in the record. 20 C.F.R. § 667.825(a); *see United Tribes of Kansas v. U.S. Dep't of Labor*, ARB No. 01-026 (ARB Aug. 6, 2001).

Subsequent to Administrative Law Judge Stansell-Gamm's Order vacating the previous grant award, Eric Luetkenhaus, a trained and certified grants management specialist who received his grant officer warrant in 2004, agreed to serve as the Grant Officer in charge of re-administering the grantee selection process. (Tr. 426-27). Grant Officer Luetkenhaus then selected three individuals with whom he had previously worked and who he felt would "be strong panelists with general knowledge of employment and training programs," to make up the review panel charged with providing the initial advisory grant application scores. (Tr. 431; Tr. 85-87). Upon selection of the panelists, the Grant Officer compiled a "Panelist Guide" of the appropriate rules and procedures and organized an orientation to instruct the panelists and facilitate their duties under the SGA. (Tr. 432; AF, Tab B, 110-11). The panelists reviewed and scored the applications, commented on the relative strengths and weaknesses of each, and submitted the scored applications to the Grant Officer for review, in accordance with the SGA and Panelist Guide. To ensure the panelists' compliance with the SGA, the Grant Officer then conducted a "general level of review to tie back the strengths and weaknesses provided by the panelists against the specific numbered italicized scoring [criteria] in [the Panelist's Guide.]" (Tr. 101; *see* Tr. 121, 136). After the panelists' initial submissions, the Grant Officer determined that some comments were "not easily tie[d] back to the scoring [criteria]," and, as a result returned the score sheets to the panel for clarification. (AF, Tab B, 111). Two of the three panel members substantially complied, and, after a second inquiry, the third provided clarification relating her comments to the SGA's explicit scoring criteria. *Id.* Initially, the panel's average scores were:

- REA: 73.67
- ROI: 77.73.

After completing the Grant Officer's requested revisions, the final average scores were:

- REA: 76
- ROI: 79.67.

Id.

The Grant Officer selected panel members who were experienced in Employment and Training Administration grants and were subsequently trained in WIA-167 procedure. (Tr. 85-87). His "general review" of the panelists' comments and scores was undertaken to ensure compliance with the provisions of the SGA. The record contains no evidence of undue influence by the Grant Officer upon the panel, and the Grant Officer repeatedly stated that the sole function of this review was to provide clear ties among the panelists' written impressions and those portions of the SGA detailing the scoring criteria. The Grant Officer's conduct of the panel review process was in accordance and consistent with both the SGA and the regulations.²

Since neither party scored above the required 80-point threshold specified in the SGA, the panel recommended neither party for the award, and the Grant Officer then followed the procedure outlined in Section II of the SGA. Section II states that "[i]n cases where the state agency was an applicant, and all applications are found not fundable . . . the Department reserves the right to designate another organization to operate the NFJP in that state."³ 72 Fed. Reg. 19974 (Apr. 20, 2007). Before attempting to identify other possible NFJP providers, the Grant Officer conducted a "responsibility review," mandated by 20 C.F.R. § 667.170.⁴ He requested information from the Special Programs Services Unit relating to ROI's compliance with the fourteen specific regulatory requirements contained in 20 C.F.R. § 667.170.⁵ (Tr. 277-81). After initiating the responsibility review, on June 4, 2008, the Grant Officer also exchanged electronic correspondence with Alina Walker, an employee in the Program Office of DOL's Employment and Training Administration ("ETA"). (DOL 2); (Tr. 248-50). Initially, the Grant Officer asked Ms. Walker if either REA or ROI failed to meet the requirements specified for the responsibility review. In response, she wrote that "[REA] has failed to meet a number of" the listed criteria, that documentation could be provided if required, and that REA's employment rate in Puerto

² Many of Complainant's allegations of error relate to the Grant Officer's selection of panelists, the lack of panelist expertise, and the panelists' application of the scoring criteria. The record contains no evidence of misapplication of scoring criteria, and neither the regulations nor the SGA requires that the panel be comprised of WIA experts. An extended discussion of the panel process is unwarranted, however, since the Grant Officer declared that its scoring and recommendations played no parts in his ultimate decision-making process.

³ The SGA also provides that, if no application is fundable and no state agency has applied for a grant, the Grant Officer is obliged to offer the state's governor an opportunity to submit an application to administer the grant. Such contact in this case was unnecessary because REA is an agency of the government of the Commonwealth of Puerto Rico.

⁴ If an applicant fails the responsibility review, it is disqualified and is not eligible to receive a grant regardless of its status in the competitive selection process. 20 C.F.R. § 667.170(b). The regulation identifies fourteen points of inquiry, two of which deal with performance.

⁵ The Grant Officer did not receive a response from the Special Programs Services Unit until one day after he made his decision. (Tr. 236-37).

Rico was 28%, while ROI's employment rate in five states in the Northeastern and Midwestern United States was 90% or above. (DOL 2). She did not state which regulatory criteria REA failed to meet. She indicated that, based on a Departmental risk assessment system, ROI was generally positively reviewed while REA was frequently considered "at risk." Ms. Walker provided no explanation of the methodology or data employed by the risk assessment system, and the record does not adequately explain the meaning or import of the assigned "risk categories." The Grant Officer "made no determination that either [REA or ROI] failed the responsibility [review]." (Tr. 285).

The Grant Officer sent two more e-mails to the Program Office. The first was in compliance with Section II of the SGA, seeking to identify any entity other than the two applicants that might be able to effectively administer the program. Ms. Walker responded that no such entity existed. The Grant Officer then sent an additional request for information:

ROI is currently serving the population in Puerto Rico. You provided some brief information relating to general performance when I requested information relating to responsibility. Is there any additional information or current issues that you want to share about this organization that would have an impact on me choosing them to continue NFJP services?

Ms. Walker responded on June 6, 2008, regarding the nature of ROI's performance administering Puerto Rico's NFJP to date, specifically, that "ROI has been able to establish this program in Puerto Rico in a relatively short time and with substantial obstacles to overcome." (DOL 2). Explicitly based on ROI's handling of the WIA grant until that time, Ms. Walker offered her support for ROI's status as grantee.

On June 10, 2008, the Grant Officer issued the decision awarding the NFJP grant to ROI. (AF, Tab B, 110). The decision memorandum lists four reasons for selecting ROI:

1. I have verified that ROI is performing successfully.
2. I have determined that there is no other organization that is clearly superior in serving the needs of the participants.
3. I have found that it is in the best interests of the participants being served to have the continuity of service from the current provider ROI.
4. I cannot justify a change in service provider if that change would not significantly benefit the participants.

Therefore, I hereby designate ROI as the grantee for the operation of the NFJP in Puerto Rico.

Id. (emphasis in the original). The Grant Officer testified that these criteria, "the four points that are specified there [in the published decision]," formed the basis for his selection of ROI as the NFJP grantee. (Tr. 540). He began his selection process anew upon the review's panel's judgment that neither party had submitted a fundable proposal, and he testified that he considered the panel's scores and comments "irrelevant" to his ultimate determination. (Tr. 273). He stated that the first e-mail he sent to Alina Walker regarding the responsibility review

was solely related to the determination of responsibility and was “independent from [his] selection process.” *Id.* Although he stated in his decision that he determined that no other organization was superior to ROI in serving the needs of the participants, his assessment of ROI’s superiority was based “on general performance information [he] received from [Ms. Walker].” (Tr. 322). Beyond the performance information supplied by Ms. Walker, the Grant Officer testified that his decision was a reflection of his desire to provide continuity of ROI’s NFJP services:

Q. At the time you made your decision, according to your memo, your main concern was the migrants and seasonal farmworkers’ consistency of services, correct?

A. My main concern was the best interests of the migrant and seasonal farmworkers.

Q. And that, in your judgment, was to have consistency of services?

A. Consistency, meaning continuity, yes.

(Tr. 452-53).⁶

The Grant Officer testified that he based his decision primarily on ROI’s “incumbency” operating the NFJP, and he did not consider the manner of ROI’s designation or the previous judges’ rulings:

Q. As of the time you made your decision, you based your decision primarily on the fact that ROI was currently operating the grant in Puerto Rico.

A. That is part of the four items that I mentioned in my memo, yes.

Q. And how they got there was not relevant.

A. I was brought in for a specific purpose here, and how their current status, as decided by previous Judges, was not part of my decision-making process.

(Tr. 308). Although the Grant Officer did not consider the prior Judges’ rulings, which vacated the selection of ROI, he had read the decision vacating the prior selection of ROI as the grantee. (Tr. 427).

⁶ The Department and ROI acknowledge the overriding importance of “continuity of service” to the Grant Officer’s decision. *See Intervenor, Rural Opportunities Inc’s Post-Hearing Submission* at 27 (“Undeniably, the continuity of services to the migrant and season farmworkers was the primary concern of Grant Officer Luetkenhaus.”); *The Grant Officer’s Post-Hearing Brief* at 11-12 (“It is well established . . . that the GO can select an incumbent grantee, over a higher-scoring challenger, to maintain continuity of service, and avoid disruption and start-up costs.”)(internal citations omitted). REA argued that it was best able to provide such continuity of service, as it had operated the NFJP grant for many years and had personnel in place.

The regulations mandate that an administrative law judge must determine whether “there is a basis in the record to support the [Grant Officer’s] decision.” 20 C.F.R. § 667.825(a). The ARB has instructed that this standard is “highly deferential” and akin to the “arbitrary and capricious” standard employed in federal courts. *United Tribes of Kansas v. U.S. Dep’t of Labor*, ARB No. 01-026 (ARB Aug. 6, 2001). Under this standard, the Grant Officer’s Decision must be affirmed unless the party challenging the decision can demonstrate that the decision lacked any rational basis. *Id.* An ALJ may not substitute his own judgment for that of the Grant Officer. *Id.* The ALJ may not undertake to make the Grant Officer’s decision *de novo*. Rather, the ALJ must determine whether the decision was arbitrary or capricious, an abuse of the Grant Officer’s discretion, and in accordance with the law. *See Lifelines Foundation, Inc. v. U.S. Dep’t of Labor*, 2004-WIA-00002 (ALJ Mar. 23, 2005). If the ALJ finds that the evidence of record provides a reasonable basis for the Grant Officer’s decision – even if the ALJ disagrees with the substance of the decision – it must be affirmed.

There is authority supporting the proposition that once a full and fair panel review process based on the submitted applications is complete, and neither applicant is scored above the applicable standard, the panel scores are no longer necessarily material to the process of selecting a grant recipient under WIA. In *Lifelines*, *supra*, Judge Chapman so held. The case, which was decided pursuant to a different SGA and under distinguishable facts, involved funding for job training and employment programs for Indian and Native American Tribes, rather than Migrant and Agricultural Workers. The panel scores for the two applicants were both well below the cutoff core of 70 prescribed by that SGA, and Judge Chapman approved the Grant Officer’s designation of the incumbent entity, despite its much lower score, based exclusively on a demonstrated capability to provide services for the Indian and Native American population in the area. In *United American Indian Involvement, Inc. v. U.S. Department of Labor* (“*UAIIP*”), 2004-WIA-00003 (ALJ June 13, 2005), Judge Gee determined that a favorable responsibility review does need not be completed prior to the time a decision is made, and that a Grant Officer’s reliance on the panelist review process, rather than his own full assessment of the applications, is not an abuse of discretion.

In his testimony before this tribunal, the Grant Officer stated that, after the panel completed its review process, he disregarded their conclusions and deemed them “irrelevant” to his further decision-making process. Insofar as the standard of review in this case is whether or not the Grant Officer’s decision is supported by a basis in the record, and the Grant Officer has testified that his decision was not based on panel input, a detailed analysis of the panel’s review process is unnecessary, as the panelists’ scores and comments did not factor into the decision-making process employed by the Grant Officer after the panel returned two non-qualifying scores that were properly determined. The Grant Officer repeatedly testified that “continuity of service,” meaning ROI’s continued administration of the NFJP grant, was the “critical” factor in his determination to select ROI. (Tr. 251, 265, 360, 603).

Intervenor ROI and the Government both point to *Lifelines* and *UAIIP* to support their contentions that the Grant Officer’s decision finds a basis in the record. But while the record supports the Grant Officer’s process for conducting his responsibility review, citation to *UAIIP* to support the contention that the Grant Officer may solely rely on incumbency status as grounds to select a grantee is inappropriate. In that case, the ALJ held that the Grant Officer’s decision

should not be overturned solely because he “did not personally review the grant applications but instead relied on the determinations of a panel.”⁷ *UAI*, *supra*. In this case, the Grant Officer testified, and the Government and ROI both concede, that he did not rely on the panelists’ findings, but that he disregarded the panel’s comments and scoresheets when it returned non-qualifying scores for ROI and REA. In Section V, when describing the panel’s scoring criteria, the SGA delineates several areas of inquiry which provide reasonable, objective bases on which to analyze the proposals vis-à-vis the “needs of eligible migrants and seasonal farmworkers in the area to be served.” Although the panel generated an in-depth analysis of the strengths and weaknesses of each applicant under the enumerated criteria, the Grant Officer disregarded its substantive conclusions. Failure to consider the panelists’ scores does not necessarily invalidate the Grant Officer’s selection, but neither do the two non-qualifying scores allow him unfettered discretion in his choice. His decision must still have a reasonable basis in the record, which is neither arbitrary nor capricious, and is in accordance with the law. The Grant Officer’s stated basis in this case is “continuity of service” and ROI’s performance as the “incumbent” grantee, notwithstanding that ROI’s incumbency was not in accordance with law because the appointment had been explicitly invalidated by Judge Stansell-Gamm as not rational or in accordance with law.

In *Lifelines*, Judge Chapman considered a set of facts different from those at bar. Although Judge Chapman held that incumbency status and attendant performance is a sufficient basis on which to affirm a grant officer’s decision, that case was distinct from this one in that, in *Lifelines*, the incumbent grantee was operating pursuant to a valid, legal grant. Here, the entirety of ROI’s incumbency operating the NFJP in Puerto Rico, and all the attendant performance data considered by the Grant Officer, was premised on a grant award that had been legally invalidated.

The Grant Officer did not read either ROI’s or REA’s application. Although the court in *UAI* held that a Grant Officer is not required to read the applicant’s submissions, the Grant Officer’s assessment of the information contained therein could have potentially formed a reasonable basis for affirming the selection. Alternatively, the Grant Officer could have relied on the panelists’ comments, the scores, or revisited the SGA’s enumerated scoring criteria as a reasonable basis for making his selection. There could be other relevant information of record upon which he could have reasonably relied. Instead, he based his decision solely and explicitly on ROI’s administration of the NFJP grant when its designation was invalid and its status illegal:

- Q. Now did you ever consider in your decision that, while they’re the current grantee, I can’t give them a preference because I would be disrespecting the order of the Court that vacated their selection?
- A. When I used the – when you used the word preference and I answered the question, I think it’s just common sense that, if an organization is providing services, and it’s important for the grant office to continue to provide those services, the one that’s providing the services would be preferred because there would be no disruption. That’s what I used in my explanation of preference.

⁷ There is also no indication that both applicants in *UAI* received non-qualifying scores.

Q. So, in effect, the Court's order vacating that selection had no impact.

A. No.

(Tr. 209). Although the Grant Officer stated that he considered ROI's performance data, all the performance he considered took place pursuant to an invalidated grant.⁸ (Tr. 304). The incumbency and performance data on which he relied was wholly undertaken pursuant to a selection that had previously been adjudged to be irrational, arbitrary, and not in accordance with the law. The Department of Labor may not ignore with impunity a judicial ruling vacating its selection, retain the selected grantee as the NFJP administrator, and then point to incumbency under the vacated, invalid ruling as a reasonable basis for re-selecting the party. Such conduct is arbitrary, capricious, in conflict with judicial orders, and it does not form a reasonable basis on which to select a grantee under the WIA. This tribunal so holds.

Complainant has asserted that the Grant Officer's conduct of the responsibility review also demonstrates grounds for removal. (*See Complainant's Post-Hearing Brief* at 10-19). The record establishes that the Grant Officer's responsibility review – while perhaps not ideal – is not alone so unreasonable as to merit reversal. The regulations require that the responsibility review be conducted “independent of the competitive process,” but they do not mandate who must conduct the review. 20 C.F.R. § 667.170(b). This tribunal has been shown nothing in the SGA or regulations that precludes the Grant Officer from conducting the responsibility review. The responsibility review in effect provides a veto, whereby an entity must be disqualified if it fails certain financial requirements. The fact that the Grant Officer received information from outside offices does not taint the process under the explicit provision of the SGA. Consultation with the Program Office is expressly permitted, and the response the Grant Officer received indicates that the information was based on records in the Department's possession.

Although the responsibility review process was not so unreasonable as to merit reversal of his selection, the information the Grant Officer received is of questionable value and could not reasonably form the basis for his decision. Ms. Walker, the Program Office representative, asserted that REA failed “a number of the items” listed as regulatory criteria, and that it was frequently determined to be “at risk.” (DOL 2). She did not, however, state which criteria REA failed, and the “at risk” comparison she made between REA and ROI is vague, save reference to “red,” “yellow,” and “green,” ratings, all of which were unexplained. The information she provided in response to the Grant Officer's general inquiry for the competitive process appears to relate solely to the limited experience of ROI in Puerto Rico, while acting pursuant to an invalid selection.

REA has requested that this tribunal find that it should have been selected as the NFJP award grantee. The regulations allow an administrative law judge to direct the Department to select a particular grantee, but such action is inappropriate in this case. 20 C.F.R. § 667.825(b). There is no authority that has been suggested to this tribunal that would require appointment of REA to administer the NFJP grant. The fact of prior incumbency of REA is not compelling as a matter of law and fact, and there is an insufficient affirmative record to compel or justify the

⁸ Judge Stansell-Gamm declined to issue an order immediately removing ROI from its position. This was based on a lack of authority to do so; it does not constitute a reinstatement of ROI as the grantee.

appointment of REA in this case before the tribunal. Based on the record, the Grant Officer's decision should be vacated. There is insufficient evidence, however, to establish that REA should have been or should be designated the grantee.

REA's request for sanctions against Respondent and counsel are without merit. The record is devoid of any evidence that Respondent deliberately engaged in bad faith conduct or acted dishonestly, although REA has challenged the accuracy of some of its and Intervenor's representations. Accordingly, REA's request for sanctions against Respondent and counsel is denied.

Although the panel process and responsibility review process were conducted properly, the Grant Officer's decision to select ROI as the grant recipient does not have a reasonable basis in the record. This tribunal cannot reasonably affirm a selection explicitly based on the invalid incumbency of a WIA applicant. To do so would condone and possibly incentivize a manifestly inappropriate procedure. The Grant Officer's stated basis for selecting ROI – "continuity of service" – is, under these facts, arbitrary, capricious, and not in accordance with the law. It is not a reasonable record basis on which to affirm the Grant Officer's decision to select ROI, but it does not establish that non-selection of REA was unreasonable, arbitrary, or not in accordance with the law. Wherefore,

ORDER

The Grant Officer's award of the NFJP grant for the 2007-2008 program year under WIA is vacated.

Complainant REA's request to be selected as the NFJP grantee for the 2007-2008 program year is denied.

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Edward Terhune Miller
Administrative Law Judge

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, Suite S-5220, 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).