



FILED AS PART
OF THE RECORD
12 MAR 1985
(Date)
R. SOBERNHEIM (JB)
Chairman

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Appeal of :
:
PORTLAND PUBLIC SCHOOLS, :
Appellant :
:
under Contract No. 41-06-J01-0100 :
.....

Case No. 84-BCA-25

Don Jeffery
Portland Public Schools
Portland, OR
for Appellant

William W. Kates
Office of the Associate Regional Solicitor
U.S. Department of Labor
Seattle, WA
for Respondent

DECISION OF THE BOARD

This is an appeal from the final decision of the contracting officer of the United States Department of Labor (hereinafter referred to as the "Department") which disallowed certain costs claimed by appellant as performance costs under the contract.

A hearing was held on 14 December 1984 at which both parties presented testimonial evidence. After the hearing both parties filed briefs.

FINDINGS OF FACT

1. The Contract

Cost reimbursement type Contract No. 41-06-J01-010 was awarded by respondent to appellant on 17 June 1975. Under the contract appellant agreed to operate a job corps center from 1 July 1975 to 30 June 1976 and was to receive reimbursement of its expenses up to a maximum of \$1,735,325. Over time, the total available for payment was increased to \$9,730,066 (Mod. No.

22, AF, p. 104) and performance time to 31 December 1979 (Mod. No. 21, AF, p. 106). The contract contained the General Provisions for Cost-Reimbursement Type Contracts of April 1974 (AF, pp. 102-103). Among the detailed provisions in the contract Schedule Section X stated:

The contractor agrees that, regarding individuals hired under the terms of this contract, personnel related by marriage or blood will not normally be employed at the Portland Job Corps Center. In no case will such personnel be employed when either one occupies an executive or supervisory position at the Center. In cases where executive or supervisory positions are not involved, such personnel may be employed only when the Center Director and the Contractor so recommend, and with the specific concurrence of the GAR and authorization of the Contracting Officer. (AF, p. 100)

By Modification No. 4, dated 17 June 1976, this provision was deleted and the following provision was substituted:

The contractor agrees to conform to all Federal, State and local laws including those pertaining to nepotism in hiring.
(AF, p. 177-179)

2. Appellant's Performance, the Dispute and the Contracting Officer's Final Decision

The record does not reflect that the educational quality of appellant's work was in issue. The Department has, however, among other questioned actions, alleged two instances of nepotism in hiring. One purportedly occurred when appellant on 10 May 1979 employed a residential advisor whose wife was employed as a Senior Clerk "B" in the Business Unit (T70). The other occurred when appellant on 23 October 1978 employed an educational staff member in its extension program whose father-in-law was the "Department Chairman" of the Recruiter/Screening Unit, employed to work in a separate unit under a separate contract (T50; 57). The contractor was well aware of the nepotism prohibition contained in the contract (T76-78). Application forms were required to be filled out by prospective employees which requested the information needed to determine whether the anti-nepotism clause would be violated should the applicant be hired (Exhibit A).

It is not contested that in each case the employee already on the job and the newly-hired employee were relatives within the proscribed familial relationships. What is in dispute is whether the persons employed occupied administrative positions at the time when their respective relatives were hired.

The center director testified that the wife did not have administrative or supervisory duties at the time when her husband was hired (T56; 57; see Ex. B). He further testified that her duties were primarily clerical (T56-57), that she supervised no one (T70) and that she "was at the bottom of the ladder" (ibid.).

The center director also testified that the so-called "Department Chairman" neither supervised nor evaluated any of the contractor's employees (T50-51, 54-55; see also Ex. C). The

center director explained that the "Department Chairman" did not have administrative duties in the sense of exercising his independent judgment (T54, 57, 58), was not held responsible for errors (T68) and was not viewed by the employees as a senior employee with whom they had to consult prior to making a decision (*ibid.*). It was a somewhat unusual practice of appellant to use this highsounding title for a position without corresponding substance.

Appellant's contract was audited by a private firm of certified public accountants under contract with the Department in the middle of 1983 (AF Tab A). The auditing firm recommended that of the total cost paid appellant under the contract the sum of \$330,948 be disallowed, including the amount of \$20,674 which involved payment to two employees in alleged violation of the anti-nepotism rule (AF Tab B).

On 23 March 1984 the contracting officer issued his final decision and disallowed \$173,097 in expenditures (*ibid.*). After a further review of the evidence, on 8 June 1984 he reduced the amount of disallowed costs to \$20,674 (*ibid.*). The amount remaining disallowed was based on the two cases of nepotism discussed above. The sum of \$6,755 was associated with the employment of the residential advisor and \$13,919 was associated with the employment of the educational staff member.

3. Pertinent Statutes and Regulations

As previously stated, the contract, as modified, required the contractor to comply with all laws pertaining to nepotism in hiring (AF, p. 179). The parties stipulated that no local or Portland School laws or regulations were violated by the contractor (T7).

a. Oregon Law

The Oregon Revised Statutes, chapter 771, provides in pertinent part:

SECTION 1. (1) Except as provided in subsection (2) of this section, it is an unlawful employment practice for an employer to refuse to hire or to terminate the employment of an individual solely because another member of that individual's family presently works for that employer.

(2) An employer is not required to hire or to continue the employment of an individual if such action:

(a) Would constitute a violation of any law of this state or of the United States, or any rule promulgated pursuant thereto, with which the employer is required to comply.

ORS 659.131.

b. Federal Law

Section 3110 of Title 5, United States Code, restricts the employment of relatives of a public official in the official's own agency or in any agency over which the official exercises

jurisdiction or control. The restriction applies throughout the Federal Government and to positions financed by the Federal Government.

The Office of Personnel Management issued a letter on 1 September 1981 clarifying the parameters of Section 3110. The letter defined a public official as anyone legally authorized to appoint or promote within a government organization. By way of example, the letter continued that:

...any supervisor, regardless of grade level, who has authority to appoint or promote, or to recommend the appointment or promotion of employees under his or her supervision, is a public official. Similarly, a personnel or placement officer who has authority to appoint or promote or to recommend the appointment or promotion of employees is a public official. However, making a determination that a person is eligible for appointment under applicable laws, regulations, or standards does not by itself constitute a recommendation.
(FPM 310-3, Subchapter 1)

The Fair Labor Standards Act of 1938, as amended, (FLSA) (29 USC 201 et seq.) characterizes an administrator as one empowered to:

appoint such employees as he deems necessary . . . establish and utilize such regional, local or other agencies, and utilize such voluntary and uncompensated services as may from time to time be needed.
29 USC 204(b).

The National Labor Relations Act, as amended, (NLRA) (29 USC 141 et seq.) defines a "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.
(29 USC 152)

(c) The CETA Regulations

The CETA regulations in effect in 1978 and 1979 provided in section 98.22 of subpart A (now 20 CFR 676.66) as follows:

No grantee, subgrantee, contractor, or employing agency may hire a person in an administrative capacity, staff position or public service employment position funded under [CETA] if a member of his or her immediate family is engaged in an administrative capacity for the same grantee or its subgrantees, contractors, or employing agencies.

29 CFR 98.22 (a).

The term "person in an administrative capacity" is defined as:

persons who have overall administrative responsibility for a program including all elected and appointed officials who have any responsibility for the obtaining of and/or approval of any grant funded under the Act—other officials who have any influence or control over the administration of the program, such as the project director, deputy director and unit chiefs; and persons who have selection, hiring, placement or supervisory responsibilities for public service employment practices.

29 CFR 98.22 (b)(3).

The term "member of the immediate family includes inter alia wife and daughter-in-law (29 CFR 98.22 (b)(1)).

CONCLUSIONS OF LAW

I

The parties have stipulated that there are no Portland local laws which address nepotism (T7). However, Oregon Law prohibits discrimination in hiring based on family relationships (ORS 659.13). Nonetheless, in the application of this provision Oregon Law defers to applicable federal law and its implementing regulations (ibid.).

II

Federal personnel legislation (5 USC 3110) prohibits the hiring of relatives of a public official in the official's own agency or in an agency under the official's control.

The Office of Personnel Management has defined a public official as a person who can appoint, or at a minimum, exert influence on the appointment of, a person for a position (see OPM Ltr, supra, p. 4). This general rule is applicable to positions funded by the Government. The CETA Job Corps Program under which appellant contracted was funded by the Federal Government. Therefore, the statute applies to this case. It is thus necessary to determine whether the wife and the father-in-law occupied positions as "public officials" within the scope of the statute at the time when their respective relatives were employed.

Under the statute, the term "public official" includes supervisors and personnel or placement officers. No case law has been adduced nor have we found decisions which interpret the meaning of the relevant terms. However, the language of the Fair Labor Standards and National Labor Relations Acts is instructive. It establishes that an administrator or supervisor is one who possesses authority and discretion in the appointment and supervision of employees.

In NLRB v. Rain-Ware, Inc., 732 F.2d 1349 (7th Cir., 1984) the court held that supervisory, disciplinary or hiring and firing responsibilities are critical in meeting the statutory definition of supervisor (id., at p. 1358). Before a person can be designated a supervisor under the NLRA, he or she must have authority to assign work or work locations, exercise expertise and independent judgment on which other employees rely, or be effectively able to recommend disciplinary action. NLRB v. St. Mary's Home, Inc., t/a St. Mary's Infant Home, 690 F.2d 1062 (4th Cir., 1982). The foregoing activity is to be distinguished from mere routine or clerical duties (ibid.).

It is clear that, before a person can be considered a supervisor under the NLRA, he or she must have authority over employees to an extent which will affect the employees' working conditions. Similarly under the Federal personnel statute (5 USC 3110) a public official must be a person who has the authority to assign work or work locations, recommend disciplinary action and affect employees' working conditions.

In the instant case the duties of the wife (whose husband was hired as residential advisor) fell wholly short of any authority or power to influence or control the work of the employees in the unit to which she was assigned. The testimony presented at the hearing and the documents in the file make it readily apparent that the wife's duties were merely clerical and routine (T56-57; see Ex. B). Although her job description stated that a person in her position would, among other things, supervise a small section of clerical employees, the testimony establishes that in fact she did not supervise any employees. She was not clothed with responsibilities described in the statute which would characterize her as a public official thereunder. Therefore, section 3110 was not violated when appellant hired her husband as a residential advisor.

A more narrow distinction is drawn between supervisory duties and purely ministerial duties with respect to the father-in-law whose daughter-in-law was hired as a member of the educational staff. Although the father-in-law's job title was "Department Supervisor" case law is clear that "job titles are meaningless; it is the authority vested in the employee, be it expressly or by implication, that is the controlling factor." Mid-Continent Refrigerated Service Company, 228 NLRB 917, 920 (1977).

The testimony at the hearing was that the father-in-law was not looked upon by the other employees of appellant as the person to whom to turn, should advice be needed (T68). The only people over whom the father-in-law had supervisory responsibilities were job corps participants who were students (Appt Ex. C). The evidence indicates that he was not a person who exercised independent judgment, but was at most a mere conduit for job instructions, having only routine, ministerial duties (T54, 68). His budget responsibilities (T57) were not the kind of powers which under 5 USC 3110 would be classified as those of a public official. Therefore, the father-in-law was not employed as a "public official" as defined by 5 USC 3110. Hence, appellant did not violate the statute when it hired his daughter-in-law for the educational staff.

III

The CETA regulations at 29 CFR Part 98 are applicable only to CETA grants. Subpart A specifically states that it governs "grant administration". Hence, it has no application to this case.

Government contracts are governed by Title 41 of the Code of Federal Regulations. There is no provision in Title 41 which addresses nepotism.

Nevertheless, we shall discuss the CETA grant regulation which prohibits nepotism (29 CFR 98.22; 20 CFR 676.66) since the parties have litigated this case as though the regulation is applicable. However, even if the regulation were applicable, it would not have been violated by the employments previously discussed.

The cited CETA regulation prohibits the hiring in an administrative capacity or staff or public service position by an employing agency of a member of the immediate family of a person who him – or herself is engaged in an administrative capacity in the same agency.

The CETA regulations define a "person in an administrative capacity" as a person who has the ability to "influence or control" the administration of the program, or has placement or supervisory powers (29 CFR 98.22(b)(3)).

It is apparent from the prior discussion of the scope of the position of appellant's employees whose close relatives were later hired that the former were not employed in an administrative capacity. As previously explained, neither the wife nor the father-in-law possessed broad administrative or supervisory powers. Thus, even if the CETA grant regulation was applicable to the contracts under which this appeal arose the CETA regulation would not have been violated.

IV

On the Findings of Fact, the Conclusions of Law, and the whole record the appeal is allowed.

Dated: Washington, DC
12 March 1985

RUDOLF SOBERNHEIM
Administrative Law Judge
Chairman, U.S. Department of Labor
Board of Contract Appeals

I concur:

SAMUEL B. GRONER
Administrative Law Judge
Member, U.S. Department of Labor
Board of Contract Appeals

I concur:

GLENN ROBERT LAWRENCE

Administrative Law Judge
Member, U.S. Department of Labor
Board of Contract Appeals