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In the Matter of :
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KENTUCKY DEPARTMENT OF :
HUMAN RESOURCES, :
 :
Appellant :
 :
.....

Case No. 79-WPA-1

APPEARANCES:

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For the U.S. Department
of Labor, Appellee

BEFORE: ROBERT L. RAMSEY
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This proceeding arises under the Wagner-Peyser Act, 29 U.S.C. §49 (1973) (hereinafter "WPA") and Title III of the Social Security Act, 42 U.S.C. §§501 et seq. (1974) (hereinafter "SSA"). The Wagner-Peyser Act, which established a national system of public employment offices, provides in pertinent part that the Department of Labor (hereinafter "Department") shall "assist in coordinating the public employment offices throughout the country and in increasing their usefulness by developing and prescribing minimum standards of efficiency, assisting them in meeting problems peculiar to their localities, promoting uniformity in their administrative and statistical procedure...." 29 U.S.C. §49b. Title III of SSA provides in pertinent part that the Secretary of Labor shall not certify payment of federal

funds to a state unless state law establishes "methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods...." 42 U.S.C. §503(a).

The Kentucky Department of Human Resources (hereinafter "KDHR") appeals from the Department's decision to disallow costs from September 1, 1971 to February 9, 1979 for certain personnel positions funded totally or partially by the Department. The Department disallowed the costs on the basis of a determination by the United States Civil Service Commission (hereinafter "CSC") 1/ that Kentucky's exemption of these positions from its merit system plan violated the federal "Standards For A Merit System Of Personnel Administration" set forth at 45 C.F.R. Part 70 (1978). 2/

1/ Under the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1188, the CSC was reorganized and renamed the Office of Personnel Management (hereinafter "OPM"); by Executive Order many of the functions of CSC were transferred to OPM on January 1, 1979.

2/ The Department's authority to prescribe and administer merit-based personnel standards under various grant statutes was transferred to the CSC by the Intergovernmental Personnel Act of 1970, 42 U.S.C. §4728 (1977). From March, 1971 until February 9, 1979, the merit regulations that apply in this case were those set forth at 45 C.F.R. Part 70, as published in 36 Fed. Reg. 4498 (March 6, 1971). Under the new, more flexible merit standards codified at 5 C.F.R. Part 900 and published on February 9, 1979, OPM determined that the previously non-exempt positions in KDHR can now be properly exempted, and thus the Department is not disallowing costs subsequent to the effective date of the new regulations (Government's Exhibit (hereinafter "G") 2; Department's Prehearing Brief). Although the Department states that this date is February 9, 1979, it also states that these positions were improperly exempted by Kentucky through February 16, 1979, the effective date of the revised regulations, and it will disallow costs for this period (See Prehearing Brief, p. 5, and Reply Brief, p. 16, n. 9). Nowhere does the Department clarify this discrepancy, but an examination of Fed. Reg. 10242 (February 16, 1979) reveals that the regulations were originally published February 9, republished on February 16, and became effective on February 9, 1979. Thus the Department appears to want to disallow costs only up to February 9, 1979.

The portion of the merit standards on which CSC based its determination provided as follows:

The following positions may be exempted from application of these standards: ...the executive head and a deputy or deputies to the executive head of each State agency as warranted by the size and complexity of the organization, scope of programs, and nature of the positions; one confidential assistant or secretary to any of the foregoing exempted officials;....

45 C.F.R. §70.2.

The CSC's official interpretation of this provision was that the title of a position was not important. Instead, whether a position was a deputy to the executive head of a state agency within the meaning of the regulations depended on whether the position was appointed by and directly responsible to the head of the agency, the position had authority to determine major policy in basic agency programs, the position was not primarily concerned with direction of line operations, and continuity of administration would not be importantly affected (G 1, Tab 44).

It is the position of KDHR on this appeal that: (1) the Department has the burden of proof but failed to establish a prima facie case that its decision to disallow costs was proper; (2) the positions met the merit standards; (3) the United States Department for Health, Education, and Welfare (hereinafter "HEW") independently decided to allow costs of certain positions that were jointly funded by "HEW" and the Department and that are now at issue in this case; (4) the positions disputed here are analogous to two positions in the Kentucky Department of Labor (hereinafter "KDOL") for which the Department allowed costs; and (5) KDHR was not properly notified of the final decisions of CSC and the Department.

It is the position of the Department that: (1) KDHR has the burden of proof; (2) the CSC was the sole agency authorized to determine the application of the merit standards, and its decision not to exempt the disputed positions from merit system coverage is binding and cannot be challenged in this proceeding; (3) even if the CSC's decision is reviewable here, it was correct, appropriate, and not an abuse of discretion; and (4) the Department has the authority to disallow costs and its decision to do so was proper.

Pursuant to notice, hearings were held before the undersigned Administrative Law Judge on May 28, 1980, April 2, 1981, and April 3, 1981 in Washington, D.C. At the hearings, the parties appeared by their respective counsel, each party was given the opportunity to make an opening and closing statement, witnesses were called and testified under oath, and exhibits were offered and admitted into evidence. The parties were given the opportunity to submit post-hearing briefs and reply briefs which were to be postmarked June 2, and June 19, 1981, respectively. On oral motion of counsel for the Government, the deadline for briefs and reply briefs was extended to June 16 and June 30, 1981, respectively. The Government then filed its brief on June 19, 1981, accompanied by a motion to file the brief out of time. By order dated July 2, 1981, the motion was denied. It was further ordered that the Government's reply brief was to be postmarked no later than July 17, 1981. All subsequent briefs were timely filed.

After the Government had rested at the hearing on April 2, 1981, KDHR moved that the Department's charges be dismissed and its appeal be sustained on the grounds that a Department audit report had not been authenticated by testimony at the hearing and no testimony had been presented that showed the positions failed to meet the merit standards. Because the testimony and documentary evidence accepted into evidence at that time both authenticated the audit report and showed CSC's reasons for deciding that the positions did not meet the merit standards, KDHR's motion will be denied.

Issues

The three basic issues presented in this case are:

1. Who has the burden of proof?
2. Does this tribunal have the authority to review CSC's application of the merit standards to the personnel positions at issue here?
3. Was the Department's decision to disallow costs for the disputed positions proper?

For the reasons stated below, I conclude that KDHR bears the burden of proof, I cannot review CSC's determination, and the Department's decision to disallow costs was an abuse of discretion.

Findings of Fact

A. Factual and Procedural History

By Executive Order in 1973, affirmed by statute in 1974, the Governor of Kentucky established the Department of Human Resources and transferred to it the functions of approximately a dozen agencies responsible for the development and operation of social service programs such as health, welfare and employment security (G1, Tabs 12, 17, 94). Employing approximately 11,000 individuals, encompassing the staff of more than one-third of the state government, and comprising about fifty organizational units, DHR became Kentucky's largest single agency (G1, Tabs 32, 94). It was designed to be an umbrella, multi-agency department. The head of KDHR was designated the Secretary. The organizational echelon established beneath the Secretary consisted of various agencies and offices. By 1979 there were seven Offices (Communications and Council Affairs, Policy and Budget, Counsel, Ombudsman, Medical Services, Administrative Services, and Inspector General), 3/ four Bureaus (Social Insurance, Health Services, Social Services, Manpower Services) headed by Commissioners, and one Division (Personnel Management) (G1, Tabs, 17, 39, 94; Kentucky's Prehearing Memo, pp. 4-6). These in turn were subdivided into smaller units. The Bureaus, which are of particular concern in this case, were subdivided into Divisions, Centers, and Sections, headed by Directors, Executive Directors, and Managers, respectively.

By operation of Kentucky statutory law, and by approval of the State Personnel Board of the Department of Personnel, the Secretary, the Commissioners, the Directors, the Executive Directors, the Managers, and the heads of the Offices were exempted from coverage by the merit system because they occupied major policy-making positions. (G1, Tabs 21-23). The Reorganization Executive Orders also stipulated that these positions were to be policy-making in nature (G1, Tab 32). Nevertheless, recognizing that Federal law takes precedence, Kentucky statutory law provided that KDHR would comply with federal rules for receiving federal funds (G1, Tabs 2, 27).

In 1974, Kentucky requested CSC to exempt from merit system coverage these positions plus a number of other confidential positions, for a total of 52 or 53 job slots (G1, Tabs 32, 47, 52). At first, in 1974, CSC exempted only ten positions (G1, Tab 27); then it expanded

3/ In 1977 the Bureau for Administration and Operations was renamed the Office of Administrative Services, and the Office of Inspector General was established; in 1978 the Office of Medical Services was established (Kentucky's Prehearing Memo, p. 4).

the exemptions to 24 (G1, Tab 47). Later in early 1976, CSC exempted three more positions, for a total of 27 exemptions (G1, Tab 78). The 26 non-exempt positions were at the echelon below the Commissioners, viz., the Directors, Executive Directors, and Managers (G1, Tab 107). Not all of the Directors were declared non-exempt; eight Directors were exempted because they administered programs that were not subject to the federal merit standards ("Labor Disputed Positions", Tabs 3 and 4). Sometime in 1976, for an unexplained reason, the total number of positions in question increased from 53 to 56, the number of exempted positions remaining at 27 and the number of non-exempted positions going to 29 (G1, Tabs 114, 127).

CSC refused to exempt these 29 positions because in the view of the CSC, they were not major policy-making positions and CSC felt that exemption would dip too far into line operations, lead to the appointment of poorly qualified partisans and lower productivity and cause poorer service delivery, disrupt continuity, and discourage recruitment and retention. Additionally, CSC noted that the number of proposed exemptions would exceed the norm in federal and other state agencies (G1, Tabs 44, 74, 83, 107).

Kentucky argued that by operation of state law and in practice these were policy-making positions and they were directly responsible and reported to the Secretary. It further argued that the Secretary could not formulate and implement policy in such a complex, umbrella agency unless these positions were subject to the principle of "management accountability" rather than "management tenure". It argued that functionally the Bureaus were equivalent to departments in which the Directors act as deputies to the Commissioners. Kentucky also noted that over 90% of its workers were already under the merit system while the 53 policy-making positions constituted less than one-half of one percent of DHR's staff. Kentucky also argued that diversity of personnel management systems should be encouraged and the rights of states should be recognized (G1, Tabs 32, 73, 94).

From 1974 to 1977, Kentucky mounted a vigorous campaign to get all of the positions exempted. An ever increasing number of federal and state officials were drawn into this contest. They exchanged many letters and held numerous meetings. Even the Governor of Kentucky took up arms, but could not win total victory. Finally, in 1977, the Governor invoked the power of the White House, but even this strategy yielded only partial success (G1, Tab 115).

Shortly thereafter, the Secretary of HEW decided to allow costs of the 56 disputed positions which were funded in whole or in part by HEW (G1, Tab 117). The Secretary of Labor, however, was adamant and refused to follow in the footsteps of his counterpart at HEW (G1, Tab 120). Several months later the Secretary decided to allow costs of the Directors of Compliance and of Training and Education in the Occupational Health and Safety Program of the Kentucky Department of

Labor (G1, Tab 121). These Directors were the subject of a struggle over merit exemption similar to the one over the Directors in KDHR. Also at some point in time, the Department reviewed the 27 non-exempt positions which it funded in whole or in part and decided to allow costs of 15 of these positions (G1, Tab 127; "Labor Disputed Positions", Tab 9).

During this dispute, the Department performed its usual and customary audits of federally funded state programs. The Department issued two audits of KDHR, one in 1975 for the period July 1, 1971 through June 30, 1974 (G1, Tab 69A), the other in 1977 for the period July 1, 1974 through June 30, 1976 (G1, Tab 124). In the first audit, the Department disallowed 17 positions for a total cost disallowance of \$73,832.43. In its Prehearing Brief the Department noted that three of these positions - two Deputy Commissioners and a secretary to one of them - were subsequently exempted, thereby reducing the audit disallowance to \$59,842.20. Of the remaining 14 positions disallowed by the 1975 audit, nine were identified as Managers or Directors and five were identified as secretaries.

In the 1977 audit, only 13 positions were disallowed, one Administrative Liaison position, and twelve Directors. Eight Directors disallowed in 1975 were also disallowed in 1977. The Director for the Center for Comprehensive Social Services System Development in the Bureau for Social Services appears to have been either abolished, or exempted and/or allowed as a cost item inasmuch as it was not disallowed in the 1977 audit. No secretaries to any positions were identified as disallowed in 1977. Thus the number of management positions disallowed in 1977 increased by five over those disallowed in the 1975 audit. In any event, the total cost disallowed for 13 positions by the 1977 audit was \$231,197.71. The 13 disallowed positions were as follows: in the old Bureau for Administration and Operations, (1) the Administrative Liaison and the Directors of the Divisions (2) for Personnel and Training, (3) for Research and Special Services, (4) for Management Systems, and (5) for Resource Management and Services; in the Bureau for Social Insurance, the Director (6) for Program Development and Directors for the Divisions (7) for Income Maintenance and (8) for Unemployment Insurance; in the Bureau for Manpower Services, the Directors (9) for the Comprehensive Manpower Development Office and (10) for the Program Development Office, and Directors for the Divisions (11) for Field Services and (12) for Manpower Training, and (13) the Manager for the Manpower Veterans Employment Section.

After the audit and the White House intervention in 1977, the dispute dragged on until 1979. On January 8, 1979, the Department issued a notice of remedial action. It stated that the positions not exempted by CSC would remain audit disallowances, and it required that these positions be placed under the merit system and be filled

by competitive examination (Gl, Tab 127). ^{4/} On January 30, 1979, KDHR requested a hearing (Gl, Tab 128), and pursuant to 20 C.F.R. §658.707 the case was referred to the Office of Administrative Law Judges.

B. Discussion

1. Burden of Proof

The regulations governing the conduct of a Wagner-Peyser Act proceeding provide that the hearing shall be conducted in accordance with Sections 5-8 of the Administrative Procedure Act, 5 U.S.C. §§553-557 (1975) (hereinafter "APA"). 20 C.F.R. §658.709(a)(1980). Section 7 of the APA provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). Defining and allocating the burden of proof in administrative proceedings has been a perplexing problem and few general rules have evolved. "Instead, where the burden of proof will fall, to a great extent, depends on the agency involved, the nature of the statute, or provision thereof, which the agency seeks to enforce, and the attitude of the courts." 4 Mezines, Stein, Gruff, Administrative Law §24.02 at 24-26 (1981). Also compare Environmental Defense Fund, Inc. v. Environmental Protection Agency, 548 F.2d 998, 1004, 1013-1018 (D.C. Cir. 1976) with Industrial Union Department, AFL-CIO v. American Petroleum Institute, ___ U.S. ___, 100 S. Ct. 2844, 2870, n. 61 (1980).

Whoever is the proponent of an order within the meaning of the APA bears the burden of proof in this proceeding. The APA burden of proof provision applies only to APA adjudications. The only APA adjudication throughout this long battle between Kentucky and the federal government is the one presently before me. This proceeding was initiated by Kentucky when it filed a request for a hearing and

^{4/} The precise number of positions disallowed by the notice appears uncertain because the notice stated both that twelve non-exempted positions and that all positions identified in the 1977 audit, of which there were 13, will remain audit disallowances. Clarifying the discrepancy, counsel for the Department explained at the prehearing conference on March 17, 1980 that the position of Administrative Liaison in the Bureau for Administration and Operations was abolished, leaving only twelve positions for which costs would be disallowed in the future, but that the Department still sought reimbursement for this position as a disallowed cost in the past. The issue of placing the positions under the merit system is moot inasmuch as OPM has exempted them.

appealed the Department's decision to disallow costs (See 20 C.F.R. §658.707; G1, Tab 128). By regulation, the appellant must state why it believes the decision is wrong. I think it is a reasonable interpretation of the APA to conclude that in this procedural posture, Kentucky is the proponent of an APA order.

In essence, Kentucky is asking me to find that it be allowed to receive and retain funds from the federal government. This reasonably comes within the APA definition of "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency...." 5 U.S.C. §551(6). While the Department is also asking for an order in this proceeding, the fact remains that absent an appeal by Kentucky, the Department's audit disallowances would have become effective. To accomplish its goal, Kentucky needs a favorable order from this tribunal, and in these circumstances it is fair to say that Kentucky is the proponent of an order within the meaning of the APA.

The same result is reached if the issue is analyzed from the angle of the substantive statutes and regulations here involved. These basically provide that Kentucky is entitled to federal funds if it meets certain eligibility requirements, one of which is that jobs funded by federal monies must be merit-staffed. Some exceptions are carved out of this blanket merit coverage requirement. To qualify for federal funding, a state must submit a plan, and if it desires to exempt any jobs from merit coverage it must apply for exemptions. To be eligible for federal funds the exemptions must be approved.

This scheme puts Kentucky in the posture of a proponent. It wants federal money, and it must show its entitlement. From the very beginning and throughout this long controversy, Kentucky has been proposing that it is entitled to federal funds. This was its posture when it sought exemption status for the KDHR positions. This was its posture when it sought allowance of costs from the Department, and this continues to be its posture in this proceeding. It is consistent with this posture that the burden of making out a prima facie case and the ultimate burden of persuasion in this proceeding be placed on Kentucky.

2. Exemption

The IPA transferred to CSC all functions, powers, and duties of all federal officers, including the Secretary of Labor, relating to the prescription of personnel standards on a merit basis under grant-in-aid statutes (42 U.S.C. §4728(a)). The IPA also conferred on CSC the duty of advising federal agencies as to the application of

required personnel administration standards and the duty of recommending and coordinating federal agency action in order to carry out the purpose of the IPA. 42 U.S.C. §4728(c). Further, the IPA provides that any systems of personnel administration that a federal agency may require as a condition of participation in assistance programs must be consistent with the personnel standards prescribed by CSC. 42 U.S.C. §4728(b).

The legislative history of the IPA also underscores the concentration of authority over merit standards in CSC. The Senate and House reports on the bill stated that it "transfers to the [CSC] all functions, powers, and duties of any Federal department, agency, office or official (other than the President) that relate to the prescription of personnel standards on a merit basis under any provision of law or regulation that specifically requires the establishment and maintenance of personnel standards on a merit basis for programs financed in whole or in part by Federal grant-in-aid funds." H. Rep. No. 91-1733, 91st Cong. 2d Sess. 13 reprinted in [1970] U.S. Code Cong. and Ad. News 5891. Both Rep. Perkins and Senator Muskie presented the bill in the House and Senate respectively and stated that one of its purposes was to transfer "to the [CSC] responsibility for administration of existing Federal statutory provisions requiring merit personnel administration for State and local employees engaged in certain federally assisted programs." 116 Cong. Rec. 43083 (1970); 115 Cong. Rec. 31544 (1969).

In a Wagner-Peyser Act proceeding, an Administrative Law Judge has the jurisdiction to decide "all issues of fact and related issues of law and to grant or deny appropriate motions...." 20 C.F.R. §658.710(a)(1980). The issue of the validity of CSC's exemption determination is a "related issue of law" and thus would appear to fall within the scope of my jurisdiction. Nevertheless, by the IPA, Congress intended to centralize all federal agency functions, powers, and duties pertaining to the prescription of merit personnel standards in one agency - CSC. I am of the opinion that review of CSC's prescription of merit personnel standards by this administrative tribunal would not be consistent with the intent of Congress. Furthermore, the task of prescribing such standards has been entrusted to a federal agency independent of the Department. My jurisdictional grant is from the Department and must be exercised within the context of remedial action taken by the Department. It would be improper to go beyond the issues posed by the terms of the Department's remedial action itself and enter the territory of a separate agency. I thus conclude that I do not have jurisdiction to consider the merits of CSC's decision. 5/

5/ If I had jurisdiction, it is my opinion that, on the basis of a consideration of CSC's arguments and KDHR's arguments and the entire record, the disputed positions should be exempt from merit coverage.

While CSC's determination is not reviewable, CSC's recommendation of appropriate sanctions for grantee deviations from merit standards is non-binding on the grantor agency and that recommendation is reviewable. See G3; 20 C.F.R. §658.700 et seq. Whether the Department's sanctions in this case were proper is the question to which I now turn.

3. Disallowance

Although the Department has the authority to disallow costs for federally funded positions that a State exempts from merit system coverage without the permission of CSC, I am of the opinion that the Department in this instance abused its discretion and that the costs should be allowed. I arrive at this conclusion not on the grounds that the Department failed to validate or authenticate its audits, or that it presented no evidence that the audit exceptions were necessary for the proper and efficient administration of Kentucky's unemployment compensation law and public employment service, or that Kentucky's unemployment insurance or employment service programs were improperly operated, or that the audit exceptions were premature, or that the Department did not properly notify Kentucky of the audit exceptions, or that CSC did not properly notify Kentucky of its final decision denying the exemptions. All of these grounds that KDHR lays out are without merit.

Rather, the basis for finding an abuse of discretion lies in the Department's decision to allow costs for two positions in KDOL. These two positions are the Director of Compliance and the Director of Education and Training who head divisions within the Occupational Safety and Health Program (hereinafter "OSHP") which in turn is a subdivision of KDOL (G1, Tabs 20, 27, 63).

At first the Department was going to disallow costs for these two positions. The grounds for disallowance were that they did not report directly to the Commissioner of Labor, were not major policy making positions, were primarily concerned with direction of line operations, and directly affected continuity of the program (G1, Tabs 60-63, 96). But after the Governor of Kentucky appealed to the White House (G1, Tab 15) and after HEW allowed costs for the positions in KDHR that it funded, the Secretary of the Department "similarly concluded" that the costs for these two positions should be allowed (G1, Tab 121).

KDHR argued in its brief that the two OSHP directors are at the same policy making level and confidential assistant position as the twelve KDHR directors (Brief, pp. 2-3). The record lends support to its argument. The location of these two positions within KDOL is analogous to those of the twelve disputed positions within KDHR. Furthermore, the four grounds offered to justify non-exemption and

to disallow costs for the two positions duplicate the grounds offered for the twelve positions (G1, cf. Tabs 47, 55, 74, and 83 with 61-63 and 103). The Department failed to come forward with rebuttal evidence or with any principled distinction between the two exempted KDOL and the twelve non-exempted KDHR positions. On this record I can only conclude that the decision not to allow costs for the disputed twelve positions was arbitrary and an abuse of discretion.

Moreover, other factors, while not decisive in themselves, buttress my conclusion. First, the Department stated that it had given due attention to the new merit standards and that OPM had agreed that the disputed positions were not exempt under these standards. But OPM in fact did exempt these positions under the new standards (G1, Tab 127; G2; "Labor Disputed Positions", Tabs 9 and 11). My decision is not inconsistent with the new regulations. Second, allowing costs will introduce consistency between the Department and HEW with respect to federally funded positions in KDHR. Third, Kentucky overall has brought the vast majority of its work force under merit system coverage, thereby achieving substantial conformity to merit standards.

I conclude that the costs disallowed by the Department should be allowed.

Conclusions of Law

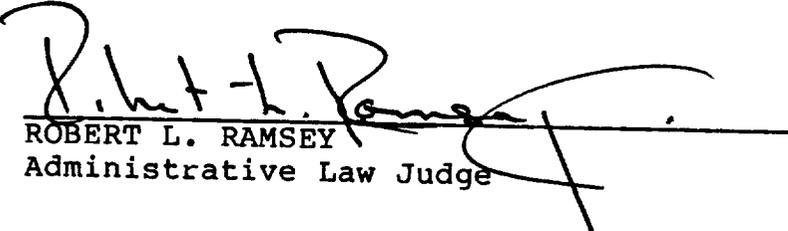
1. Pursuant to the APA and 20 C.F.R. §658.709(a), KDHR has the burden of proof.
2. Review of the merits of CSC's determination that KDHR's personnel positions are non-exempt is not within the jurisdiction of this administrative tribunal.
3. Review of CSC's recommendation of imposition of sanctions on Kentucky for deviations from federal merit standards is reviewable by this administrative tribunal.
4. The decision to disallow costs of the twelve disputed positions was arbitrary and an abuse of discretion.

ORDER

IT IS HEREBY ORDERED that KDHR's motion to dismiss the Department's charges and to sustain its appeal be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that the decision of the Regional Administrator of the U.S. Department of Labor disallowing costs in the above-captioned matter be, and the same hereby is, REVERSED.

IT IS FURTHER ORDERED that the allowance of costs for the twelve positions at issue in the above-captioned matter be, and the same hereby is, GRANTED.


ROBERT L. RAMSEY
Administrative Law Judge

Dated: 29 SEP 1981
Washington, D.C.

RLR:kat

SERVICE SHEET

Case Name: KENTUCKY DEPARTMENT OF HUMAN RESOURCES

Case No.: 79-WPA-1

Title of Document: DECISION AND ORDER

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