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U.S. DEPARTMENT OF LABOR
SECRETARY OF LABOR
WASHINGTON, D.C

DATE: July 13, 1994
CASE NO. 93-JTP-2

IN THE MATTER OF
FLORIDA DEPARTMENT OF LABOR
AND EMPLOYMENT SECURITY,

COMPLAINANT,

v.

U.S. DEPARTMENT OF LABOR
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER

The Grant Officer requested the Secretary to "assert jurisdiction" to review the Administrative Law Judge's (ALJ) order directing the Grant Officer to comply with a request for production of documents served by the Complainant in this case arising under the Job Training Partnership Act (JTPA), 29 U.S.C. 1501-1781 (1988), and simultaneously filed "exceptions" to that order. The Grant Officer had withheld certain portions of the documents requested by Complainant relying on the deliberative process privilege, but the ALJ denied the Grant Officer's claim "in toto." ALJ Order Granting Complainant's Motion to Compel Discovery (ALJ Order), May 19, 1994, slip op. at 1.

Nothing in JTPA, its implementing regulations governing complaints, investigations and hearings, 29 C.F.R. Part 636 (1993), or the Rules of Practice and Procedure for Administrative

Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18, provides for the filing of exceptions to, or review by the Secretary of, interlocutory orders by ALJ's such as the discovery order at issue here. ~~See~~ 20 C.F.R. § 636,10(d). Section 166 of JTPA provides that any recipient of financial assistance upon whom a corrective action or sanction has been imposed, as was the case here, may request a hearing before an administrative law judge whose decision constitutes final action by the Secretary unless a party dissatisfied with the decision has filed exceptions to it within 20 days of its receipt. 29 U.S.C. § 1576. It is clear that the ALJ "decision" subject to review by the Secretary is the decision whether the sanction or corrective action ordered by the Grant Officer was proper. See 29 C.F.R. §§ 636.8-10. An order compelling compliance with a discovery request is interlocutory and such orders generally are not reviewable before issuance of a decision by the ALJ on the Grant Officer's final determination. Cf., Marchese v. City of Easton, Case No. 92-WPC-00005, Sec'y. Order Mar. 10, 1994, slip op. at 3-4 and cases discussed therein; Fowler v. Seay Trucking, Case No. 92-STA-40, Sec'y. Order Oct. 13, 1993, slip op. at 2-3; see also Boushton v. Cotter Corp., 10 F. 3d 746, 748 (10th Cir. 1993) ("District court orders for the production of documents during the course of litigation are not 'final orders' subject to immediate appellate review.")

The Grant Officer urges me to accept jurisdiction because "it will be too late to request review of [the ALJ's Order] once

the documents are disclosed." Grant Officer's Exceptions at 1. But as the court explained in Boushton v. Cotter Corp., where defendants advanced essentially the same argument ,

[t]he practical consequences of the district court's decision ... can be effectively reviewed on direct appeal following a judgment on the merits. If this court determines that privileged documents were wrongly turned over to the plaintiffs and were used to the detriment of defendants at trial, we can **reverse** any adverse judgment and require a new trial, forbidding any use of the improperly disclosed documents. Plaintiffs would also be forbidden to offer at trial any documents, witnesses, or other evidence obtained as a consequence of their access to the privileged documents.

10 F. 3d at 749.

Accordingly, the Grant Officer's request for assertion of jurisdiction of the ALJ Order is DENIED.

SO ORDERED.



Secretary of Labor

Washington, D-C.

CERTIFICATE OF SERVICE

Case Name: Florida Department of Labor and Employment
Security v. United States Department of Labor

Case No. : 93-JTP-2

Document : Order

A copy of the above-referenced document was sent to the following
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