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In the Matter of)
ALLEN GIOIELLI)
_____)

Case No. 79-CETA-148

DECISION AND ORDER
of the
Secretary of Labor

Statement of the Case

This case arises under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. 801 et seq. and Department of Labor implementing regulations, 29 C.F.R. Part 98. 1/ The State of Rhode Island and the Town of Johnston, Rhode Island petitioned the Secretary of Labor for review of the Decision and Order of March 7, 1980 of Administrative Law Judge Roy P. Smith which held that Petitioners had violated CETA and the regulations. The Judge found that petitioners violated the requirements of 29 C.F.R. 98.26 in failing to provide written notice and an opportunity to respond before terminating Allen

1/ The events which gave rise to this case took place in the summer and fall of 1977. We therefore will consider the rights and obligations of the parties in light of the CETA statute and regulations (29 C.F.R. Part 98) then in effect. The statute and regulations were substantially amended in 1978 and 1979, respectively. (P. L. 95-524; 20 C.F.R. Parts 575-679, 44F.R. 19990, April 3, 1979.)

Gioielli, a -participant in a CETA public service employment (PSE) program. Mr. Gioielli was a PSE employee of the Town of Johnston in the summer of 1977 for three weeks when he was terminated for alleged insubordination and "lack of ability to adapt to the job requirements."

After informal hearings at the Town and State level resulting in decisions upholding his termination, Mr. Gioielli appealed to the Employment and Training Administration of the Department of Labor (E.T.A.). ETA investigated the matter and upheld the petitioners' (recipients') decisions. Mr. Gioielli was offered a hearing before an Administrative Law Judge who decided the matter on the pleadings, memorandums and documents submitted by the parties without an evidentiary hearing.

Findings of Fact

Allen Gioielli was employed by the Town of Johnston in a CETA PSE position in the Division of Parks and Recreation of the Department of Public Works on June 27, 1977. He was assigned to work on a maintenance crew supervised by Thomas Maranaccio. Mr. Gioielli and Mr. Maranaccio had a disagreement and argument on July 14, 1977 about Mr. Gioielli's work assignments, some of which he refused to perform. On the same day, Mr. Maranaccio sent a memorandum to his supervisor, Daniel Marzulla, Director of the Division of Parks and Recreation, recommending dismissal

of Mr. Gioielli.^{1/} Mr. Gioielli and Mr. Marzulla met on the 14th to discuss Mr. Gioielli's work situation. On July 25, 1977 Mr. Marzulla notified Albert Capelli, the Federal Funds Coordinator, that Mr. Gioielli had been terminated as of Friday, July 14th. ^{2/}At Mr. Gioielli's request, a hearing was held on his termination before the Town Council of the Town of Johnston on September 12, 1977. The Town Council voted to affirm Mr. Gioielli's dismissal and notified him of that decision in writing on September 13, 1977. Mr. Gioielli appealed that decision to the Rhode Island CETA Division of Job Development and Training which held a hearing on October 19, 1977 and also affirmed his dismissal,

Mr. Gioielli filed a complaint with the Regional Administrator of the Department of Labor Employment and Training Administration on December 6, 1977. When ETA determined on April 5, 1978, after an investigation, that the decision of the State CETA Division of Job Development and Training was correct, Mr. Gioielli appealed and requested a hearing. Apparently, because he found procedural violations on the face of the record, consisting of the administrative file of ETA received in evidence, the Administrative Law Judge (ALJ) determined that a hearing was not necessary. His decision of March 7,

^{1/} Mr. Maranaccio used the phrase "removed from my crew immediately" which was apparently interpreted by all concerned as a recommendation of dismissal.

^{2/} Friday of the second week of July, 1977 was actually the 15th and subsequent references in the record are to July 15, 1977 as Mr. Gioielli's termination date.

1980 held that the Town of Johnston and the Rhode Island CETA Division of Job Development and Training are jointly liable for violation of the requirements of 29 CFR 98.26, that a participant must be given written notice and an opportunity to respond when adverse action is taken against him, and that those protections had not been afforded to Mr. Gioielli here. Judge Smith ordered that Mr. Gioielli be reinstated and paid back pay from the date of his dismissal to the date of his reinstatement.

Discussion and Conclusions

There are three principal **issues** raised in this case, first, what procedural protections must be provided when a CETA recipient (either prime sponsor or subrecipient) takes adverse action against a participant; second, which recipient is responsible for providing those procedures; and third, whether back pay is an appropriate remedy for violation of CETA procedural requirements in this case and, if so, for what period of time.

I. Procedural Requirements of CETA

Department of Labor regulations in effect in 1977 required prime sponsors to establish procedures for resolving disputes between participants and the prime sponsor or any of its **subre-** cipients. When adverse action is taken against a participant,

the individual must be given written notice of the grounds for the adverse action, an opportunity to respond and an opportunity for an informal hearing. 29 C.F.R. 98.26(a). (July 1, 1980 ed.) There is no rigid, talismanic requirement in this regulation which, if not strictly adhered to, deprives the entire process of its validity. If, upon consideration of all the facts, it is clear that the basic elements of the fair procedures required by the regulation have been provided, the particular approach used by a CETA recipient is immaterial. ^{3/}

There is no evidence in the record that before Mr. Gioielli was terminated he was given written notice and an opportunity to respond. The first document received by Mr. Gioielli containing a summary of the grounds for his dismissal was the letter of September 13, 1977 from Council President Thomas L. Ucci notifying him that the Council upheld his termination. This was in clear violation of 29 C.F.R. 98.26. In contrast, in Shepherd v. Houston County Water Department, 79-CETA-195, cited by Rhode Island CETA and the Town of Johnston, the complainant was given written notice one day after he was terminated, so that at most there was a de minimus violation of the regulations. Although there is no requirement in that

^{3/} I would note that this case is being decided under the CETA statute and regulations. I express no opinion, if I had authority to do so, whether a CETA participant has any "property" interest in a CETA position, or "liberty" interest affected by the adverse action procedures, so that constitutional protections of due process apply. The cases have found no liberty or property interest in a CETA job. Hayward v. Henderson, 623 F.2d 595 (9th Cir. 1980); Gooley v. Conway, 590 F.2d 744 (3rd Cir. 1979).

regulation to hold a pre-termination hearing^{4/}-, the concept of providing written "notice" and an opportunity to respond necessarily implies that it be done before taking action.

Malonev v. Sheehan, 453 F. Supp. 1131, 1137 (D. Conn 1978).

Thus, as I view the evidence, Mr. Gioielli's rights under 29 C.F.R. 98.26(a) were violated when he was dismissed without written notice summarizing the grounds for dismissal. This infirmity in the procedures was cured, however, when the Town Council President sent Mr. Gioielli a letter formally notifying him of his discharge and setting forth the reasons. One purpose of any set of fair procedures is to clearly put a person on notice of the action to be taken against him so that he has a reasonable opportunity to prepare a response. That was accomplished by the Council President's letter of September 13, 1977. (On this view of the evidence, the so-called hearing before the Town Council of September 12, as well as the due process violations connected with it found by Judge Smith, are irrelevant.) Mr. Gioielli's termination should be dated at September 15, 1977 because that would have given him an opportunity to respond to the Town Council's letter, as **required** by the regulations.

^{4/} I note that a pre-termination hearing in these circumstances is also not required by the Due Process Clause of the Fifth and Fourteenth Amendments. Arnett v. Kennedy, 418 U.S. 134 (1974); Giles v. U.S., 553 F.2d. 647, 649 (Ct. Cl., 1977.)

The informal hearing required by the regulations was that held before the Rhode Island CETA Job Development and Training **Division on October 19, 1977**. It is important to emphasize that the regulations require only an informal hearing. As long as basic elements of fairness are present such as advance notice, an adequate statement of the basis for the proposed action and an impartial hearing officer, the regulation has been satisfied. See Billington v. Underwood, 613 F2d. 91 (5th Cir. 1980). More elaborate procedures such as use of formal rules of evidence, cross examination and a formal written decision with findings of fact and conclusions of law are not required. id., 613 F2d. 91, 95. See also Robbins v. Railroad Retirement Board, 594 F2d. 448, 451-53 (5th Cir. 1979). The hearing before the State CETA clearly met these requirements. **Moreover**, the record of that hearing (a transcript of a tape recording) does not support a finding that Mr. Gioielli was denied the right to present a witness on his behalf. Mr. Gioielli tried to contact a Mr. Alan Longeroux, who either did not get the message or refused to appear on Mr. **Gioielli's** behalf. (Transcript of 10/19/77 hearing, pp. 8, 34, 46, 47, 51.)

II. Responsibilities of Prime Sponsors and Subrecipients

Rhode Island CETA and the Town of Johnston point accusing fingers at each other, each disclaiming responsibility for compliance with the CETA procedural regulations. Each re-

recipient of financial assistance under CETA is responsible for compliance with CETA regulations. Not surprisingly, a prime sponsor is primarily responsible for assuring that the procedures adopted by its subrecipients comply with the regulations. Prime sponsors are obligated to assure the Secretary that their programs "will be administered by or under the supervision of the prime sponsor." (P.L. 93-203, section 105(a)(1)(B).) Prime sponsors also, of course, are bound by the Secretary's regulations. (Section 105(a)(7).) Those regulations require a prime sponsor to establish procedures for resolving disputes not only between itself and participants in its own programs, but between its subrecipients and their participants. (29 C.F.R. 98.26(a).) Prime sponsors are explicitly obligated by the regulations to require their **subrecipients** to comply with the Act and regulations. (29 C.F.R. 98.27(d).)

Under this scheme, a prime sponsor has the flexibility of operating the dispute resolution machinery itself in all cases, or delegating that responsibility, in whole or in part, to its subrecipients, which was apparently the case here. The subrecipient cannot escape responsibility for compliance with the regulations, particularly where, as here, it decides to fire one of its own employees. Written notice required by the regulations must be given by the subrecipient employer, not by the prime sponsor, which had no knowledge of the facts and circumstances leading to the dismissal. I hold that

the State of Rhode Island and the Town of Johnston are jointly liable for the violation of 29 C.F.R. 98.26(a) found in (I) above.

III. Rack Pay

The authority of the Secretary of Labor to order the payment of back pay derives from the purposes of CETA and the Secretary's responsibility for carrying out the provisions of the statute. **CETA's** purpose, among other things, is "to provide . . . employment opportunities for economically disadvantaged, unemployed and underemployed persons . . ." (P.L. 93-203, section 2.) The Secretary issued regulations pursuant to his general rulemaking authority (P.L. 93-203, section 602(a), as amended and renumbered section 702(a) by P.L. 93-567) toward that end (29 C.F.R. Part 98) which, among other things, required the use of fair procedures in adverse actions against CETA participants. That regulation was intended to assure that individuals for whom CETA funds were granted to provide employment were not terminated or adversely treated in that employment arbitrarily and capriciously, which would undermine the purpose of the Act.

Where a participant has been deprived of employment in violation of a specific provision of the Act or regulations, the purposes of the Act are served by ordering a remedy which, to the extent

possible, puts him in the position he would have been in but for the violation. Payment of wages lost, or back pay, is one element of such a remedy.

In similar situations, courts and administrative agencies have awarded back pay for violations of procedural requirements, without regard to the validity of the underlying case. For example, when a union refused to process an employee's grievance seeking higher pay because the employee had previously gone to work for a non-union employer, the Fifth Circuit held the union had breached its duty of fair representation. Abilene Sheet Metal, Inc. v. NLRB, 619 F.2d 332 (5th Cir. 1980).

The union was held liable in damages equal to the amount the employee would have earned if he had gotten the pay raise, less current earnings. He was entitled to a presumption that, if the grievance had been processed, his claims would have been successful. See also Teamster Local 559, 1979-80 CCH MLRB 16,151 at p. 29,482. Similarly, in Electrical Workers (IUE) Local 485, 1970 CCH NLRB 22,095, the National Labor Relations Board held that a union breached its duty of fair representation under section 8(b)(1)(A) of the National Labor Relations Act by failing to process an employee's grievance that he had been discharged without following the procedural steps in the collective bargaining agreement. Back pay was awarded, to run from the date the employee requested union processing of his grievance until the time the union fulfills that obligation. 1970 CCHNLRB 22,095 at p. 23,444.

Back wages here are appropriate because, if the regulations had been adhered to, Mr. Gioielli would have remained on the Parks and Recreation Division payroll until he received his written notice of termination and had an opportunity to respond. As discussed above; the denial of Mr. Gioielli's procedural rights ceased at that point and payment of back wages for that reason beyond September 15, 1977 would not be appropriate.

A. Exceptions of Town of Johnston

1. That the decision of the ALJ is unsupported by and against the weight of the evidence:

The entire record, including all pleadings and briefs filed by the parties has been reviewed, and I hold that the findings of fact and conclusions of the ALJ, except as modified in (I) and (III) above, are supported by the record.

- 2 & 3. That-the ALJ should have held that the Town of Johnston fulfilled all its responsibilities under CETA with respect to hearings for Mr. Gioielli and complaint and grievance procedures:

I hold that the Town of Johnston violated the CETA procedural requirements, for the reasons set forth in (I) above.

4. That the ALJ should have held that the prime sponsor, not the subgrantee, is responsible for providing procedural protections to participants:

I hold that the prime sponsor and subgrantee are jointly responsible for compliance with the CETA procedural requirements, for the reasons set forth in (II) above.

5. That the ALJ should have held that only a prime sponsor is required to give written notice of adverse action against a participant:

I hold that the Town of Johnston was required by the CETA regulations to give written notice of adverse action to its participants in these circumstances, for the reasons set forth in (II) above.

6. That the ALJ should not have awarded back pay to Mr. Gioielli because the Town of Johnston is not liable, the Department of Labor has no authority to order back pay, and the award is excessive:

I hold that the Town of Johnston is liable (see II. above) and back pay may be ordered by the Department of Labor under CETA (for the reasons set forth in (III) above). This exception is sustained to the extent that the ALJ ordered back pay beyond the date the violation was cured. (See (III) above.)

B. Exceptions of State of Rhode Island

1. That the decision of the ALJ is unsupported by and against the weight of the evidence:

The entire record, including all pleadings and briefs filed by the parties has been reviewed, and I hold that the findings of fact and conclusions of the ALJ, except as modified in (I) and (III) above, are supported by the record.

2 & 3. That the ALJ should have held that the State of Rhode Island fulfilled all its responsibilities under CETA with respect to hearings for Mr. Gioielli and complaint and grievance procedures:

I hold that the State of Rhode Island violated the CETA regulations, for the reasons set forth in (I) above.

4 . That the ALJ should have held that the subrecipient, not the prime sponsor, is responsible for providing procedural protections to participants:

I hold that the prime sponsor and subgrantee **are jointly** responsible for compliance with the CETA procedural requirements, for the reasons set forth in (II) above.

5. That the ALJ should have held that only the **subre-** cipient is required to give written notice of adverse action against a participant:

I hold that the Town of Johnston was required by the CETA regulations to give written notice of adverse action to its participants in these circumstances and the prime sponsor State of Rhode Island was required to assure that its subrecipients followed those procedures, for the reasons set forth in (II) above.

6. That the ALJ should not have awarded back pay to Mr. Gioielli because the **State** of Rhode Island is not liable, the Department of Labor has no authority to order back pay, and the award is excessive:

I hold that the State of Rhode Island is liable (see II above) and back pay may be ordered by the Department of Labor under CETA (for the reasons set forth in (III) above). This exception is sustained to the extent that the ALJ ordered back pay beyond the date the violation was cured. (See (III) above.)

C. Exceptions of the Regional Administrator

1. That the ALJ erred in granting back pay for a period greater than the life of the program:

Sustained. (See III above.)

2. That back pay for a procedural violation should be limited to the time at which it was cured:

Sustained. **(See (I) above.)**

3. That upon remand, no back pay including back pay for the procedural violation, should be awarded if the ALJ finds Mr. Gioielli was terminated for just cause:

Denied. Back pay is due for the procedural violation as explained in (III) above-, and it is not dependent on whether Mr. Gioielli was terminated for just cause. Carey v. Piphus, 435 U.S. 247 (1978), cited by the Regional Administrator, does not hold that damages may not be awarded for procedural violations when the underlying basis for adverse action is upheld. It holds only that a plaintiff must prove actual damages caused by the procedural violation. Those damages are clear in this case.

This case, therefore, must be remanded to the ALJ for a determination of the amount of back pay due under the decision and for a hearing and decision under 20 C.F.R. 676.89 and 90 (the

currently applicable hearing rules). ^{5/} The purpose of the hearing will be limited to determining whether the reasons given for dismissing Mr. Gioielli have been the basis of dismissal of other employees by the Town of Johnston. If they have, Mr. Gioielli would have been assured of "working conditions ... neither more nor less favorable **than**" those enjoyed by other employees. (Section 208(a)(4), P.L. 93-203.) In that event, it is not the function of the ALJ to inquire into whether that basis for dismissal is reasonable or constitutes just cause. If the ALJ finds that the termination was improper and back pay is appropriate (in addition to back pay awarded under this decision), it should be limited to the period of time Mr. Gioielli could have been employed in the PSE

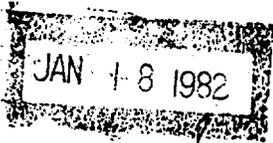
5/ Mr. Gioielli argues that the Secretary has no authority to remand this case for a "re-hearing" because the regulations only permit the Secretary to "modify or vacate" the ALJ's decision. 20 C.F.R. 676.91(f). Absent statutory authority, he argues, an agency may not re-open a final decision. However, my order of remand here is not a re-opening of a final decision nor a direction for a re-hearing. An ALJ's decision does not become the final decision of the agency if the Secretary vacates or modifies it. Upon remand, the ALJ shall hold the evidentiary hearing he found unnecessary because of his prior, and in our opinion overbroad, holding on the procedural issues.

Such a remand order is well within the power of an agency which, under the Administrative Procedure Act "[o]n appeal from or review of the initial decision, ... has all the powers which it would have in making the initial decision" 5 U.S.C. 557-(b). An agency's powers in reviewing **an initial** or recommended decision of a hearing officer are greater than those of an appellate court reviewing the decision of a trial judge. NLRB v. A.P.W. Products, 316 F.2d 899 (2nd Cir. 1963). Appellate courts, of course, have the power to remand cases to the courts from which they came. Almalqamated Workers Union v. Hess Oil V.I. Corp., 478 F.23 540 (3rd Cir. 1373).

position he held in July, 1977. Thus, if necessary, the ALJ should make a finding of fact as to the period of the **subgrant** from Rhode Island CETA to the Town of Johnston. Back pay is not due beyond the time employment with the offending employer would have ended in any event. (See, Peters v. Missouri Pacific RR Co. 3 EPD 8274 (D. Tex. 1971); cf. NLRB v. Kolpin Bros., 379 F.2d. 488 (7th Cir. 1977); Jack C. Robinson, 129 NLRB 1040 (1960). To order any back pay beyond that point would also be a pure windfall to any complainant.

Therefore it is ORDERED,

1. That the State of Rhode **Island** and the Town of Johnston, R.I. pay Allen Gioielli back pay for the period from July 15, 1977 to September 15, 1977, in an amount to be determined by the ALJ with appropriate set-offs if any and legal deductions, such payment to be made from non-CETA funds;
2. That the decision of Judge Roy P. Smith of March 7, 1980, to the extent it is inconsistent with this decision, is vacated and this case is remanded for a hearing and decision on the merits of Allen **Gioielli's** complaint.



Signed Raymond J. Donovan
Secretary of Labor

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