

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY
WASHINGTON

In the Matter of)

BRUCE LEE CAUKIN)

v.)

CITY OF CHULA VISTA)

Case No. 80-CETA-74

FINAL DECISION OF THE SECRETARY OF LABOR

Statement of the Case

This case arises under the Comprehensive Employment and Training Act, 29 U.S.C. §§ 801 et seq. ("CETA" or "Act"), and the pertinent U.S. Department of Labor ("USDOL") regulations issued thereunder, at 29 CFR Part 98 and 20 CFR Part 676 ("Regulations"). 1/

Following a hearing and the issuance of the Administrative Law Judge's ("ALJ's") decision in this matter on January 21, 1981, the complainant, Mr. Caukin, filed an

1/ Both the Act and the Regulations have been amended during the history of this matter. The events giving rise to the case occurred during the period December 12, 1976, through January 3, 1977, the date on which the City of Chula Vista notified Mr. Caukin that he was not eligible to appeal his dismissal to the City's Civil Service Commission. Accordingly, the rights and duties of the parties are considered in the light of the Act and Regulations at 29 CFR Part 98 as in effect at that time. The evidentiary and procedural provisions of 20 CFR Part 676 in effect at the time of the Administrative Law Judge's proceeding will guide our consideration of that aspect of the case.

appeal with the U.S. Court of Appeals for the Ninth Circuit. 2/ The USDOL CETA Grant Officer, believing the ALJ's decision to be contrary to law, moved for a remand of the matter to the Secretary of Labor for reconsideration. 3/ The Court thereupon remanded the matter to the Secretary for a period of six months.

Issues

The issues considered, in this Final Decision are:

1. Whether the ALJ erred in his determination that Section 98.24(b) 4/ of the Regulations "was not intended to cover disciplinary procedures" for CETA public **service-**employment participants (ALJ decision, ["Dec."], at 6); and

2/ Bruce Lee Caukin v. U.S. Department of Labor and City of Chula Vista, California, Docket No. 81-7122.

3/ Thirty days after its issuance, the ALJ's decision became, by operation of law (20 CFR § 676.91(f)), a decision of the Secretary of Labor.

4/ 29 CFR § 98.24(b), as in effect during the time period in question (see n. 1, supra), provides that: "Each participant in an on-the-job training, work experience, or public service employment program shall also be assured of health insurance, unemployment insurance coverage under collective bargaining agreements and other benefits at the same levels and to the same extent as other employees similarly employed, and to working conditions and promotional opportunities neither more nor less favorable than such other employees similarly employed (secs. 208(a) (4), 703(5) and 703(6)). Nothing in this section shall be interpreted to require coverage for health insurance, unemployment insurance and similar benefits for participants, such as work experience participants, where there is no employee of the employer performing the same or similar work in the employment situation. In determining whether the work is the same or similar to that of a person regularly employed, the prime sponsor will take into consideration, but shall not be limited to, employment status, type of work performed, job classification and method of appointment to the position." 41 Fed. Reg. 26380 (June 26, 1976).

2. Whether the ALJ erred in his determination that the City of Chula Vista ("City") did not violate Section 98.24(b) of the Regulations by its refusal to grant Mr. Caukin a municipal Civil Service Commission hearing regarding his job dismissal by the City's Fire Department (Dec., at 7 f.); and,

3. If Mr. Caukin was improperly dismissed, what remedies should be ordered (in substitution for the ALJ's dismissal of Mr. **Caukin's** complaint [Dec., at 8]), and who should be held liable for provision of those remedies.

Findings of Fact and Conclusion of Law

1. At all relevant times, (1) the San Diego Regional Employment and Training Consortium ("**RETC**"), was a prime sponsor within the meaning of the Act and Regulations and received Federal funding to operate programs under the Act; (2) the County of San Diego, California ("County"), was a recipient of Federal funds, through the RETC, to operate programs under the Act; and (3) the City was a recipient of Federal funds, through the County, to operate programs under the Act.

2. Bruce Caukin was hired by the City as a CETA Title II participant on October 13, 1975, to serve in a position designated in a City "Request for Personnel," dated October 10, 1975, as that of "Firefighter (CETA)." The position description for that job was identical to the position description for a City firefighter with permanent, classified civil service status.

3. In order to obtain his CETA job, Mr. Caukin had to pass a City civil service examination. Although he thereby established his eligibility for civil service appointment to the job, his examination score was not high enough, at the time of his selection as a CETA participant, for him to be reached **for a** civil service appointment to the position of firefighter.

4. On or about December 12, 1976. Mr. Caukin received a written communication from the City's Fire Department requesting that he "attend a hearing" at a specified date, time, and place "in regard to evaluating your job performance during the period of November 13, 1975 to December 18, 1976," and advising him that, "[a]s a result of the above evaluation hearing, a decision will be made to retain you in your position or terminate your employment with this department." On or about December 20, 1976, and following the Fire Department hearing, Mr. Caukin received a further communication from that department notifying him of his dismissal and stating that his last day of employment would be January 2, 1977. Mr. Caukin then requested a hearing on the dismissal before the City's Civil Service Commission, but was notified by the City's director of personnel that he was ineligible for such a hearing on the ground that "[o]nly permanent, full-time employees are eligible to appeal a dismissal before the Commission."

5. Mr. Caukin complained about that denial to the prime sponsor, the RETC; and on August 17, 1977, **RETC** investigator Jerome C. Foster issued a report concluding that the City should grant Mr. Caukin a Civil Service Commission hearing regarding his dismissal, in that its failure to do so violated the Regulations at 29 CFR § 98.24(b) by denying him working conditions neither more nor less favorable than other workers similarly employed. On October 12, 1977, at the City's request, an RETC informal hearing was held on the matter, and on October 17, the RETC hearing officer issued a report concurring with the investigator's conclusion that denial of Mr. **Caukin's** request for a Civil Service Commission hearing would violate his rights under 29 CFR § 98.24(b). By letter dated October 18, 1977, the RETC adopted its hearing officer's report as part of the RETC final determination in the matter, and instructed (i) "the Civil Service Commission of the City ... to review the discharge of Bruce L. Caukin under the same terms and conditions that the Civil Service Commission would review the discharge of a non-CETA Fireman employed by the City ... for more than one year," and (ii) "**the City ... Civil Service Commission to initiate review procedures on or before November 20, 1977.**"

6. The City then appealed from the RETC decision to the USDOL CETA Grant Officer. On September 14, 1978, after

investigation of the matter, the Grant Officer 5/ issued a decision upholding the RETC determination and calling upon the City to grant Mr. Caukin a Civil Service Commission review of his job termination, to be initiated by November 10, 1978. The Grant Officer found, in support of that determination, that Mr. **Caukin's** work was similar in several respects referred to in 20 CFR § 98.24 to that of **regular-civil-**service firefighters of the City who were expressly entitled to a Civil Service Commission hearing as a part of the **job-**termination procedure.

7. The City then requested a hearing on the matter before a USDOL Administrative Law Judge. In that proceeding, all four of the parties present -- Mr. Caukin, the City, the RETC, and the Grant Officer -- indicated that the only CETA-participant adverse-action question that concerned them was whether the City had violated the Regulations at 29 CFR § 98.24 by denying Mr. Caukin's request for a City Civil Service Commission hearing on his job termination; and the only remedy sought by Mr. Caukin, the RETC, and the Grant Officer was an order requiring the City to provide Mr. Caukin with a Civil Service Commission hearing. Mr. Caukin subsequently (in pleadings addressed to the Court and the Secretary) raised a further question of entitlement to an award of back pay.

8. The ALJ conducted a hearing, and on January 21, 1981, issued his decision. In it, he stated that "[t]he

5/ William Haltigan, Regional Administrator for Region IX of the USDOL Employment and Training Administration.

issue for decision is whether Bruce Lee Caukin, who was employed by the City of Chula Vista as a CETA firefighter for fourteen months[,] was entitled to a Civil Service hearing after his termination on January 2, 1977." Dec., at 4. He ruled, on the basis of two documents (a notice to Mr. Caukin of a job-performance-evaluation hearing, and a subsequent notice of dismissal based upon that hearing), that "[i]t would appear ... that the City of Chula Vista had provided Mr. Caukin with procedures provided for in 29 C.F.R. 98.26(a), (b), (c), and (d)." Dec., at 5. He held that "[t]he action taken against Mr. Caukin in December, 1977 conformed to all of the procedures provided for in ... **Sec. 98.26 (a)**." Dec., at 7. Those assertions are not adopted as a part of this Final Decision, and no ruling is made herein as to the adequacy of City compliance with the requirements of 29 CFR § 98.26, since that issue was not presented by the parties.

9. The ALJ, having noted (Dec., at 4) that Mr. Caukin's claim of entitlement to a Civil Service Commission hearing was predicated on the provisions of 29 CFR § 98.24(b), held (Dec., at 6), that "Section 98.24(b) was not intended to cover disciplinary procedures for CETA[-par-ticipant] employees." He based this ruling on a bulletin from the prime sponsor (RETC) to its CETA employing agencies. -The ALJ further held (Dec., at 6f) that "Sec. 98.26(a) of the CETA regulations was intended to cover adverse actions and that Sec. 98.24 was to apply to working conditions other than disciplinary or adverse actions."

10. In support of the ALJ's view that 29 CFR § 98.24(b) does not apply to adverse actions **against** CETA participants, the City relies on certain canons of statutory construction. First, the City points to the canon that where there is **irreconcilable** conflict between different provisions of a statute, that provision which is last in order of position shall prevail. However, that canon provides little support in this context, since it is based upon the assumption (unwarranted in this instance) that a provision found in a later part of an enactment is a more recent expression of legislative will (73 Am. Jur. **2d**, Statutes, §256). The City also relies on the canon that where there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control. But both of those canons are clearly subservient to the rule that, where possible, it is the duty of the courts, in the construction of statutes, to so read the various provisions of a single act that all may, if possible, have effect without repugnancy or inconsistency, so as to render the statute a consistent and harmonious whole. (73 Am. Jur. **2d**, Statutes, at § 254).

11. In this instance, Sections 98.24(b) and 98.26(a) may readily be harmonized so as to yield a result far more reasonable than the City's and the **ALJ's** construction. Read together, the two sections yield a requirement that, subject

to the minimum procedural requirements set forth in Section 98.26(a), a CETA Participant's adverse-action Procedural rights shall be equal to those of similarly employed non-CETA employees of the employer. The alternative construction, that CETA-participant employees are entitled to working conditions as good as similarly employed non-CETA workers in every respect but one of the most important (procedural rights designed to protect them from unwarranted dismissals and other unwarranted adverse action), is singularly unpersuasive. Accordingly, the ALJ's ruling that "Section 98.24(b) was not intended to cover disciplinary procedures for CETA[-participant] employees" is specifically rejected, and I hold instead that Section 98.24(b) applies to all working conditions, including adverse action procedures. I would note, however, that Section 98.26(a) specifies minimum adverse-action procedures to which a CETA public-service-employment participant is entitled even if his similarly employed non-CETA co-workers are not provided with such procedural protections.

12. Having ruled that 29 CFR § 98.24(b) does not apply to adverse actions against CETA participants, the ALJ further determined that, even if 20 CFR § 98.24(b) does so **apply, Mr. Caukin** was not entitled to a Civil Service Commission hearing on his job termination because his employment was not similar to that of other, non-CETA firemen whose rights (as permanent civil service employees) included such a hearing. The ALJ's arguments in support of that position are as follows:

"Rule VIII, Sec. 3 of the Civil Service Rules of the City of Chula Vista ... relating to disciplinary action and appeal only refers to classified employees. Mr. Caukin was not a classified employee and not entitled to any greater rights than other unclassified employees of the City of Chula Vista. Civil Service Rules in effect at the time of Mr. **Caukin's** employment provided that all appointments from eligible lists to permanent positions shall be for a probationary period of one year A Civil Service employee terminated during the probationary period would not be entitled to a Civil Service appeal. The contention that a CETA employee in a temporary status has greater rights than a probationary Civil Service employee is without merit." Dec., at 5 f.

"The evidence ... established that the City had a number of unclassified employees who did not have a right to a Civil Service Commission appeal. Mr. Caukin was a CETA firefighter, not a permanent employee and he was not treated any differently than the other unclassified employees of the City. He was not a Civil Service classified employee and was not entitled to a Civil Service appeal." Dec., at 7.

". . . [T]he Regional Administrator ... appears to have . . . [attached significance to] the fact that Chula Vista had in some manner failed to clearly show the status of CETA employees as being temporary or limited. Also, in the opinion of the Regional Administrator, the fact that Mr. Caukin was employed 14-1/2 months was a variation from the City of Chula Vista's definition of a temporary employee who would be limited to 6 months.

"The fact that the City of Chula Vista did not have a special classification of CETA employees or that Mr. Caukin worked for 14-1/2 months does not alter the reality that CETA employees by the very nature of their funding are temporary in nature and within the City of Chula Vista Charter (Sec. 801) description of unclassified employees." Dec., at 7 f.

"Had Mr. Caukin not been terminated and had he received a Civil Service appointment from the posted list ... he would have had to serve one year on probation during which time he would not have been eligible for a civil service commission hearing had he been terminated To hold that his CETA status under Sec. 98.24 would give him greater rights than other[,] classified Civil Service employees would be incongruous and inequitable." Dec., at 8.

13. The ALJ's analysis 6/ is defective in that it too narrowly views the indicia of similarity of CETA and non-CETA employment set forth in 29 CFR § 98.24(b):

"In determining whether the work is the same or similar to that of a person regularly employed, the prime sponsor will taken into consideration, but shall not be limited to, employment status, type of work performed, job classification, and method of appointment to the position."

In his analysis the ALJ held that CETA-participant employment was, in the nature of CETA programs, inherently temporary; that a CETA participant therefore could not be considered to be similar to a permanent classified civil service employee (the only kind of City employee entitled under the City's personnel rules, to a Civil Service Commission adverse-action hearing); and that it would be anomalous to afford an unclassified CETA participant greater adverse-action procedural rights than would be accorded, under the City's rules, to a non-CETA probationary classified employee.

14. These points do not take into consideration all four of the indicia of similarity specified in Section 98.24(b). A more complete analysis, consistent with the requirements of Section 98.24(b), would have also taken note of the facts that:

6/ The ALJ's discussion of the Grant Officer's allegedly inconsistent treatment of this case and another matter (Scott) which he had previously ruled on is omitted as irrelevant. Whether the Grant Officer was consistent in his treatment of the two cases is not in issue at this juncture.

- (a) Mr. Caukin's position description and work assignments were identical to those of permanent, classified, civil service City firefighters.
- (b) His method of appointment was essentially identical to that of classified firefighters, i.e., he had to take and pass a written civil service examination (the same one taken by candidates for civil service appointment), and thus establish his eligibility for civil service appointment. The fact that his CETA eligibility gave him employment priority with respect to certain Federally funded firefighter positions is somewhat similar to the fact that, as indicated by civil service documents in the record, a military veteran was also entitled to firefighter employment priority. Veterans who did not score high enough on the civil service examination to be selected for appointment as firefighters in the absence of their additional, veteran's_preference points would, once appointed with the aid of those extra points, receive all civil service protections.
- (c) During the time period in question, the Federal regulations set no limit on the duration of CETA public service employment. If such employment was contemplated by the USDOL as temporary in nature, it was only so viewed in the sense that it was

intended to provide a means by which, inter alia, persons who would otherwise have difficulty in obtaining employment could establish their qualifications for and, in a substantial **percentage** of cases, move into permanent **local-government** employment, If CETA-participation employment was "temporary" in the sense that its duration depended on the continuing provision of Federal funds for it, that must be weighed against the fact that the "permanency" of permanent civil servants' jobs is also dependent on the continued availability of funds to pay their salaries.

- (d) Mr. Caukin had worked as a CETA firefighter for **14-1/2** months, in a position which (just as with probationary civil service employees) provided his employers with an opportunity to observe and evaluate his qualifications under actual working conditions. Had he been a probationary firefighter, he would have completed that performance-test period at the end of 12 months. The fact that he was continued in his employment beyond the City-mandated 12-month probationary period should be counted in his favor in an evaluation of the similarities of his work with that of permanent classified employees.

(e) As far as the record indicates, the only unclassified City firefighters were CETA participants. Such participants should be compared with other City firefighters, and not with unclassified City workers in general.

upon consideration of these factors, in addition to the ones cited by the ALJ, I am persuaded that Mr. Caukin's work was most similar to that of a permanent, classified City firefighter, and that he was therefore entitled to working conditions -- including a Civil Service Commission job-dismissal hearing -- equal to those available to a permanent-status firefighter.

15. In view of the foregoing, it is clear that the ALJ should not have dismissed Mr. Caukin's claim, but rather should have recognized its legitimacy and provided him with an appropriate remedy. Accordingly, I hold that Mr. Caukin should be given a hearing before the City of Chula Vista's Civil Service Commission 7/ for it to determine, by its normal criteria, (1) whether he should have been dismissed, and, (2) if not, the same remedy for his improper dismissal as would be given to similarly employed workers (i.e., regular civil service firefighters) if they were improperly dismissed.

16. Mr. Caukin has expressed a specific interest in receiving an appropriate amount of back pay as at least part of the remedy he considers his due. I am persuaded -- in

7/ I note that both Mr. Caukin and the Grant Officer have requested **this remedy**.

view of the circumstances of his case -- that all questions of back pay, reinstatement to comparable work, etc. coming under the general rubric of remedial action should be referred to the City Civil Service Commission for resolution in the same manner, with the Commission according Mr. Caukin the same treatment as it would accord similarly employed City workers.

Order

Accordingly, it is Ordered that:

1. Within 30 days after the date of issuance of this Final Decision, the City, through its Civil Service Commission, shall initiate and expeditiously conduct a hearing (consistent with its normal rules and practices for the conduct of a hearing concerning a permanent classified civil service employee, and applying the same standards of judgment that it would in such a hearing) to determine --

(a) whether the City of Chula Vista Fire Department should have dismissed Mr. Caukin from his position as a CETA-participant firefighter;

(b) what remedies shall be accorded Mr. Caukin for the City's failure to provide him with a timely Civil Service Commission hearing following his dismissal: and,

(c) if it is determined that Mr. **Caukin's** job **termina-**tion was substantively unwarranted, what remedies shall be accorded him therefor.

2. Within 45 days after the completion of the **hear-**ing, the Civil Service Commission shall issue a decision in

the matter which shall be implemented by the City within 30 days thereafter.

3. The **RETC** (including the governmental entities which are parties to it) and the City are held jointly and severally liable for the implementation of this Final Decision. Thus, for example, if the City fails to provide Mr. Caukin a hearing as described in paragraph 1 of this order, it shall be the obligation of the RETC to provide Mr. Caukin with a hearing before an alternate tribunal (applying the normal rules, practices, and standards of judgment of the City Civil Service Commission); and if the City fails to implement the decision of the City Civil Service Commission or alternate tribunal within 30 days after its issuance, it shall be the obligation of the RETC to provide Mr. Caukin with the same (or, if that is impossible, comparable) implementation of that decision.

4. Failure to comply with any provision of this order by either the City or the RETC shall result in immediate termination of all CETA programs conducted by or through the noncomplying party or parties, and of any **CETA funding therefor**; and shall render the noncomplying party or parties (including, in the case of the RETC, all governmental

entities which are parties to it) ineligible for any subsequent CETA programs until such time as it establishes to the satisfaction of the Department of Labor that its eligibility should be reinstated.

FEB 15 1982

Secretary of Labor

Dated: _____
Washington, D.C.