

U.S. DEPARTMENT OF LABOR

DEPUTY SECRETARY OF LABOR

WASHINGTON, D.C.

20210

DATE: December 14, 1987

CASE NO. 80-CETA-253

80-CETA-371

IN THE MATTER OF

TOMMIE BROOME, ET AL.,

COMPLAINANTS,

v.

CITY OF CAMDEN EMPLOYMENT
AND TRAINING ADMINISTRATION,

RESPONDENT.

BEFORE: THE DEPUTY SECRETARY OF **LABOR**^{1/}

FINAL DECISION AND ORDER

BACKGROUND

This is a consolidated proceeding under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§ 801-999 (Supp. v 1981),^{2/} and the implementing regulations at 20 C.F.R. Parts 675-680 (1987).

^{1/} There is presently a vacancy in the office of Secretary of **Labor**. The Deputy Secretary is authorized to "perform the duties of the Secretary until a successor is appointed" 29 U.S.C. § 552 (1982); Department of Labor Executive **Level** Conforming Amendments of 1986, Pub. L. No. 99-619 (November 6, 1986).

^{2/} CETA was repealed by the Job Training Partnership Act, 29 U.S.C. §§ 1501-1781 (1982), but CETA administrative and judicial proceedings pending on October 13, 1982, were not affected. 29 U.S.C. § 1591(e) (1982). In this proceeding, all complainants were represented by the same counsel (**80-CETA-253**), with the exception of Irene Myers, who appeared pro se (80-CETA-371).

On May 4, 1979, the City of Camden, New Jersey, Employment and Training Administration (Camden ETA) terminated complainants' employment as part of a reorganization in which the functions of their Operations Unit were contracted out to the Camden County Community College and the Private Industrial **Council.**^{3/} The reorganization was eventually approved by Grant Officer Thomas E. Hill, Region II, Employment and Training Administration, United States Department of Labor, on June 29, 1979. Stip. Ex. 13.

The complainants appealed their terminations to the aforementioned Regional-Office of the Department **of** Labor. On November 10, 1980, Regional Administrator James A. Ware issued his Final Determinations that: (1) as a result of Camden ETA's failure to obtain prior Department of Labor approval under 20 C.F.R. § 676.16(b) **(2)**, Camden ETA must pay the complainants' salaries from the date of their termination to June 29, 1979; (2) by reason of Camden ETA's noncompliance with its personnel procedures for reductions in force for **CETA staff**, it must reinstate the terminated staff members into positions similar to those from which they were terminated; and (3) CETA funds paid to Camden County Community College and the Private Industrial Council **for** functions previously performed by the terminated staff members from May 4, 1979, through June 29, 1979, **must** be repaid to the Department of Labor as disallowed costs. Exs. 93 and 92.

^{3/} See generally 20 C.F.R. Part 679 (1979), on the operations of Private Industry Councils (PICs) in the Private **Sector** Initiative Program under Title VII of CETA.

Camden ETA and the complainants appealed the Grant Officer's Final Determinations to the Office of Administrative Law Judges. A hearing on the merits was held on January 12-14, and September 28, 1983, before Administrative Law Judge (ALJ) Robert J. Shea. On May 23, 1984, the ALJ issued a Decision and Order (D. and O.).

The ALJ found, inter alia, that Camden ETA had failed to obtain prior Department of Labor approval before initiating the reorganization as required by 20 C.F.R. § 676.16(b)(2),^{4/} although the reorganization was subsequently approved on June 29, 1979. See D. and O. at 2-4. He also found that the terminations violated 20 C.F.R. § 676.43(a)(1), requiring that CETA agencies establish and maintain personnel policies in conformity with the Standards for a Merit System of Personnel Administration which incorporate the Intergovernmental Personnel Act Merit Principles prescribed by the Office of Personnel Management in 5 C.F.R. Part 900, Subpart F. Under these Standards,

[e]mployees who have acquired permanent status will not be subject to separation except for cause or such reasons as curtailment of work or lack of funds Retention of employees in classes affected by reduction in force will be based upon systematic consideration of type of appointment and other relevant factors Quality of performance and length of service **should be** taken into account in reduction in force systems.

5 C.F.R. § 900.606-1(a) and (b)(3) (1979). (The preceding sentence is not contained in the ALJ's quotation from 5 C.F.R. § 900.606-1. D. and O. at 5.)

4/ "Prime sponsors shall obtain prior R[egional]A[dministrator] approval of a modification initiated by a prime sponsor which proposes to make a significant change in the Narrative Description [of the Master Plan]."

Pursuant to the federal Standards for a Merit System of Personnel Administration, Camden ETA developed a Staff Personnel Handbook containing a provision for reductions in force due to lack of funds or work. In such circumstances, Camden ETA was required to exhaust all possibilities of transfer, new assignment, and/or promotion. Ex. 29 at 13. The ALJ found that Camden ETA had made no efforts to implement this provision with regard to any of the complainants. D. and O. at 3, 5-7.5/

5/ The ALJ's holdings with respect to the violations against the complainants are summarized as follows:

In the case at hand, each of the Complainants has made a "particularized" showing that they are entitled to an award of back pay and to reinstatement. Each complainant has demonstrated that they have suffered a denial of substantive rights guaranteed to them. The personnel policies of the Camden City E.T.A. guaranteed that the employees of the E.T.A. could be terminated only for cause or due to a reduction in force (**1T-64**). Since the complainants were not validly terminated for cause and since there was no reduction in force (**1T-64**), each of the complainants was denied a substantive right guaranteed to them, namely the right to keep their positions until terminated for cause or by reduction in force. Similarly, the Camden City E.T.A. personnel policies also guaranteed each employee the substantive right to post-employment assistance in the form of efforts by the E.T.A. to transfer, promote or assign former employees. Each complainant was also denied this right. Lastly all of the complainant's [sic] were the victims of prolonged delays in the processing of their grievances. The right to promptly grieve a termination is also a substantive right.

D. and O. at 14 (emphasis in original). Some of these holdings are confusing or incorrect. The ALJ correctly applied the reduction in force provision of the Staff Personnel Handbook to the complainants, although he apparently believed that the term technically connoted a reduction in the total number of agency employees. See D. and O. at 7, 14. I do not take such a narrow

(footnote continued)

The ALJ concluded that the ten complainants were entitled to an award of backpay and to reinstatement to positions similar to those which they formerly held. D. and O. at 7-27, as modified by the computations and backpay findings in the ALJ's Supplemental Decision and Order (Supp. D. and O.) of November 21, 1984. The ALJ awarded backpay, based on the complainants' former positions, including cost of living increases and longevity pay, from May 4, 1979, the date of complainants' termination, to January 14, 1983, one of the hearing dates, plus interest. He deducted interim earnings, unemployment compensation, and welfare payments from the various backpay awards.^{6/} The ALJ also ordered repayment

5/ (footnote continued)

interpretation of the term. There obviously was a reduction in force for the Operations Unit, although the agency itself expanded for a time. Hearing Transcript (Tr.) at 64, January 12, 1983; 1979 and 1980 rosters, Ex. 20. Camden ETA's termination of the complainants before the Department of Labor's approval of the reorganization was improper and subject to backpay relief. D. and O. at 4. Camden ETA was not precluded from its reorganization because some or all affected employees might be terminated as a result thereof; it was, however, subject to the reduction in force provision of the Handbook with regard to the employees displaced. Whether it had just cause (e.g. incompetency or inefficiency) to terminate the complainants is irrelevant to the permissibility of the reorganization. See 20 C.F.R. § 676.16. Cf. D. and O. at 5-6. Since the delay **in processing** their grievances was not the cause of the complainants' loss, the delay does not entitle them to backpay. See City of Philadelphia v. United States Department of Labor, 723 F.2d 330, 333 (3rd Cir. 1983); County of Monroe, Florida v. United States Department of Labor, 690 F.2d 1359, 1362-63 (11th Cir. 1982). Cf. D. and O. at 4, 7.

6/ No numerical backpay award was made for Irene Myers because **the** ALJ lacked certain salary and financial data and **documentation**. Supp. D. and O. at 12. Apparently this information was not supplied by Camden ETA and/or Ms. Myers because the ALJ did not compute backpay for her in a subsequent supplemental order, as specified in his order to **Camden** ETA and his reminder therein to **Ms. Myers**. See *id.* at 13.

of \$21,579 to the Department of Labor for payments to Camden County Community College prior to the Department's approval of the reorganization. **D. and O. at 25-26; Supp. D. and O. at 13.**

On December 13, 1984, counsel for Camden ETA filed various exceptions to the D. and O. and the Supp. D. and O. On December 28, 1984, counsel for **complainants**^{7/} filed exceptions and a response to Camden ETA's exceptions. On January 2, 1985, the Under Secretary of Labor asserted jurisdiction pursuant to 20 C.F.R. § 676.91(f), thereby vacating and staying the D. and O. and Supp. D. and O. pending this Final Decision and Order.

DISCUSSION

A. The Individual Complainants

Camden ETA challenges the ALJ's holding that CETA confers authority to award backpay and reinstatement to CETA administrative staff. The ALJ enunciated the following rationale.

Awarding benefits to the Complainant's [sic] in this situation would clearly help to effectuate the purposes of the Act. The purpose of the Act is to "provide job training and employment opportunities for economically disadvantaged [,] unemployed, or underemployed [persons]..." In order to achieve these goals, it is necessary to have a competent organization of individuals to administer a CETA program. In order to develop such an organization it is necessary to develop personnel policies which will insure **that the** individuals who fill the positions of CETA staff **will be** treated fairly. Without fair personnel policies, it **would** be impossible to attract individuals to take **positions as** members of the staff of a CETA organization. Awarding benefits in this situation, therefore, would further the purposes of the Act in that it would enforce the substantive rights of CETA staff members who are necessary to carry out the policies of the Act. A CETA

^{7/} All complainants except Irene **Myers**. See n.2.

program could not function at all if the Staff who administer the program were not treated fairly. The Complainants are therefore entitled to an award of back pay and to reinstatement in positions similar to the positions which they formerly occupied. [footnote omitted]

D. and O. at 14. I find the ALJ's holding to be sound and correct.

CETA requires as a condition of financial assistance that a prime sponsor submit a comprehensive employment and training plan including

a detailed description of the prime sponsor's administrative arrangements, including the procedures to be used to supervise deliverers of service (including criteria for determining that a program has demonstrated effectiveness), to select and to place individuals on the administrative staff, to evaluate and audit the operation of such programs, and to process complaints and grievances.

29 U.S.C. § 813(a)(4)(A). This provision, like the ALJ holding quoted above, links delivery of service and program effectiveness to the administrative staff. Similarly, 29 U.S.C. § 813(a)(18) requires that the plan "include a description of actions to ensure compliance with personnel procedures and collective bargaining agreements." Finally, 29 U.S.C. § 816(a)(1) mandates grievance procedures "for handling complaints about the program arising from its participants, subgrantees, contractors, and other interested persons," (emphasis added), i.e. CETA staff. See 20 C.F.R. § 676.83(a)(3), referring to complaints by "staff of the recipient or subrecipient."

In order to ensure, inter alia, that CETA staff will receive adequate resolution of their statutorily recognized employment complaints, 29 U.S.C. § 816(d)(1) provides:

If the Secretary concludes that any recipient of funds under this Act is failing to comply with any provision of this Act or the regulations under this Act . . . , the

Secretary shall have authority to terminate **or** suspend financial assistance in whole or in part and order such sanctions or corrective actions as are appropriate, including the repayment of misspent funds from sources other than funds under this Act and the withholding of future funding, if prior notice and an opportunity for a hearing have been given to the recipient. ...

(Emphasis added.) The Secretary's authority to order remedial relief ("sanctions or corrective action") contains no exclusion of CETA staff from such relief, and none should be implied in view of the close nexus between staff and participants in this statutory scheme to provide employment and training. Further, 29 U.S.C. § 816(f) directs the Secretary to take action or order corrective measures within thirty days if he determines that any recipient "unlawfully denied to any person a benefit to which that person is entitled under the provisions of this Act or the Secretary's regulations." This provision also enables the complainants to obtain appropriate relief. See Stip. Ex. 28, ETA Regional Directive (Region II) No. **37-80** (May 13, 1980), Reinstatement and Payment of Back Wages Awarded Due to Terminations in Violation of the Act or Regulations, Section **5b**, Termination of a CETA staff person; Machado v. South Florida Employment and Training Consortium, Case No. 80-CETA-494, Secretary's Decision and Order, February 19, 1982 and July 29, 1983 (providing backpay and reinstatement under CETA of 1973 to a regular employee of the Training Consortium). See also Black v. Broward Employment and Training Administration, Case No. 80-CET-255, Secretary's Final Decision and Order, May 10, 1985, (dismissing on the merits an action by a temporary Personnel Officer under CETA of 1973).

Camden ETA, the Grant Officer, and the complainants object to the scope of the remedial relief ordered by the ALJ.¹ Both Camden ETA and the Grant Officer/ argue that the backpay period of May 4, 1979 to January 14, 1983, is excessive. Complainants represented by counsel urge that backpay should continue through the present since Camden ETA has not taken any steps to reinstate them. Irene Myers requests that the backpay period be extended

8/ Camden ETA also questions whether an award of backpay constitutes an improper retroactive application of 20 C.F.R. § 676.91(c) (1979), which specifies that remedial relief may include awards of backpay. It notes that the Ninth Circuit stated in City of Great Falls v. United States Department of Labor, 673 F.2d 1065, 1068 (9th Cir. 1982), that the Secretary promulgated this regulation on May 15, 1979, subsequent to the issuance of the complainants' notices of termination and their actual termination. However, 29 C.F.R. § 676.91(c) was effective April 1, 1979 and was published on April 3, 1979. See 44 Fed. Reg. 19,990, 20,007. At that time the **complainants were** entitled to management's invocation of the reduction in force provision of the Staff Personnel Handbook and continued retention in the absence of Department of Labor approval of the contemplated reorganization. Any violations of these obligations were subject to potential backpay awards under 20 C.F.R. § 676.91(c). However, even assuming, arguendo, that the date of issuance of 20 C.F.R. § 676.91(c) precludes its application to this case, backpay would still be awardable under the predecessor regulation at 29 C.F.R. § 98.48(f) (1978). Commonwealth of Kentucky, Department of Human Resources v. Donovan, 704 F.2d 288, 294-97 (6th Cir. 1983). In any event, backpay is awardable here pursuant to the statute itself at 29 U.S.C. §§ 816(d)(1) and 816(f). See City of Philadelphia v. United States Department of Labor, 723 F.2d 330, 332 (3rd Cir. 1983); D. and O. at 8-13.

9/ Complainants' counsel argues that the Grant Officer has no standing to challenge the ALJ's determination of the backpay period since he did not file exceptions within the thirty-day period specified in 20 C.F.R. § 676.91(f). However, I shall consider the Grant Officer's briefs in order to ensure that my deliberations benefit from a full and fair consideration of the positions of all the parties, including the agency charged with administration of the statute. See American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539 (1970); Amcors, Inc. v. Brock, 780 F.2d 897, 899 (11th Cir. 1986).

until a final decision is issued and also requests that the backpay awards be doubled because, she asserts, Camden ETA maliciously deprived complainants of their jobs and systematically denied their hearing rights.

Under CETA, the Secretary must be shown some reason justifying backpay in the particular circumstances of a case. City of Philadelphia v. United States Department of Labor, 723 **F.2d** at 332. There must be a logical correlation between the award and the loss, or else the backpay is a windfall rather than a **make-whole** compensation. City of Ann Arbor, Michigan v. United States Department of Labor, 733 **F.2d** 429, 432 (6th Cir. 1984); County of Monroe, Florida v. United States Department of Labor, 690 **F.2d** 1359, 1362 (11th Cir. 1982); City of Boston v. Secretary of Labor, 631 **F.2d** 156, 161 (1st Cir. 1980). The backpay period must coincide with the claimant's period of employment absent the improper discharge. New York Urban Coalition, Inc. v. United States Department of Labor, 731 **F.2d** 1024, 1032 (2nd Cir. 1984); City of Buffalo, New York v. United States Department of Labor, 729 **F.2d** 64, 70 (2nd Cir. 1984). See Gibson v. Mohawk Rubber Company, 695 **F.2d** 1093, 1097-99 (8th Cir. 1982), and Lamb v. Drilco Division of Smith International, Inc., 32 FEP Cases (BNA) 105, 107 (S.D. Tex. 1983), for the same remedial principle under the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964, respectively. The propriety of remedial reinstatement depends upon the same formulation. City of Buffalo, 729 **F.2d** at 70; Lamb v. Drilco Division, 32 FEP Cases at 107-08.

Based upon these standards, the ALJ's order for backpay and reinstatement falls short of an "individualized justification." City of Philadelphia, 723 F.2d at 333. Since the Grant Officer did not approve the reorganization until June 29, 1979, the termination of the complainants prior to that date was improper. D. and O. at 4; 20 C.F.R. § 676.16(b)(2). Clearly, but for Camden **ETA's** termination action, the complainants would have been employed until June 29, 1979, and are therefore entitled to backpay until that date. However, the notion that they would have been employed beyond that date if Camden ETA had complied with the reduction in force provision of its Staff Personnel Handbook is too speculative to justify additional backpay and reinstatement.

Camden ETA has aptly described the flawed assumptions behind the **ALJ's** remedial order as follows:

Furthermore to assume - as the ALJ does - that if all of the regulations and procedures had been followed (as it is alleged they were not) the Complainants would have been qualified for CETA administrative staff positions and would have retained those positions regardless of any other circumstances whatsoever through 1979, 1980, 1981 and 1982 (the Order awards back pay up to the middle of January, 1983) is purely conjectural. ...

. . . .

It is a supposition that, in spite of the level of funding, in spite of the "contracting out" of any administrative operation, in spite of the realignment of priorities and targets requiring different administrative skills, in spite of the requirements of affirmative action guidelines - in short, in spite of everything - the Complainants would have retained their positions on the CETA administrative staff at the same salary levels with the usual increments. The "more" is the assumption that, for three and a half years after their functions were "contracted

out" and their positions abolished, they would have been so competent that, regardless of any other variable, there would have always been a position for them on the administrative staff; and the ultimate thrust of the ALJ's Order is that, unless the Respondent can prove otherwise, it is liable for back pay for this entire period. ...

. . . .

In the instant matter, the Grant Officer ordered the Respondent to reinstate all of the terminated staff members while the ALJ, modifying this somewhat, ordered the reinstatement of the complainants to positions similar to those which they had originally held. (It is interesting to note, parenthetically, that at the time of the ALJ's order - some five months before CETA came to an end - the complainants outnumbered the scaled down administrative staff of the City of Camden's ETA program.)

Even assuming, arguendo, that the Respondent was procedurally negligent in not obtaining prior approval or in not following regulations and procedures, there is no logical basis for the order of reinstatement. The ALJ blandly assumed that all of the complainants would somehow - even if all of the regulations and procedures had been followed to the letter - have been retained in similar positions on the CETA administrative staff virtually up until the end of the program. ... Would none of the complainants have ever been subject to termination? Would all of the complainants have always been capable of performing whatever administrative staff functions remained, even as the staff dwindled as the program was being "phased out"?

Camden ETA Brief to the Secretary of Labor, February 1, 1985, at 13-19.

There is insufficient evidence regarding the employment of the complainants past June 29, 1979, if the reduction in force provision of the Staff Personnel Handbook had been implemented, to warrant further backpay and reinstatement. Philip Benson, personnel assistant to personnel officer Dolores Davis until his Camden ETA employment ended on September 30, 1980,

testified, in **part**:

[BY MR. STEINBERG:]

Q. Having gone through the list of job opportunities, and even eliminating those which were participants serving as staff members, is it your testimony or opinion that every one of the terminated persons could have filled some position or another of the new ones created?

A. I think so, yes.

. . . .

BY MR. MCKERNAN:

Q. Is it your testimony that all of these positions in Exhibit 43 could have been filled by at least one of the terminated individuals?

A. It is my testimony that there were people who were terminated who had the educational background and necessary skills, as well as knowledge of the program itself, who could have filled some of these positions and not have been terminated.

Q. Could have filled some.

A. Yes. One or two of the positions. I myself could have filled several.

Hearing Transcript (Tr.) at 142-44, January 13, 1983. Mr. Benson's testimony fails to establish further employment for any of the complainants if the reduction in force provision had been followed. See *id.* at 103-44. There is nothing in the record to indicate that any of the complainants would have been selected over those eventually chosen for the various openings discussed in Mr. Benson's testimony if the provision had been utilized consistent with the agency's right to select from among the best **candidates.**^{10/}

^{10/} The Introduction in the Staff Personnel Manual provides for "[r]ecruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open

At most, Mr. Benson's testimony indicates that he felt the complainants could perform these **jobs**,^{11/} not that they would have received them on the basis of merit over those actually selected. No comparison was made of the qualifications, skills, past performance, work habits or other criteria between the complainants and those selected which would demonstrate that the jobs would have been filled by the **complainants**.^{12/}

10/ (footnote continued)

consideration of qualified applicants for initial appointment." Ex. 29 at 1. Similarly, the Promotions section provides: "The purpose of in-house promotion ... is to insure that the overall staffing ... is accomplished by utilizing the best qualified individuals in each specific job classification In order to maintain an effective career ladder, **effort will** be made to promote from within the organization before securing a suitable applicant from outside resources." Id. at 7-8. Further, the Standards for a Merit System of **Personnel Administration** to which Camden ETA's personnel policies were required to conform state at 5 C.F.R. § 900.603-2(b)(3) (1979): "Any one of a variety of approaches providing for appointment from among the most qualified available eligibles from lists meets the requirements of this section." These Standards also state at 5 C.F.R.

§ 900.603-3(b)(2) :

Systematic promotion methods are encouraged. They need to provide for competition among qualified career employees at appropriate points in the career advancement system. In addition, provisions need to be made to bring persons into the career service through open competition at higher levels where this will provide abilities not available among the career employees, enrich the career service, or contribute to improved employment opportunities for underrepresented groups.

^{11/}In one instance, he testified that certain complainants could have filled the **IMU** technician position, although he was unsure of the meaning of "**IMU**" but thought it meant Intake Monitoring Unit. He "[didn't] recall the exact responsibilities" and "[had] forgotten exactly what the job entails." Tr. at 136-37, January 13, 1983.

^{12/} This includes complainants William Boyer, Jerome Thomas and Katherine **LaFrance**, who applied for positions and were not hired. See Tr. at 103-06, January 13, 1983.

The **ALJ's** order is further flawed because it fails to recognize the sharp decline in Camden ETA staff subsequent to the complainants' termination. Dolores Davis, the agency's personnel officer, testified as follows:

BY MS. SNELL:

Q. Mrs. Davis, were there ever other situations where people were terminated because of a reduction in force or reorganization other than the reorganization in this case?

A. Yes. Right down until today. Because of the lack of funds we have constantly been laying off.

Q. Did you in your position as Director of Personnel attempt to transfer any of these other people?

A. No.

Q. Did you attempt to reassign any of these other people?

A. No.

Q. Why?

A. Well, there was no place to reassign them to or to place them, you know.

Tr. at 65-66, September 28, 1983. Indeed, under these reductions, staff size fell from sixty-eight (nonparticipant) employees on June 30, 1980, to approximately fifteen individuals on January 14, 1983. Ex. 20; Tr. at 14, January 14, 1983. Even assuming, arguendo, that some of the complainants would have been employed in other positions if the agency adhered to the reduction in force provision, there is nothing to indicate that the employment of any complainant would have continued to January **14**, 1983, as provided in the ALJ's order, in light of the agency's staff shrinkages.

In sum, the ALJ's order is not "individually justified" and cannot stand. City of Philadelphia, 723 F.2d at 332-33. Based upon a full review of the entire record, I conclude that remedial relief cannot extend beyond June 29, 1979.^{13/} Accordingly, the complainants' remedy will consist of whatever backpay they would have earned from May 4, 1979 to June 29, 1979,^{14/} including any cost of living increases and longevity pay which would have accrued to them during that period. Cf. D. and O. at 15. Interim employment earnings during this period will reduce the backpay otherwise owing. However, no reductions should be made for unemployment compensation or welfare benefits received for this period, since they are viewed as collateral benefits not subject to setoff. National Labor Relations Board v. Gullett Gin Company, 340 U.S. 361, 364 (1951); Maxfield v. Sinclair International, 766 F.2d 788, 793-95 (3rd Cir. 1985); Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 81-85 (3rd Cir. 1983); Stip. Ex. 28, ETA Regional Directive (Region II) No. 37-80 (May 13, 1980), Reinstatement and Payment of Back Wages Awarded Due to Terminations in Violation of the Act or Regulations, Section 8(b)^{15/} Interest on the

^{13/} 29 U.S.C. § 823(e)(2), cited by complainants' counsel in his letter of February 14, 1985, is inapposite to this case. This provision was intended to ensure that CETA funds create new employment and training opportunities, rather than subsidize existing jobs through the use of CETA enrollees as replacements for non-CETA incumbents. Cf. State of Maine v. United States Department of Labor, 669 F.2d 827 (1st Cir. 1982).

^{14/} Page 3 of the D. and O. states that the reorganization was approved by the Department of Labor on June 30, 1979. It was approved on June 29, 1979. Stip. Ex. 13. Cf. D. and O. at 4.

^{15/} The ALJ deducted unemployment compensation and welfare benefits in his D. and O. and Supp. D. and O.

backpay awards will accrue from June 29, 1979^{16/} at the interest rates established under 26 U.S.C. § 6621 (1982), as amended by Section 1511 of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2744. Taylor v. Hampton Recreation and Hampton Manpower Services, Case No. **82-CETA-198**, Secretary's Decision, April 24, 1987, slip op. at **10-12**; 29 C.F.R. § 20.58(a) (1986).

B. Repayment to the Department of Labor

Camden ETA challenges the ALJ's repayment order of **\$21,579.00** for CETA payments to Camden County Community College for costs incurred prior to the Grant Officer's approval of the contracting out of functions previously performed by the terminated administrative staff.^{17/} Although Camden ETA clearly was required by 20 C.F.R. § 676.16(b)(2) (1979) to obtain the prior approval of the Regional

16/ The ALJ did not order prejudgment interest for the individual complainants. See D. and O. at 15 and Supp. D. and O. at 12-13, providing postjudgment interest under 28 U.S.C. § 1961 (1982) commencing with the date of issuance of the Supp. D. and O. However, I believe that both forms of interest are necessary in this case as part of the "make whole" remedy. Accordingly, the interest will commence from June 29, 1979, when the backpay sum accrued, rather than from the date of issuance of this Decision and Order. See Berndt v. Kaiser Aluminum & Chemical Sales, Inc., 789 F.2d 253, 259-60 (3rd Cir. 1986); Sun Ship, Inc. v. Matson Navigation Company, 789 F.2d 59, 62-63 (3rd Cir. 1986); City of Chicago v. United States Department of Labor, 753 F.2d 606, 608 (7th Cir. 1984).

17/The Grant Officer's Final Determination also required repayment of CETA funds for costs incurred to the Private Industrial Council prior to his approval of the reorganization. See Ex. 83. At the hearing, Ella Cintron, Camden ETA Deputy Administrator of Administration, testified as follows on these expenditures:

[BY MR. MCKERNAN]

Q. Mrs. Cintron, as part of the grant officer's

(footnote continued)

Administrator because the modification proposed "to make a significant change in the Narrative Description [of Camden

17/ (footnote continued)

determination in this matter, there was a determination that the City of Camden was to pay back to the Department of Labor the funds that it had paid to the Camden County Community College and the Private Industrial Council, PIC, for the functions previously performed by the terminated staff members on May 4, 1979 through June 29, 1979. Were you familiar with that award, that determination?

A. Yes.

Q. Was there indeed any money paid to the Private Industrial Council for services performed in that time frame?

A. Not to the county.

Q. Was there funds paid to the Camden County Community College for the services previously performed by the terminated individuals within that time frame?

A. Yes.

Q. Did you, at my request, look at the amount of money that was paid to the Camden County Community College for the services previously performed by the terminated staff members for the period May 4, 1979 through June 29, 1979?

A. Yes.

Q. And what was the total amount paid to the Camden County College for the services performed during that period?

A. **\$21,759.79.**

Tr. at 58-59, January 13, 1983 (emphasis added). The ALJ interpreted the underscored portion to mean that no CETA funds had been paid to the Private Industrial Council. D. and O. at 26. Ms. Cintron's reference to the "county" in the transcript may be an error by the court reporter; Ms. Cintron may, in fact, have referred to the "Council," a similarly sounding word. If she said "county," she might have been indicating that the Private Industrial Council was funded through the County, but if not, her answer was unresponsive to the question. In any event,

ETA's Master Plan], ^{18/} it argues that the Grant Officer has no legal entitlement to recovery of the funds because the expenditures were "substantively proper courses of action that are only procedurally deficient because they require the prior approval of the Regional Administrator." Camden ETA Brief to the Secretary of Labor, February 1, 1985, at 22. Camden ETA cites the final paragraph of Justice White's concurring opinion in Bell v. New Jersey, 461 U.S. 773 (1983), in support of its position. In Bell, the Supreme Court held that the Elementary and Secondary Education Act granted the Secretary of Education the right to require States to repay misspent funds. Justice White stated: "In my view, there is a significant issue whether a State can be required to repay if it has committed no more than a technical violation of the agreement. ..." 461 U.S. at 794. In a

17/ (footnote continued)

since the Grant Officer never sought clarification, objected, or filed exceptions on this point, I shall accept the **ALJ's** finding of improper payments limited to Camden County Community College. The ALJ also predicated the amount of such payments to the College on Ms. **Cintron's** testimony. D. and O. at 26. Her testimony refers to **\$21,759.79**, while the ALJ's finding and order refer to **\$21,579.00**. Because the discrepancy is only \$180.77 and the Grant Officer has not excepted to this likely transposition of digits by the court reporter or the ALJ, I accept the ALJ's finding as dispositive.

18/ The Narrative Description of the Master Plan must describe the counseling, classroom training, assessment and intake services which the prime sponsor intends to utilize. 20 C.F.R. § 676.10-4(c). It must also describe the organizational structure. 20 C.F.R. § 676.10-4(g). The Narrative Description of Camden ETA's Master Plan in effect when the complainants were terminated specified that these services would be provided by Camden ETA's administrative staff. Stip. Ex. 25.

subsequent decision approving the recovery of funds under the Elementary and Secondary Education Act, the Court, in Bennett v. Kentucky Department of Education, 470 U.S. 656, 673 n.5 (1985), stated: "Because the disputed expenditures violated a substantive requirement concerning the use of Title I funds, we do not address in this case whether the Secretary could demand repayment for no more than a technical violation of a grant agreement. Cf. Bell v. New Jersey, 461 U.S. at 794 (WHITE, J., concurring)."

The issue of grantee repayment "for no more than a technical violation" was not before the Supreme Court in Bell v. New Jersey or in Bennett v. Kentucky Department of Education. Thus, the Court did not define the term or indicate its views on the subject in general or with regard to a particular statute. If anything, these decisions and Bennett v. New Jersey, 470 U.S. 632 (1985), by holding grantees strictly accountable for improper expenditures, strongly support the propriety of my requiring Camden ETA to repay the Department of Labor for CETA funds expended in violation of 20 C.F.R. § 676.16(b)(2).

Moreover, a technical violation generally connotes a violation that is minor, insignificant, insubstantial, not serious, unimportant, trivial and/or de minimis.^{19/} By these standards, Camden ETA's failure to obtain the Grant Officer's approval under 20 C.F.R. § 676.16(b)(2) prior to implementing its agreement with Camden

19/ Cf. Consolidated Coal Company v. Federal Mine Safety and Health Review Commission, 824 F.2d 1071 (D.C. Cir. 1987); Dixey v. Idaho First National Bank, 677 F.2d 749 (9th Cir. 1982); Clark v. Mobil Oil Corporation, Case No. 80-629C (B), 1981-1 Trade Cas. (CCH) 63,903 (E.D. Mo., Sept. 5, 1980).

County Community College was no mere technical violation. The Grant Officer's review and approval of Camden ETA's operational changes prior to their lawful implementation were necessary to ensure that Camden ETA's participants would receive proper intake, assessment, counseling and classroom training services thereunder, rather than potentially inadequate or inferior services which did not meet federal requirements. An ex post facto review of the new methodology would be of no benefit to participants who had already passed through the program or pertinent portions thereof and received poor or substandard services.

Further, Camden ETA was specifically warned not to proceed without approval from the Department of Labor.

The Employment and Training Administration expects CETA programs to operate in accordance with approved plans. If a prime sponsor wishes to change its program administration or operation, it must submit a modification to its plan which, upon approval by the Regional Office, then constitutes the new approved plan which can then be implemented by the prime sponsor. In the matter of your "reorganization", no modification was submitted to this office to incorporate this plan. The Prime Sponsor Agreement/Master Plan modification which you submitted on March 2, 1979 was incomplete in its discussion of your CETA organizational structure. Your April 16, 1979 Master Plan submission contains more information but is also incomplete in its discussion of how various program activities and services will be administered. Thus, at this time, the approved organizational structure is the one which was contained in your Prime Sponsor Agreement.

. . . .

As we understand the situation, your new CETA Administrator, Ms. Barbara Broadwater, was unhappy with the performance of the internal intake and assessment unit. She then made the decision to **subgrant** these functions, and others,

too [sic] other organizations, which brought about a "reorganization" of the existing CETA structure. The net effect of this was to eliminate fifteen positions from the Camden City CETA office. On **3/23/79**, the fifteen individuals who were the incumbents of these positions were given a 45 day notice that their employment with Camden City CETA was to be terminated. This termination action is due to take effect on May 4, 1979.

We would like to provide you with guidance on these matters. First, because inadequate information has been presented in the Master Plan, we have not approved what we understand to be the "reorganization." You, therefore, do not have authority to proceed to contract/subgrant for these services. Second, grievances from affected staff members must be accepted and heard in accordance with the established procedure.

We would like you to resolve these matters as expeditiously as possible. As always, should you have any questions or need for clarification, please contact this office.

Letter from Janice M. Sawyer, Associate Regional Administrator for Area Operations, signed by James Thorp, Acting Associate Regional Administrator, to Mayor Angelo J. Errichetti, April 27, 1979, Stip. Ex. 11, Ex. 42. Similarly, Mr. Thorp met with Mayor Errichetti and Ms. Broadwater, Camden ETA Administrator, in **May**, 1979, concerning the reorganization. Be cautioned Ms. Broadwater about the inadvisability of proceeding with the reorganization plan before receiving the Regional Administrator's approval. Tr. at 79-85, January 13, 1983. The ALJ was clearly correct in holding that "[i]n light of the fact that Respondent knowingly and flagrantly violated the CETA regulations, the amounts spent in contracting out the functions of the terminated staff without prior approval are disallowed costs." D. and O. at 26.

Without question, Camden ETA spent CETA funds in contravention of applicable regulations. In the absence of any legally cognizable factor which might limit the extent of restitution in this case, I conclude that full repayment is lawful and proper. See Bennett v. Kentucky Department of Education, 470 U.S. 656 (1985); Bennett v. New Jersey, 470 U.S. 632 (1985); Bell v. New Jersey, 461 U.S. 773 (1983); City of St. Louis v. United States Department of Labor, 787 F.2d 342 (8th Cir. 1986). Accordingly, my Order will require restitution of **\$21,579.00**, plus interest accruing from the date of issuance of this Decision and Order **as** established under the Debt Collection Act of 1982, 31 U.S.C. **§** 3717 (1982). See 29 C.F.R. **§§** 20.51(b) and 20.58 (1986).

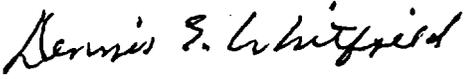
ORDER

1. Camden ETA through the City of Camden, New Jersey, is ordered to reimburse the Employment and Training Administration of the United States Department of Labor the principal sum of **\$21,579.00**, plus interest accruing from the date of issuance of this Decision and Order at the annual interest rate established under the Debt Collection Act of 1982, 31 U.S.C. **§** 3717 (1982), for that date.

2. Camden ETA through the City of Camden, New Jersey, is ordered to provide backpay and interest to complainants Katherine **LaFrance**, Dilma Garcia, William Boyer, Thomas Watson, Jerome Thomas, Tommie Broome, Wayne Malloy, Bruce **Benton**, Barbara Powell and Irene Myers. For each complainant, backpay shall consist of whatever pay the complainant would have earned from May 4,

1979, to June 29, 1979, including any cost of living increase and longevity pay which would have accrued to the complainant during this period. Interim employment earnings of a complainant during this period shall be subtracted from his/her backpay, but no reductions shall be made for unemployment compensation or welfare benefits received. Interest on the backpay awards for each complainant shall accrue from June 29, 1979, at the interest rates established under 26 U.S.C. § 6621 (1982), as amended by Section 1511 of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2744.

SO ORDERED.



Deputy Secretary of Labor

Washington, D.C.

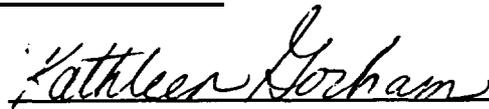
CERTIFICATE OF SERVICE

Case Name: Tommie Broome, et al. v. City of Camden
Employment and Training Administration

Case No. : **80-CETA-253 & 80-CETA-371**

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following persons on DEC I 4 1987



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