

U.S. DEPARTMENT OF LABOR .

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: March 22, 1988
CASE NO. 79-CETA-254

IN THE MATTER OF

CITY OF TORRANCE

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

The Grant Officer requested that the Secretary assert jurisdiction and modify a portion of the Administrative Law Judge's (ALJ) Decision and Order (D. and O.) in this case. The ALJ allowed costs under 20 C.F.R. § 676.88(c) (1987) which he found could have been disallowed as misspent in violation of some of the then applicable eligibility provisions of the regulations for Title II programs under the Comprehensive Employment and Training Act (CETA or Act). 29 U.S.C. §§ 801-999 (Supp. V 1981). ^{1/} The Grant Officer seeks reversal of that finding. The City of Torrance did not seek review of the ALJ's finding that the City had violated the regulations by employing in CETA jobs participants who had been unemployed fewer than 30 days when they filed their applications. 29 C.F.R. § 96.27 (1975). ^{2/}

The ALJ found that the City of Torrance had employed two participants who had been unemployed for 10 and 22 days respectively at the time of application, although they both had been unemployed more than 30 days when they commenced CETA employment. He held, however, that although there had

^{1/} CETA was repealed effective October 12, 1982. The replacement statute, the Job Training Partnership Act, 29 U.S.C. §§ 1501-1781 (1982), provided that pending proceedings under CETA were not affected. 29 U.S.C. § 1591(e).

^{2/} The ALJ correctly applied the CETA regulations as they existed at the time the participants in question applied for CETA employment. D. and O. at 3-4.

been a technical violation of 29 C.F.R. § 96.27, the criteria under 20 C.F.R. § 676.88(c) for allowing otherwise disallowable costs had been met, and an order for repayment of the costs of employment of these two participants would not serve the purpose of the Act. D. and O. at 5-7. He did order the City of Torrance to adhere to proper participant eligibility standards in the future. The Secretary asserted jurisdiction and gave the parties an opportunity to file briefs, which they did. ^{3/}

DISCUSSION

The Grant Officer argues, first, that the City of Torrance did not make a timely request to the Grant Officer for allowance of costs under 20 C.F.R. § 676.88(c), but only raised it for the first time after the Grant Officer had issued the final determination. 20 C.F.R. § 676.88(e). This case arises out of events which occurred in 1974. The regulations applicable at the time, 29 C.F.R. Parts 93-99 (1975), had no counterpart to 20 C.F.R. § 676.88(c), which became effective April 1, 1979. 44 Fed. Reg. 19,990 (1979). Although the City of Torrance had filed a timely request for a hearing under 29 C.F.R. § 98.47 in November of 1978, the Grant Officer directed the City by telegram on August 31, 1979, to file a new request for a hearing with the Chief Administrative Law Judge under 20 C.F.R. § 676.88(f) because that regulation then governed. The City promptly filed a new request for a hearing on September 7, 1979, and, on the same day, wrote to the Grant Officer requesting that the questioned costs be allowed under 20 C.F.R. § 676.88(c). That request was denied in a one paragraph letter dated October 11, 1979, which stated no reasons and did not consider

^{3/} The Secretary gave the parties an additional opportunity to file briefs in July 1985, but neither party did so.

the factors listed in 20 C.F.R. § 676.88(c). Since the August 31, 1979, telegram was the first notice to the City that the new regulations would be applicable, and it immediately made a request for allowance of costs under 20 C.F.R. § 676.88(c), I find that the request was timely.

The Grant Officer argues further that 20 C.F.R. § 676.88(c) 4/ commits the decision to allow costs for misspent funds to the unreviewable discretion of the Grant Officer. Alternatively, the Grant Officer asserts that, if the Grant Officer's decision is reviewable by the ALJ, the scope of review is very narrow, limited to whether the decision was arbitrary, capricious, or otherwise not in accordance with law, and that it should be upheld here.

I do not agree with the Grant Officer's assertion that a Grant Officer has unreviewable discretion to allow costs under 20 C.F.R. § 676.88(c). To contend that an Administrative Law Judge has no authority under the regulations to allow costs amounts to an assertion that the Secretary also

4/ Subsection (c) provides:

(c) Allowability of certain Questioned costs. In any case in which the Grant Officer determines that there is sufficient evidence that funds have been misspent, the Grant Officer shall disallow the costs, except that costs associated with ineligible participants and public service employment programs may be allowed when the Grant Officer finds:

(1) The activity was not fraudulent and the violation did not take place with the knowledge of the recipient or subrecipient; and

(2) Immediate action was taken to remove the ineligible participant; and

(3) Eligibility determination procedures, or other such management systems and mechanisms required in these regulations, were properly followed and monitored; and

(4) Immediate action was taken to remedy the problem causing the questioned activity or ineligibility; and

(5) The magnitude of questioned costs or activities is not substantial.

lacks that power, and that promulgation of 20 C.F.R. § 676.88(c) was a complete and irrevocable grant of authority by the Secretary to the Grant Officer.

The language and structure of the Act and the CETA regulations, however, show that the Secretary has not relinquished to the Grant Officer all authority to construe and apply this provision for allowing costs. Section 676.88(c) is derived from Section 106(d)(1) of CETA, **which** grants broad authority to the Secretary, when she finds that the Act or regulations have been violated, to "order such sanctions and corrective actions as are appropriate, including the repayment of misspent funds. . . ." 29 U.S.C. § 816(d)(1) (Supp. V 1981). Section 676.88(c) is part of the section in Subpart F of the CETA regulations -- "Complaints, Investigations and Sanctions" • providing for the "Initial and final determination; request for hearing at the Federal level." Determinations under paragraph (c), Allowability of certain questioned costs, would be included in both the initial and final determinations (paragraphs (b) and (e)). Any recipient "affected" by the Grant Officer's final determination may request a hearing. 20 C.F.R. § 676.88(f).

There is nothing in section 676.88 to indicate that any aspect of the Grant Officer's final determination was excluded from the scope of the hearing which may be requested. Use of the word "may" in subsection 676.88(c) is no more than a delegation to the Grant Officer, in the first instance, to exercise the discretionary powers of the Secretary under section 106(d)(1) of CETA. The Secretary always retains the authority to make the final decision on all matters which may be the subject of a hearing

under section 676.88. ^{5/} Campbell v. Doe, 54 U.S. (13 How.) 244, 249 (1852) (A decision of an inferior officer who acts under the authority of an agency head has no force and effect when the agency head has "interposed and decided the matter ... [because the decision of the agency head] must be considered as the only one under the law"; Northwest Airlines, Inc. v. Goldschmidt, 645 F.2d 1309, 1317 (8th Cir. 1981) (Delegation of authority from Secretary of Transportation to Administrator of the Federal Aviation Authority does not deprive the Secretary of authority to act).

In Action, Inc. v. Donovan, 789 F.2d 1453 (10th Cir. 1986), the court reviewed the Secretary's failure to explain why he did not waive costs under 20 C.F.R. § 676.88(c) and ordered that he consider the applicability of that regulation and set forth reasons for his decision under it. 789 F.2d at 1459. Surely, if the Secretary's action, or failure to act, under 20 C.F.R. § 676.88(c) is reviewable in court, the Grant Officer's action in exercising delegated discretionary authority is reviewable by an ALJ and the Secretary.

I agree that due deference should be given to the decision of the Grant Officer under 20 C.F.R. § 676.88(c) as the official charged with the overall management and administration of CETA programs and responsible for prudent and consistent financial management. I decline to adopt the "arbitrary or capricious" standard of review, urged by the Grant Officer, however, which appears to be borrowed from the judicial review provisions of the Administrative Procedure Act (APA). 5 U.S.C. § 706(2)(A) (1982). That

^{5/} I would note that EEOC v. Exchange Security Bank, 529 F.2d 1214 (5th Cir. 1976), cited by the Grant Officer, does not aid his position. The court there noted explicitly that, since the EEOC retained power to review the denial of petitions for revocation of subpoenas, it was "unnecessary to determine whether the Commission could have delegated ... the unreviewable authority to consider such petitions." 529 F.2d at 1218.

standard is inappropriate to order the relationship between the Secretary, a Presidential appointee assigned the authority and responsibility by Congress to exercise enforcement powers under CETA, and the various Grant Officers to whom the day to day administration of CETA programs has been delegated.

Even under the arbitrary and capricious standard of review, however, the Grant Officer's response denying the City's request without any explanation would be inadequate. Under the **APA**, 5 U.S.C. §§ 551-706 (1982), some statement of reasons for agency action is required. In French's Estate v. Federal Energy Regulatory Commission, 603 F.2d 1158 (5th Cir. 1979), for example, the FERC denied a petition for relief from an order for a refund for prices charged in excess of established rates for natural gas. The court said two provisions of the **APA** required the agency to give reasons for its action. Under section 706 "there must be sufficient indication in the agency decision of the basis for the Commission's action, so that the court may ascertain whether the agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. ..." 603 F.2d at 1162. In addition, under section 555(e), "the agency notice of denial [of a petition or written application] [must] be accompanied by a brief statement of the grounds for denial." Id. Here, where specific criteria have been set by regulation, the Grant Officer must, at a minimum, explain why one or more of those criteria have not been met, or what other significant factors led him to deny the request. Even if all five criteria have been met, the Grant Officer retains discretion under 29 C.F.R. § 676.88(c) to refuse to allow costs for misspent funds, but he must provide reasons for doing so.

Based upon review of the record in this case, I agree with the ALJ that the first four criteria of section 676.88(c)(1)-(4) have been met. The

ALJ's discussion of the fifth factor, whether the magnitude of questioned costs is substantial, seems to go more to the issue of what remedy or sanction would best serve the purposes of the Act, rather than to the question of what is "substantial". The magnitude of the questioned activity here is not substantial, involving as it did only two employees. There has been no suggestion that premature taking of applications was a general practice by the City. In the circumstances of this particular case, therefore, I find that the magnitude of questioned costs also is not substantial.

In considering the facts of this case pursuant to section 676.88(c), the ALJ appropriately **focussed** on whether the questioned expenditures tended to carry out the purposes of CETA. There was no dispute that the two participants involved were, in all other respects, eligible and properly could have been employed if they had filed their applications 20 and 8 days later, respectively. When they actually commenced CETA employment each had been unemployed more than 30 days. I find that the actions of the City of Torrance did carry out the purposes of Title II of CETA to "provide unemployed and underemployed persons with transitional employment in jobs providing needed public services" 29 U.S.C. § 801 (Supp. V 1981). The **ALJ's** decision, therefore, was consistent with the admonition to **ALJs** in 29 C.F.R. § 676.91(c) that their "orders for relief . . . may contain such terms . . . as are consistent with and will effectuate the purposes of the Act" Accordingly, I affirm the **ALJ's** decision and order.

SO ORDERED.


Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: City of Torrance
Case No. : 79-(ZETA-254
Document : Final Decision and Order

A copy of the above-named document was sent to the following persons

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