

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: **June 7, 1988**
CASE NO. 83-CET-92

IN THE MATTER OF

JOHN GOTTLIEB, ET AL.,

COMPLAINANTS,

v.

COMMONWEALTH OF MASSACHUSETTS,

PRIME SPONSOR,

AND

NEW BEDFORD CONSORTIUM,

SUBRECIPIENT,

RESPONDENTS.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

The issue in this case arising under the Comprehensive Employment and Training Act of 1973, as amended (CETA or the Act), 29 §§ U.S.C. 801-999 (Supp. V 1981) ^{1/}, is whether an entity which takes over the operation of a CETA program in a geographic area, after the cancellation of an agreement with the prime sponsor by the subrecipient which previously ran the program, is obligated to continue to pay the employees of the program the same wages they received under the cancelled agreement. Because I conclude that it is not obligated to do so, the complaint in this case will be dismissed.

^{1/} CETA was repealed effective October 12, 1982, by the Job Training Partnership Act, 29 U.S.C. §§ 1501-1781 (1982), but pending proceedings were not affected. 29 U.S.C. § 1591(e).

The Commonwealth of Massachusetts was a prime sponsor under CETA for all areas in that state not served by other prime sponsors, and for that purpose was referred to as Massachusetts Balance of State (BOS). BOS entered into an agreement in 1979 with the Town of Yarmouth to administer the CETA program for the Cape Cod area, including the islands of Martha's Vineyard and Nantucket (Cape area). In February, 1981, Yarmouth gave notice, as it had the right to do under the agreement with BOS, that it was terminating the agreement in 90 days effective May 31, 1981. BOS entered into an agreement with the New Bedford Consortium (NBC), a prime sponsor for the New Bedford area, to act as a subrecipient of BOS to administer the CETA program for the Cape area. The agreement covered the period to the end of the fiscal year, June 1, 1981, to September 30, 1981, and required NBC to provide wages and fringe benefits to employees of the Cape area program at the same rate they had received when employed by the Town of Yarmouth.

At the beginning of the new fiscal year on October 1, 1981, BOS and NBC entered into a new agreement under which NBC was to administer the CETA program for the Cape area as a subgrantee of BOS. NBC decided to retain the staff which had been employed by the Town of Yarmouth but brought the salaries of those staff members in line with the salaries of comparable staff of its own in the New Bedford area. This caused a reduction in salary for a number of Cape area employees. A group of those employees filed a complaint over that salary reduction. John Gottlieb also filed a separate complaint raising three issues, **two** of which were consolidated into this case **by the**

Administrative Law Judge (**ALJ**), viz., that Mr. Gottlieb's seniority was affected by the reduction in salary, and that the reduction in salary was discriminatory because all employees did not receive the same percentage reduction.

All of these complaints were denied at the local level and by the Grant Officer, and Complainants requested a hearing before an **ALJ** which was held on December 16, 1984. The **ALJ** held that "NBC lacked authority to enter into the agreement with BOS ... to administer a CETA program for a geographic area not contemplated or authorized by the [New Bedford] Consortium agreement. ... **[I]t** would also appear that NBC had no legal authority to reduce the salaries of the Yarmouth staff" **ALJ's** Decision and Order (**D.** and **O.**) at 6. The **ALJ** held that NBC had no authority to reduce the salaries of the Cape area staff because NBC had no authority under Massachusetts law to act outside the geographic boundaries of the units of local government making up the consortium, and because there is nothing in CETA authorizing such consortiums to serve as subrecipients of another prime sponsor. The **ALJ** held further that, even if NBC had the authority to enter into a subrecipient agreement with BOS, it had no authority to treat the Cape area employees as if they were employees of the consortium in its capacity as a prime sponsor. He held, therefore, that NBC had no authority to adjust the Cape area employees' salaries to the level of the NBC employees' salaries.

DISCUSSION

The Complaints and Sanctions section of CETA provides that the Secretary of Labor shall investigate, make determinations, and after notice and hearing impose sanctions, "[w]henever the Secretary receives a complaint from any interested person ... that a recipient of financial assistance under this Act is failing to comply with the requirements of this Act, the regulations under this Act, or the terms of the comprehensive employment and training plan" 29 U.S.C. § 816(b). Complainants had the burden, therefore, of showing that the reduction in salary they suffered violated some provision of CETA, the regulations, or the BOS Comprehensive Employment and Training Plan, or some other requirement which was incorporated into that plan, such as a contract of employment for a specified period.

It is clear that NBC was the employer of the Cape area employees. Complainant Gottlieb, himself, testified that NBC had jurisdiction over and was running the Cape area program, including paying the salaries of the Cape area employees and **issuing** their checks, from October 1, 1981, until CETA went out of existence in 1984. Transcript of hearing (T.) at 65. See also, testimony of Ralph Schmarsow, Executive **Director** of NBC, T. at 165, that the NBC personnel policies applied to Cape area employees, and the **subgrant** agreement, paragraph 8, in which NBC agreed to apply the Merit Principles to "former Yarmouth CETA personnel." **"The** essential characteristic of the employer-employee relationship is the employer's power or right to control the employee's conduct" Members of the Bridgeport Housing Authority Police Force v. City of Bridgeport, 26 FEP 1478,

1491 (D. Conn. 1980). The court held in City of Bridaenort that the City was the employer of the Housing Authority police officers because "it determines their salaries, controls their conduct on the job, **directs** their assignments and alone possess the power to fire them." **Id.** (Footnote omitted.) Similarly, in Dumas v. Town of Mt. Vernon, 436 **F.Supp.**866 (S.D. Ala. **1977**), CETA workers used by a town were held to be employees of the "CETA office" based on the common law **indicia** of an employer-employee relationship, such as authority over "hiring, salary, employee control and firing." 436 F. Supp. at 872-3. NBC, therefore, as would any employer, had the discretion to adjust the salaries of its employees to meet its fiscal and administrative needs, absent any requirement of CETA or the regulations limiting its discretion in that regard. ^{2/}

The ALJ held that NBC had no authority to reduce Complainants' salaries because it had no authority to operate the Cape area program either under Massachusetts law or CETA itself and the regulations. There is a serious question, however, whether under CETA or Department of Labor regulations, an **ALJ** has the authority to decide whether an entity created under state or local law has exceeded the terms of its enabling statute. **See** 29 U.S.C. §§ 816(b) and 816(c)(2); 20 C.F.R. §§ 676.86(c) and **676.90(c)** (1987). ^{3/} In a hearing convened under section 106 of CETA, an **ALJ** is authorized only to decide whether a recipient has violated the Act, the regulations or its comprehensive

^{2/} NBC was constrained, of course, by other requirements not here relevant, such as the minimum wage laws.

^{3/} The same provisions were in effect in 1981. 29 C.F.R. §§ 676.86(c) and **676.90(c)** (1980).

employment and **training plan**. **Id.**; Cf. Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 746 (1983). Moreover, even if the authority of a recipient to act under state law were cognizable in a proceeding such as this, it is hard to see how its lack of authority would confer **any rights on** its employees in the context of a CETA complaint. At most, it might entitle the Department of Labor or the prime sponsor to relief for misrepresentation of its capacity to administer CETA funds. **See, e.g.**, section 5 of the Memorandum of Agreement between BOS and NBC, Administrative File at 66. Moreover, if NBC had authority as the employer of the Cape area employees to pay their salaries at all, authority which Complainants surely would not challenge, it must also have had authority to take other acts in the scope of an employer's authority, such as directing the employees in the performance of their duties (which it did) or adjusting their salaries. I find no logical or legal support for the **ALJ's** conclusion that the salaries of the Cape area employees could never be reduced because NBC, assertedly, had no authority to act as their employer at all, when in all other respects NBC was in fact their employer.

In addition, there is nothing in the Act or regulations which prohibits a consortium of local governments, which was organized for the purpose of becoming a prime sponsor, from acting as a subrecipient of another prime sponsor. Indeed, the regulations governing selection of subrecipients (referred to as "service deliverers") clearly are broad enough to give a prime sponsor, such as BOS, discretion to select another prime sponsor, such as NBC, as a service deliverer

because it meets the standard of being a "community based **organization[]** with [a] **program[]** of demonstrated effectiveness in the delivery of employment and training services" 20 C.F.R. § 676.23(c). The regulations also provide that "[c]onsideration shall be given to making use of appropriate services currently available in the community Agencies which typically provide such services include ... community based organizations, and other public agencies." 20 C.F.R. § 676.23(d). NBC certainly comes within the class of organizations contemplated by the regulations as a service provider, that is, a subrecipient.

The ALJ held that NBC operated the Cape area program as a subrecipient of BOS and had no authority to act as the prime sponsor for the Cape area. He thus concluded that NBC had no authority to treat the Cape area staff as part of its staff in its role as a prime sponsor, and therefore had no authority to downgrade the positions of the Cape area staff. However, based on the record, I do not understand NBC's position here to be that it had become the prime sponsor for the Cape area and had merged the Cape area staff with its own staff. NBC was operating the Cape area program as a subrecipient of BOS, and as the program operator and employer of the staff had made a decision within its discretion to adjust the salaries of the Cape area staff.

Complainants rely on the Standards for a Merit System of Personnel Administration, promulgated by the United States Office of Personnel Management, 44 Fed. Reg. 10,242 (1979), codified at 5 C.F.R. Part 900, Subpart F (1987), and incorporated in the CETA regulations,

20 C.F.R. § 676.43(a), in **support** of their position. Complainants argue that Merit Principle II on classification and compensation required NBC to take into account the differences in the cost of living between the New Bedford area and the Hyannis area (where the Cape area employees worked) in setting the salaries of the Cape area employees. (Hyannis had a higher cost of living,) The **ALJ** appeared to accept that argument, noting that "NBC in establishing its salary equalization plan never gave any thought or consideration to any differences in the cost of living between the New Bedford and Cape areas." D. and O. at 6. Somewhat inconsistently, however, the ALJ also held that the requirement in the Memorandum of Agreement between NBC and BOS that NBC comply with the Merit Principles was in violation of the CETA regulations at 20 C.F.R. § 676.43. D. and O. at 5.

The regulations simply exempt "any subrecipient" from the requirements of 20 C.F.R. § 676.43(a)(1) and (2) which makes the Merit Principles applicable to "public agencies administering a program under the Act". The exempting regulation, 20 C.F.R. § 676.43(a)(3), does not prohibit subrecipients from voluntarily agreeing to comply with the Merit Principles as part of their **subgrant** agreements.

In any event, I find nothing in the Merit Principles which would have prohibited NBC from adjusting the salaries of the Cape area staff. Merit Principle II provides that "to maintain a high quality public work force and to assure equitable compensation for comparable work, the compensation plan will take into account the responsibility and difficulty of the work, the compensation needed to compete in the labor market and to stay in proper alignment with other agencies of

the government, and other pertinent factors." 5 C.F.R. § 900.604-1(a). There is, however, no explicit reference to setting salaries based on the cost of living in the area of employment, although that may be a "pertinent factor," id., which may be considered if the employer chooses to do so. "[T]he responsibility and difficulty of the work," id., is based on job duties and has no relationship to cost of living. "[T]he compensation needed to compete in the labor market and to stay in proper alignment with other agencies of the government," id., focuses on the employer's ability to attract workers.

In conclusion, I find nothing in CETA or ~~the~~ regulations which restricted the discretion of NBC to adjust the salaries of the Cape area staff or established a right of those employees to the same salaries they received when employed by the Town of Yarmouth. Accordingly, the complaint in this case is DISMISSED.

SO ORDERED.



Secretary of labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: John Gottlieb et al. v. Commonwealth of Massachusetts
and New Bedford Consortium

Case No. : 83-CET-92

Document : Decision and Order

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

persons on JUN 7 1988.

Antea Brown

CERTIFIED MAIL

Jane Davis-Gavin, Esq.
379 South Street
Hyannis, MA 02602

Armand Fernandes, Jr.
442 County Street
New Bedford, MA 02740

Joellan **D'Esti**, Esq.
Deputy General Counsel
Executive Office of Economic
Affairs
One Ashburton Place • Rm. 2101
Boston, MA 02108

Grant Officer
Employment and Training Admin.
U.S. Department of Labor
JFK Federal Building
Boston, MA 02203

REGULAR MAIL

Hon. Nahum Litt
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Department of Labor
1111 20th Street, N.W. 20036

David O. Williams
Office of Program & Fiscal Intergrity
U.S. Department of Labor
Room N-4671
200 Constitution Ave., N.W.

Associate Solicitor for Employment
and Training
200 Constitution Ave., N.W.
Washington, D.C. 20210
Attn: Marcia A. Lurensky, Esq.

Office of the Solicitor
U.S. Department of Labor
1803 JFK Federal Building
Boston, MA 02109
Attn: Constance Franklin, Esq.

Linda Kontnier
Chief, Debt Collection
Room **N-4671/ETA**
200 Constitution Ave., N.W.
Washington, D.C. 20210

Hon. Chester Shatz
Administrative Law Judge
Office of Administrative Law Judges
John W. **McCormack** Post Office
and Courthouse
Room 409
Boston, MA 02109