U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON. D.C.

DATE : November 21, 1988
CASE NO. 82-CTA-156

IN THE MATTER OF

IDAHO MIGRANT COUNCIL, INC.

BEFORE: THE SECRETARY OF LABOR

ORDER OF REMAND

The captioned matter is before me for review under the Comprehensive Employment and Training Act, as amended (CETA or the Act), 29 U.S.C. §§ 801-999 (Supp. V 1981), [1] and its implementing regulations at 20 C.F.R. Part 676, Subpart F (1987). The Administrative Law Judge (ALJ) ordered the case remanded to the Grant Officer, finding the Grant Officer's initial and final audit determinations invalid by reason of the Grant Officer's "Unofficial" and impermissible subdelegation to a contract employee of the Grant Officer's authority to prepare such documents and to make the judgments and decisions on the issues raised. Order Vacating Initial and Final Determinations (ALJ's Order). Upon the filing of exceptions by the Grant Officer, the case was accepted for review. [2]

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[1] CETA was repealed by the Job Training Partnership Act of 1982, Pub. L. No. 97-300, § 184(a)(l), 96 Stat. 1357. That legislation provided that pending proceedings under CETA were not affected. 29 U.S.C. § 1591(e) (1982).

[2] Review was stayed pending appellate and Supreme Court review of the applicability of the "120-day" provision in section 106(b) of the Act, 29 U.S.C. § 816(b), which was raised by IMC

The exceptions contend that the ALJ's Order reflects an inadequate understanding of the manner in which the Office of the Grant Officer functions within the Employment and Training Administration (ETA) and an improper interference with the authority of the Assistant Secretary for ETA with respect to management and operations. In addition, the Grant Officer excepts to the ALJ's admission of and reliance upon the Grant Officer's pre-hearing deposition of July 23, 1984, "in lieu of the Grant Officer's testimony at the hearing. ..." Grant Officer's Exceptions at 6.

In response, the Idaho Migrant Council, Inc. (IMC), argues that the Grant Officer unofficially and improperly transferred his authority to a "low-level" contract employee and that the Grant Officer exercised virtually no control over the contractor's activities. This type of unsupervised delegation, says IMC, is not contemplated by the Act or the regulations. Response to the Grant Officer's Exceptions at 1.

DISCUSSION

The facts in this case are primarily procedural. A formal hearing was requested by the IMC in order to contest the January 28, 1982, Final Determination of Grant Officer David T. Copenhafer which disallowed $394,830 in costs incurred by the

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in its opposition to the assertion of jurisdiction. The Court, in a unanimous opinion, held that the Secretary does not lose the power to recover misspent CETA funds after the expiration of the 120-day period specified in section 106(b). Brock v. Pierce County, 476 U.S. 253 (1986).

IMC under four CETA grants. [3/] The hearing was convened and continued on July 31, 1984, in Boise, Idaho, and subsequently adjourned without any hearing testimony taken on the merits of the disallowance. Prior to adjourning the hearing the ALJ accepted into evidence as Respondent IMC's Exhibit 1 (RX-l), the July 23, 1984, deposition of Grant Officer Copenhafer (pending receipt of a corrected copy from Mr. Copenhafer). The ALJ held, largely it appears on the basis of information contained in this deposition, that

> the evidence establishes that the Grant Officer merely signed off on the Final Determination, which was prepared by a low-level staff member not even an employee of the United States Government, and on the Initial Determination, the author of which he cannot identify with any degree of certainty. The Grant officer cannot state that he reviewed any of the underlying evidence, and he did not draft either of the determinations or have any significant input into their contents.
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> Under these conditions, it is clear that the Grant Officer invalidly subdelegated his authority.

ALJ's Order at 3.

Whether the Grant Officer delegated undelegable authority, i.e. his authority to decide the disputed issues in this case, to a [contract] staff member was the critical question addressed by the ALJ below and is the central issue before me. The crux of the Grant Officer's position is that it is permissible and appropriate for the Grant Officer to rely upon staff in reviewing the extensive materials supporting the initial and

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[3/] Nos. 99-7-345-31-4; 99-8-345-31-21; 99-9-345-31-10 and 99-8-345-15-34, covering the period from January 1, 1977 through March 31, 1979.

final audits determinations, that such reliance was employed in this case and that the Grant Officer did not relinquish his obligation under the Act and the regulations to consider and appraise the evidence of record prior to the issuance of the initial and final determinations. Since there was not a hearing in the case, the Grant Officer's position is that his prima facie case has been established, through the materials contained in the Administrative File, and that the burden of proof has, thereby, been placed on the grantee (IMC) to establish that it expended the CETA funds under the four grants in question in accordance with applicable CETA regulations. Hearing Transcript (T.) at 18.

For the reasons set forth below, I reject the ALJ's decision to vacate the Grant Officer's findings, and remand the case to the ALJ for further proceedings on the merits of the disallowance.

I. Admissibility of Grant Officer's Deposition.

It is first necessary to determine whether the ALJ erred in admitting into evidence the deposition of the Grant Officer, since, if that was error, there is no factual basis for the ALJ's remand to the Grant Officer. The Grant Officer, characterizes the Copenhafer statement as a "discovery" deposition and opposes its admission on the ground that its admission, "precluded the government from presenting evidence on the issue regarding the subdelegation of authority." Grant Officer's Brief (G.O.) at 9. Moreover, referring to the ALJ's

presumed reliance on Rule 32 of the Federal Rules of Civil Procedure (FRCP) 4/ in admitting the deposition, the Grant Officer argues that without a finding by the ALJ that one of the circumstances set forth in Rule 32(a)(3) existed, admission under that rule was improper. G.O. at 9.

I do not accept the Grant Officer's argument. The ALJ, without making specific reference to Rule 32 stated that he admitted the deposition because of the unavailability of the

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4/ Rule 32, "Use of depositions In Court Proceedings", reads, in pertinent part, as follows:

> (a) Use of Depositions. At the trial ... any part or all of a deposition, ... may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
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> . . . .
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> (2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a . . . governmental agency which is a party may be used by an adverse party for any purpose.
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> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment: or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of representing the testimony of witnesses orally in open court, to allow the deposition to be used.

declarant and noted that the deposition testimony would be admissible in any event since, as the Grant Officer in the case, Copenhafer's testimony would be admissible as the admissions of a party-opponent. ALJ's Order at 2, n.1.

The applicable regulation under CETA, 20 C.F.R. § 676.89(a), provides that the ALJ shall be guided by the Federal Rules of Civil Procedure, "[o]n any procedural question not regulated by this subpart, the Act, or the Administrative Procedure Act. ..". 20 C.F.R. § 676.89(a), See also 29 C.F.R. § 18.1(a) (1987). Rule 32(a)(2) and (3)(B) and (D) afforded ample basis to admit the deposition. 5/

II. Subdelesation bv the Grant Officer.

The ALJ vacated the Grant Officer's initial and final determinations finding that, "[t]he Grant Officer's unofficial subdelegation of his authority to a low-level staff member was not contemplated by the Act or the regulations and is invalid." ALJ's Order at 5. This characterization of the Grant Officer's admitted delegation as "unofficial" is not, however, supported by any authority under either the Act or the regulations. Instead, it appears to be based upon a set of presumptions by the ALJ: that the delegation by the Grant Officer of review and preparatory functions has to be to a Federal employee in order to be valid: that preparation by another abdicates the Grant

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5/ The determination to admit the deposition does not preclude the Department on remand from offering further testimony by Mr. Copenhafer in person or by deposition.

Officer's independent performance of the reviewing, analytical and judgmental functions which are the essence of his particular responsibilities in this review process.

Aside from the fact that the ALJ did not afford counsel for the Grant Officer an opportunity to rebut the ALJ's presumptions, the presumptions are at variance from the established principle that there is a "strong presumption of regularity attached to the official acts of public officials." National Urban Indian Council, d/b/a Ohio Indian Job Trainina Partnership Asencv v. United States Deoartment of Labor and North American Indian Cultural Center, 85-JTP-13, Final Decision and Order of the Secretary, issued January 9, 1987, at 15. In National Urban Indian Council, a case arising under the Job Training Partnership Act, see note 1, supra, the Secretary quoted, slip op. at 15, the Supreme Court's position in United States v. Chemical Foundation, Inc., 272 U.S. 1, (1926), that "[t]he presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrarv, courts presume that they have properly discharged their duties." 272 U.S. at 14-15; emphasis by the Secretary in National Urban Indian Council, slip op. at 15.

> As a corollary to this general rule "all necessary prerequisites to the validity of official action are presumed to be complied with, and . . . where the contrarv is asserted it must be affirmatively shown." Lewis v. United States, 279 U.S. 63, 73 (1929) (emphasis added), citing United States v. Rover, 268 U.S. 394, 398 (1925); Nofire v United States, 164 U.S. 657, 667 (1987); and cases cited therein. See also, R.H. Stearns Co. v. United States, 291 U.S. 54, 63 (1934), and cases cited therein; United States v.

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Aherns, 530 F.2d 781, 785-87 (8th Cir. 1976): United States v. Norman, 413 F.2d 789, 791-92 (6th Cir. 1969).

National Urban Indian Council at 15-16.

This "presumption of regularity" is not controverted by the record before the ALJ. Mr. Copenhafer's deposition testimony is forthright regarding the organization of his office, the use of contract staff employees in combination with the regular, full-time staff of Federal employees and the training received by those staff members. CX-1 at 15-23. Mr. Copenhafer described the role of his subordinate staff, including contract employees, in assembling and preparing the determinations at issue here and testified firmly that the ultimate authority to review and to accept or reject the recommendations of his staff remained with him at all times. CX-1 at 17. 6/

The record before the ALJ showed that the original audit of the IMC was performed by the independent accounting firm of Cattern, Sorenson, Vilmure and Yu, and Mr. Copenhafer testified to the systematic set of procedures for the staff in investigating and processing auditing complaints under Subpart F. The record falls far short of the affirmative showing which the Court contemplated in Lewis v. United States, 279 U.S. at 73, before the presumption of regularity can be overcome.

Even if the facts of this case could be deemed to overcome the presumption of regularity, the ALJ did not properly apply the

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6/ The Grant Officer's testimony, at page 17, indicates that one other individual, Linda Kontnier, had Grant Officer authority but there is no suggestion that Ms. Kontnier exercised that authority with regard to either of the determinations in this case.

developed law on the concept of delegable authority. In Moraan v. United States, 298 U.S. 468 (1936), the Court examined the validity of a rate making hearing before the Secretary of Agriculture under the Packers and Stockyards Act of 1921. The evidence indicated that many of the steps necessary to a full, due process evidentiary hearing (the hearing of arguments, the receipt of evidence and testimony etc.) had been performed by subordinates of the statutorily designated Congressional agent -- the Secretary of Agriculture. Morqan, while holding that "[t]he one who decides must hear," 298 U.S. at 481, establishes that agency officials may rely on subordinates in reviewing a record. The Court found that if the evidence and argument are "sifted and analyzed by competent subordinates" an agency [deciding] official may rely upon and consult with such subordinates in reviewing the record. 298 U.S. at 480, 481. This permits a rule of "practicable administrative procedure", id. at 481, which recognizes that the decision making responsibility, predicated upon the satisfaction of certain fundamental procedural requirements, cannot possibly be performed by a single body or individual. See Guerreo v. State of New Jersey, 643 F.2d 148, 149 (3rd Cir. 1981), rehearinq and rehearina en banc denied (1981) (upholding the adoption by a state board of medical examiners "in its entirely and without modification" of an ALJ's findings and conclusions); United Steelworkers of America, Etc. v. Marshall, 647 F.2d 1189, 1217 (D.C. Cir. 1980) (upholding the reliance by the Assistant Secretary of Labor for Occupational Safety and

Health on outside consultants in the face of a claim that the Assistant Secretary had "abdicated her responsibilities for setting the lead standard to outsiders." Id. at 1216.). 7/

The cases relied upon by the IMC, are inapposite since they stand for the proposition that delegation of responsibility becomes an impermissible delegation of authority only when a legitimate lack of independence can be shown on the part of the decision maker. Sierra Club v. Lvnn, 502 F.2d 43, 59 (5th Cir. 1974) (citing Greene County Plannins Board v. F.P.C., 455 F.2d 412 (2nd Cir. 1972), cert. denied, 409 U.S. 849 (1972)). Those cases involved instances where the federal agency/decision maker allowed interested parties (a project developer in Sierra Club and a licensing applicant in Greene County) to submit into the record arguably self-serving information which ultimately was included as part of the total package of the statutorily required environmental impact statements. The issue raised by those cases was whether the federal decision maker had delegated decision making authority by allowing an interested (and self-promoting) party to put its views into an official record. That is not the case here where, whatever the status of the ETA contract employee, he is not alleged or shown to be interested in the outcome.

7/ See also Davis, Administrative Law Text, § 9.01 at 215 (1972), noting that today the federal courts "rather freely" permit instances of subdelegation and that in light of the responsibility which has been consistently shown by both state and federal agencies in the practice of subdelegating responsibilities, "subdelegation questions are disappearing from judicial opinions" and "not many practitioners still try to win on the ground of unlawful subdelegation." Id. at 216, 218.

By his ruling here the ALJ has exceeded the scope of his authority. As the Grant Officer's filing points out, the Assistant Secretary for the Employment and Training Administration has the duty to run that agency and may in the exercise of that duty, make use of competent subordinates -- in this instance, the Grant Officer and his subordinate staff. Under Subpart F of the CETA regulations the role of the ALJ is to determine whether a grantee has carried its burden of proof in a manner which dictates that the Grant Officer's determination be overturned. As several recent decisions have emphasized, an ALJ's authority in CETA and JTPA cases is not without boundaries. See Gottlieb, et al. v. Commonwealth of Massachusetts and New Bedford Consortium, Case No. 83-CET-92, Secretary's Final Decision and Order, June 7, 1988, (providing that 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 employment and training plan); Nebraska Indian Inter-Tribal Development Council v. U.S. Department of Labor and Resion VII American Indian Council, Case No. 87-JTP-19, Secretary's Decision and Order of Remand, May 23, 1988, (in case challenging nondesignation as a grantee under section 401 of JTPA and its implementing regulations, held ALJ has no authority to order relief prior to expiration of the time allowed to seek Secretarial review or for a period of 180 days after the

Secretary asserts jurisdiction without issuing a decision, slip op. at 5; ALJ lacks authority to order remedies with respect to the administration of grants and apparent misexpenditure of funds which are not properly before him in a "nondesignation appeal.") Cf. Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 746 (1983)). In the Nebraska Indian decision the Secretary added that, "[b]y purporting to order such remedies, the ALJ has in effect assumed the administration, management, and quasi-prosecutorial roles of the Grant Officer and his counsel." Slip op. at 10-11.

I find that the ALJ's order vacating the initial and final determinations of the Grant Officer is an impermissibly broad exercise of his remedial authority because the remand to the Grant Officer contains implicit instructions to him (and, thus, to the Assistant Secretary for Employment and Training) regarding the administration and management of the audit review procedure and who shall perform certain vital functions within that procedure. Moreover the record does not establish that any impermissible or unofficial delegation of review and decision-making responsibilities has occurred.

Accordingly, upon review of the record, and the parties' submissions and for the reasons above, I VACATE the ALJ's Order Vacating Initial and Final Determinations and REMAND this case

to the ALJ for a hearing on the merits of the contested cost disallowances.

SO ORDERED.

Ann McLaughlin

Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: In the Matter of Idaho Miurant Council, Inc.

Case No. : 82-CTA-156

Document : Order of Remand

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