

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: April 27, 1990
CASE NO. 80-CETA-157

IN THE MATTER OF

MARIA HERNANDEZ,

COMPLAINANT,

v.

ORANGE COUNTY MANPOWER COMMISSION,
ET AL.,

RESPONDENTS.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Comprehensive Employment and Training Act (CETA or the Act), 29 U.S.C. §§ 801-999 (Supp. V 1981). ^{1/} The primary issue is whether compensatory damages are available to prevailing complainants under the CETA.

BACKGROUND

Orange County Manpower Commission (OCMC) is a CETA prime sponsor whose subrecipient, Casa **Placentia**, Inc. (CPI), wrongfully discharged Complainant Maria Hernandez, a former **CETA-**

^{1/} Effective October 13, 1982, the **CETA** was replaced by the Job Training Partnership Act (JTPA), 29 U.S.C. §§ 1501-1781 (1982). However, the CETA continues to govern administrative or judicial proceedings pending on October 13, 1982, or begun between October 13, 1982, and September 30, 1984. 29 U.S.C. § 1591(e).

participant employee, on June 8, 1978. Hernandez appealed her dismissal to the CPI board of directors and to OCMC. OCMC assigned the matter to a hearing officer who **issued** a decision on September 19, 1978, in which he found that the discharge was without good cause, as well as being procedurally improper. The hearing officer awarded Hernandez back pay from the date of her discharge until August 31, 1978 (the expiration date of the CETA grant under which she had been employed), attorneys' fees and "special and punitive damages" in compensation for apartment rent, moving costs, and expenses incurred in defense of an unlawful detainer action.

Thereafter, Hernandez requested that the Department of Labor (DOL) certify the **OCMC** hearing officer's decision for enforcement. The DOL Grant Officer subsequently affirmed the hearing officer's finding of improper discharge and order of back **pay**. The Grant Officer reversed the hearing officer's award of "**special** and punitive" damages and the attorneys' fee award on the ground that such awards were not authorized under the Act or regulations.

Hernandez appealed that determination to the Office of Administrative Law Judges. Administrative Law Judge (ALJ) Everette E. Thomas issued a Decision and Order (D. and O.) on December 5, 1980, upholding the back pay and damages awards. The **ALJ** considered the damages described by the OCMC hearing officer

as "special and punitive" to be compensatory in nature. The **ALJ** also affirmed the Grant Officer's denial of attorneys' fees. ^{2/}

On January 5, 1981, OCMC appealed the **ALJ's** compensatory damages award to the Secretary of Labor. On January 7, 1981, **Hernandez'** attorney wrote to the Secretary in partial support of the **ALJ's** decision, and on January 14 he petitioned the Secretary to modify the decision. On January 14, 1981, the Grant Officer urged the Secretary to review the **ALJ's** decision. On January 19, 1981, the Secretary issued an order asserting jurisdiction in the case and vacating and staying the **ALJ's** decision pending final determination. Only those portions of the **ALJ's** decision concerning compensatory damages and **OCMC's** joint and several liability have been challenged, and accordingly the finding of wrongful discharge and the order of back pay are not at issue. 20 C.F.R. § 676.91(f).

DISCUSSION

I. Compensatory Damases

The **ALJ** determined that the CETA and its implementing regulations authorized compensatory damages awards when traditional remedies, e.g., reinstatement, were unavailable

^{2/} CETA legislation, enacted in 1973, Pub. L. No. 93-203, 87 Stat. 839, was revised by the CETA amendments of October 27, 1978, Pub. L. No. 95-524, 92 Stat. 1909. New regulations then were promulgated to implement the amendments. 44 Fed. Reg. 19,990 (April 3, 1979). While the hearing officer's decision was issued under former regulations, 29 C.F.R. Part 98 (1978), the **ALJ**, consistent with the parties' agreement, decided the case under the amended Act and new regulations, in particular 29 U.S.C. § 816(f) and 20 C.F.R. § 676.91(c). D. and O. at 2 n.2, 5.

through no fault of the CETA participant. D. and O. at 4. The ALJ reasoned:

29 U.S.C. § 816(f) gives the Secretary of Labor authority to "take such action or order such corrective **measures**" with respect to the aggrieved CETA participant "**as** necessary." Pursuant to the Act, the Secretary promulgated the remedial provisions of the CETA regulations authorizing orders of relief containing terms that are consistent with and that will effectuate the purposes of the Act. I find that 29 U.S.C. § 816(f) and 20 C.F.R. § 676.91(c) provide the necessary authority under CETA for an award of special damages when that is the only adequate method of compensating the complainant.

D. and O. at 5. I disagree. My reading of the statute persuades me that compensatory damages awards are not available to prevailing complainants under the CETA.

Relief generally available to persons wrongfully discharged is dependent upon the particular statute under which a claim is brought. Statutory relief may include (1) affirmative or corrective action necessary to correct the wrongful conduct, including reinstatement and associated restitution, e.g., back pay; (2) damages, typically compensatory or exemplary; and (3) reasonably incurred costs and expenses, including attorneys' and expert witness fees.

The CETA authorizes only the first form of relief. In particular, section 106(f) provides that upon determining that any grant recipient has engaged in discrimination, unlawful denial of benefits, or other failure, "**the** Secretary shall ... take such action or order such corrective measures, as necessary, with respect to the recipient or the aggrieved person, **or both.**"

(Emphasis added). ^{3/} The absence of language specifically authorizing recovery of damages, costs, or expenses strongly suggests that they are not available. ^{4/} I note that in related contexts the courts have read statutory provisions for "appropriate affirmative, corrective **action**" as meaning reinstatement or hire rather than the award of damages unless damages expressly are made available. See, e.g., Johnson v. Railway Express Agency, 421 U.S. 454, 457-460 (1975); Richerson v. Jones, 551 F.2d 918, 926-928 (3d Cir. 1977).

The remainder of section 106 supports this conclusion in that the Secretary is charged exclusively with taking "**action**" in

^{3/} Noting that the CETA requires the Secretary to institute "necessary" corrective measures, 29 U.S.C. § 816(f), and that the regulations permit sanctions which "**will** effectuate the purpose" of the CETA, 20 C.F.R. § 676.91(c), the court in City of Philadelphia v. U.S. Department of Labor, 723 F.2d 330, 333 (3d Cir. 1983), held that, read together, these provisions invoke back pay as a permissible, but not presumptive, remedy, and that such an award is justified only upon a particularized showing of appropriateness.

^{4/} Cf. 42 U.S.C. § 5851(b)(2)(B) (1982) ("Secretary shall order [discriminator] to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the **complainant.**") (on request, all costs and expenses, including attorneys fees, "**shall**" be assessed); 42 U.S.C. § 9610(b) and (c) (1982) (Secretary shall issue decision requiring violator "**to** take such affirmative action to abate the violation as the Secretary ... deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee to his former position with compensation"; award of reasonable "**costs and expenses (including the attorney's fees)**" also available).

furtherance of statutory purposes. ^{5/} Vis-a-vis CETA grantees, these actions generally include plan revocation and complete or partial termination of financial assistance, ordering appropriate sanctions or corrective actions, including the repayment of misspent funds from non-CETA sources, and the withholding of future funding. 29 C.F.R. § 816(c) and (d). ^{6/} The Secretary also is empowered to withhold funds otherwise payable in order to recover amounts unlawfully or improperly expended. 29 U.S.C. § 816(g). If withholding results from fraud or abuse, the Secretary may order a prime sponsor to proceed in conducting a program on the basis of other, non-CETA funding. Id. Finally, in order to ensure compliance, the Secretary may require participation in an audit program. 29 U.S.C. § 816(j).

Perhaps the most telling indication that relief is limited, however, appears at subsection 106(1) which reads: "The existence of remedies under this section shall not preclude any

^{5/} Purposes of the Act are to provide job training and employment opportunities for economically disadvantaged, unemployed, or underemployed persons and to ensure that training and other services lead to "employment opportunities and enhance self-sufficiency by establishing a flexible, coordinated, and decentralized system of Federal, State, and local programs." 29 U.S.C. § 801. The Act also is designed to provide for the "coordination of plans, programs, and activities under this Act with economic development, community development, and related activities, such as vocational education, vocational rehabilitation, public assistance, self-employment training, and social service programs." Id.

^{6/} Such actions are taken in the event of a pattern or practice of violative discrimination, failure to carry out fundamental purposes of the CETA, failure to proceed appropriately against other recipients, or conducting a public service employment program in violation of the Act or regulations.

person, who alleges that an action of a prime sponsor or of any other recipient violates any of the provisions of the Act or the regulations promulgated under the Act, from instituting a civil action or pursuing any other remedies authorized under Federal, State, or local **law.**" 29 U.S.C. § 816(1). This language suggests that a person aggrieved under subsection 106(f) may not be accorded a complete remedy under the CETA, i.e., that relief in the form of damages may be available as the result of other actions in other forums.

The legislative history of CETA is consistent. The Senate Report discusses as "sanctions" under section 106, revocation of sponsorship and termination or suspension of financial assistance. S. Rep. No. 891, 95th Cong., 2d Sess. 16, reprinted in 1978 U.S. Code Cong. & Admin. News (USCAN) 4495-4496. In discussing particular subsections, the report states:

Subsection (c) authorizes the Secretary ... to ... take such corrective actions as ordering the repayment of misspent funds, withholding future funding, and taking direct legal action against recipients, subgrantees, subcontractors and operators under nonfinancial agreements, or ordering the recipient to take legal action to recover misspent funds or protect the integrity of the program. ... Subsection (d) authorizes the Secretary to protect persons who either make complaints or testify against a recipient from actions by the recipient. Subsection (e) provides that nothing in this act precludes a person who alleges a violation of the act or regulations from instituting a civil action.

S. Rep. at 81; 1978 USCAN at 4561. The House Conference Report describes the Secretary as possessing authority under section 106 to take "corrective **actions**" or "**measures,**" and comments that the

existence of section 106 remedies "**does** not preclude a person from instituting a civil action or pursuing other remedies authorized under [other] **law[s].**" H. Conf. Rep. No. 1765, 95th Cong., 2d Sess. 125, 1978 **USCAN** at 4589-4590.

Thus, an examination of the statute and its history establishes that the primary object in authorizing the Secretary to take action under section 106 is to maintain the integrity of the CETA program by restoring plans to their intended operation and, in some instances, by eliminating recipients from further participation. Whereas reinstatement of a participant employee, with employment compensation, terms, conditions, and privileges, would represent an aspect of plan restoration, an award to compensate for injury to the employee, resulting from lack of income because of discrimination or failure, would not. Accordingly, I conclude that compensatory damages are not available under the CETA, ^U and the **ALJ's** damages award is reversed.

II. Liability of Grantee

In its brief to the Secretary, OCMC states that the **ALJ's** decision fails to specify which Respondent, OCMC or CPI, should compensate Hernandez for back pay. OCMC requests that the Secretary hold only CPI liable for payment.

^U In examining an analogous provision in the JTPA, 29 U.S.C. § 1574(g) and (h), and its history, I have found nothing to support a different outcome here. **See** S. Rep. No. 469, 97th Cong., 2d Sess. 121, reprinted in 1982 **USCAN** at 2636, 2743.

In San Diego Regional Employment and Training Consortium v. U.S. Department of Labor, 713 **F.2d** 1441 (9th Cir. 1983), the court determined that a prime sponsor could be held jointly and severally liable for a CETA violation committed by its subrecipient. In an attempt to decentralize the planning and administration of employment programs, the CETA invests prime sponsors with the responsibility to supervise, police, and enforce against its subgrantees in order that their programs operate properly and effectively. *Id.* at 1444-1445. The court cited Milwaukee County v. Peters, 682 **F.2d** 609, 612 (7th Cir. 1982), which states:

[T]he overall scheme of the CETA program is that the Department of Labor will deal primarily with its grantees, and grantees will have responsibility for further ramifications of the program. Specifically, the grantee has responsibility for the "development approval and operation of all contracts and **subgrants**" 29 C.F.R. § 98.27(d). . . . Holding the prime **sponsor** liable for back pay **awards is** consonant with the legislative scheme.

Moreover, "[a] grantee may arrange for another entity to perform the grantee's obligations under the latter's CETA agreement with this Department, but doing so does not divest the grantee of liability for nonperformance of those obligations." U.S. Department of Labor v. California Indian Manpower Consortium, Inc., Case No. 85-CTA-124, Sec. Final Decision and Order, October 25, 1988, slip op. at 4. See Colorado Department of Labor & Employment v. U.S. Department of Labor, 875 **F.2d** 791, 801-802 (10th Cir. 1989) (without question, prime sponsor can be held liable for violation of regulations by subrecipient).

Accord City of Gary, Ind. v. U.S. Department of Labor, 793 F.2d 873, 875 (7th Cir. 1986); Action, Inc. v. Donovan, 789 F.2d 1453, 1460 (10th Cir. 1986). Accordingly, I hold OCMC jointly and severally liable with CPI for payment of back pay to Hernandez.

ORDER

Orange County Manpower Commission and Casa **Placentia**, Inc., shall pay Complainant Maria Hernandez back pay compensation computed at her most recent CPI rate from June 8, 1978, until August 31, 1978, less any wages earned by her during that period. Prejudgment and postjudgment interest shall be paid pursuant to the rates established under 26 U.S.C. § 6621 (1982) through the actual date of payment made pursuant to this Final Decision and Order. City of Chicago v. U.S. Department of Labor, 753 F.2d 606, 608 (7th Cir. 1985) (award of prejudgment interest appropriate under the CETA as inherent component of back pay remedy); Taylor v. Hampton Recreation and Hampton Manpower Services, Case No. 82-CETA-198, Sec. Final Decision and Order, April 24, 1987, slip op. at 10-12. ^{8/}

For applicable payment rates through March 31, 1990, see Internal Revenue Service News Release IR-89-137 and rate table

^{8/} This method has been approved in determining prejudgment interest on NLRA and Title VII back pay awards. See, e.g., Florida Steel Corp., 231 NLRB No. 117, 1977-78 NLRB Dec. (CCH) par. 18,484 at 30,713-30,714 (1977); EEOC v. FLC & Bros. Rebel, Inc., 663 F. Supp. 864, 869 (W.D. Va. 1987), aff'd, 846 F.2d 70 (4th Cir. 1988); EEOC v. Wooster Brush Co., 523 F. Supp. 1256, 1268 (N.D. Ohio 1981), aff'd in relevant part sub nom. EEOC v. Wooster Brush Co. Employees Relief Ass'n, 727 F.2d 566, 579 (6th Cir. 1984); EEOC v. Pacific Press Pub. Ass'n, 482 F. Supp. 1291, 1319-1320 (N.D. Cal. 1979), aff'd, 676 F.2d 1272 (9th Cir. 1982).

CERTIFICATE OF SERVICE

Case Name: In the Matter of Maria Hernandez v. Orange County
Manpower Commission, et al.

Case No. : 80-CETA-157

Document : Final Decision and Order

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