

U.S. DEPARTMENT OF LABOR

SECRETARY OF **LABOR**
WASHINGTON, D.C.

DATE: May 31, 1991
CASE NO. 79-CETA-269

IN THE MATTER OF
IRVING SIEGEL

v.

PROJECT COPE, **NORWOOD** CETA
CONSORTIUM, MASSACHUSETTS
BALANCE OF STATE PRIME SPONSOR,
AND U.S. DEPARTMENT OF LABOR.

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/} and promulgated regulations. The Complainant, Irving Siegel, **filed** exceptions to that part of the Decision and Order (D. and O.) of the Administrative Law Judge (ALJ), finding that Complainant was not discriminated against because of his handicap. The case was accepted for review as provided under the applicable regulations.

BACKGROUND

~~Complainant filed a CETA complaint in the complaint program for~~
training program conducted by Project COPE, a contractor for the

^{1/} CETA was repealed effective October 12, 1982. The replacement statute, the Job Training Partnership Act, 29 U.S.C. §§ 1501-1791 (**1988**), provides that pending proceedings under CETA are not affected. 29 U.S.C. § 1591(e).

subgrantee, **Norwood** CETA Consortium. The training consisted of fifteen weeks of classroom instruction beginning in January 1978, followed by a twelve week internship ending in July 1978 with Digital Equipment Corporation (Digital), a private firm. D. and O. **at 2**; Transcript (T.) at 50; Complainant's Exhibits (CX) 1-L, **1-M, 8.**

Initially Project COPE rejected Complainant because of poor results on a vocational screening test, but he was admitted later based on **a** letter of recommendation by the Massachusetts Rehabilitation Commission and because of his motivation and persistence. Respondent's Exhibit (RX) 6; CX 3; T. at 42, 171-72. He completed the classroom instruction and was assigned an internship at Digital along with another Project COPE participant. T. at 57-58.

At Digital, Complainant experienced problems with the work, which he attributed to improper supervision. T. at 65-67. He was reassigned eventually to the library for training as a computer tape librarian. T. at 86. Although Complainant initially did satisfactory work there, his supervisor at Digital did **not recommend him for hire.** T. at **239.**

On July 31, 1978, **Complainant filed** a grievance with the **subgrantee, alleging that the internship had not been properly** conducted. CX 1-H. The subgrantee denied the grievance by letter dated August 11, 1978. **CX 1-F.** The grantee, Massachusetts Balance of State Prime Sponsor, affirmed the denial on February 22, 1979. CX 1-A. The Grant Officer, in a final

determination dated September 10, 1979, concurred in the grantee's decision.

Before the ALJ, Complainant argued that the Department of Labor was responsible for procedural abuses in failing to investigate his CETA grievance and failing to make a timely final determination. D. and O. at 1-2. Complainant also alleged that he was denied the opportunity to make sufficient discovery prior to the hearing. D. and O. at 10. The ALJ concluded that there was no need for any additional investigation nor was there any procedural abuse which was in his power to correct. D. and O. at 12. As to the discovery issue, the ALJ stated that the administrative file contained no information of efforts to obtain discovery or use of the subpoena power to obtain testimony. D. and O. at 10.

Complainant alleged that the subgrantee and grantee violated the Act by referring him to Project COPE despite the assessment that he did not have sufficient aptitude to gain employment in his area of training. He also argued that they violated the Act by failing to provide supportive services, particularly job **training and individual counseling, necessary for him to** participate successfully in Project **COPE. Finally Complainant asserted that, as a qualified handicapped person, he was afforded** an internship at Digital which was unequal and inferior to that afforded the other intern placed there by Project COPE. D. and O. at 1.

The ALJ decided that neither the subgrantee nor the grantee violated the Act by referring Complainant to Project COPE despite the assessment of his poor aptitude for computer programming. D. and O. at 9. He also concluded that Complainant was not denied supportive services in that instruction was provided to the point that any more would have required the supervisors to do the job themselves. Additionally, the ALJ found that it was within Project COPE's discretion to suggest psychiatric counseling as a means of accommodating Complainant's anxiety. D. and O. at 10. Concerning the alleged unequal and inferior internship, the **ALJ** found that the only evidence regarding disparate treatment was the case of the other intern who was not shown to be in need of counseling or psychiatric service, whereas Complainant was in need of such service. Under the circumstances, the ALJ concluded that it was a legitimate decision on the part of Project COPE to determine if Complainant's impairment could be ameliorated rather than adjusting the training environment and there was, therefore, no violation of the anti-discrimination provisions of CETA and the Rehabilitation Act of 1973. D. and O. at 11.

DISCUSSION

A. Procedural Issues.

Complainant contends that the Grant Officer's response should be disregarded because it was not "partially or fully in support of" **Complainant's** petition as required by the June 5, 1981, Notice of Amended Response and Reply Schedule. Complainant's Reply (C. Reply) at 6. The notice does not limit

the Grant Officer to responding in favor of the Complainant. Rather, it sets a time frame for **receipt** of parties' responses, and I have considered all filings by the parties. ^{2/}

Before me Complainant again contends that there was no investigation of his CETA grievance. C. Reply at 4. A review of the record, however, discloses, as the ALJ found, that there was ample information available concerning the issues raised in the grievance. This included performance evaluations, progress reports, a letter of recommendation, a vocational assessment and a counselor's report. CX 1-1, J, L, M and N; CX 3; RX 6; and cx 9. I therefore reject Complainant's contention.

Complainant next alleges that, in accordance with 20 C.F.R. § 676.86(b)(9) (1979), the portion of his complaint involving disparate treatment of a handicapped individual should have been referred to a Department of Labor Equal Employment Opportunity officer for investigation and handling pursuant to 29 C.F.R. Part 31. C. Reply at 6,7. Section 676.86(b)(9) provides in relevant part that "[c]omplaints alleging discrimination on the basis of ... handicap ... shall be investigated by a Department of Labor EEO officer and otherwise handled in accordance with the federal level procedures set forth at 29 C.F.R. Part 31, . . ." (emphasis added). The complaint here

^{2/} Complainant argues against considering the response "filed on behalf of Hershey [sic] Products, Inc.," asking "[w]ho is Hershey [sic] Products, Inc., and what interest does it have in this matter?" C. Reply at 5. Complainant's grievance identifies the respondent as Project COPE Hersey Products, Inc. CX 1-H. See also progress reports headed Project COPE Hersey Products, Inc., CX 1-M. This argument is rejected.

states only that "Mr. Siegel received inadequate internship training substantially different from the other intern" CX1-D. It is in the Supplemental Prehearing Statement, at 2-3, presented at the hearing, that Complainant alleges handicap discrimination and for the first time purports to invoke the protections of Section 504 of the Rehabilitation Act of 1973. Section 676.86(b)(9), however, provides for referrals of handicap discrimination cases only where the allegation is made in the complaint. Inasmuch as Complainant was represented by counsel before the Grant Officer and failed to allege handicap discrimination in the complaint, there is no basis for referring that issue to an EEO officer for an investigation. Accordingly, I vacate that part of the D. and O. which makes findings under the Rehabilitation Act of 1973 and dismiss the claim as to that issue.³

Complainant's assertion of error concerning the time limitations in the Act for handling CETA grievances, C. Reply at 4, is denied. Brock v. Pierce County, 476 U.S. 253, 266 (1986).

B. Handicap Discrimination

Discrimination based on handicap is proscribed by Section 132(a) of CETA, which provides in relevant part that "[n]o person . . . shall on the ground of ... handicap ... be subjected to discrimination under ... any program or activity funded in

^{3/} No prejudice to any concern of Complainant is apparent by this ruling because the basic merits of the handicap discrimination claim are reviewed infra under CETA.

whole or in part with funds made available under this chapter." 29 U.S.C. § 834(a). See also 29 C.F.R. § 98.21(b) (1979).

CETA protects only workers who, despite a handicap, remain qualified for their job. Cook v. United States Department of Labor, 688 F.2d 669, 670 (9th Cir. 1982). An otherwise qualified person is thus one who is able to meet all of a program's requirements in spite of his handicap. Southwestern Community Colleae v. Davis, 442 U.S. 397, 406 (1979).

Complainant has identified his alleged handicaps as anxiety and chronic lower back pain, Complainant's Petition for Review (C. Pet.) at 2, although it is by no means clear which he views as the asserted basis for his discrimination claim. ^{4/} Irrespective of this, the credible record evidence does not support a claim of discrimination against Complainant, on the basis of handicap or otherwise.

Complainant alleges that the other intern at Digital received more closely supervised training. C. Pet. at 2. I find this contention refuted by the bulk of the other testimony ^{5/} and other evidence of record. ^{6/} Specifically, there was

^{4/} Complainant's claim that he received less supervision and training than a fellow CETA participant seems to relate more to accommodation of Complainant's asserted anxiety than to his back pain.

^{5/} Complainant produced no witnesses to corroborate his allegations.

^{6/} Complainant alleges that the ALJ found convincing evidence cited to show that in the initial weeks at Digital his training was left largely to his own devices. C. Reply at 15.

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testimony that Digital complained that Complainant could not do anything without being so closely supervised that the supervisor might as well have done the work. T. at 177, 264. While Project **COPE's** vocational rehabilitation counselor acknowledged that Complainant needed considerable structured supervision, she concluded that he was provided with the necessary supervision. **U** T. at 252, 264. Under these circumstances, providing Complainant even closer supervision would have imposed an undue hardship on Digital and be tantamount to Complainant's admitting that he was not otherwise qualified to perform his job at Digital because it would have required Digital to substantially lower its standards to accommodate him. See Davis, 442 U.S. at 413. Complainant would then not be entitled to protection under CETA. cook, 688 **F.2d** at 670.

Complainant argues that the **ALJ** erred by not allowing him to cross examine the Project COPE Director to elicit testimony as to the nature of the other intern's disability and the training he received. C. Reply at 12-13. See T. at 164, 216. While in most cases this information might be germane, here the evidence establishes that Complainant received. the **maximum supervision** possible consistent with his being considered otherwise qualified

Complainant misreads the **ALJ's** decision. The ALJ used these words in recounting Complainant's arguments, not in making findings. See D. and O. at a.

U A CETA recipient had to make reasonable accommodation to the limitations of an otherwise qualified handicapped applicant unless it could demonstrate that the accommodation would impose an undue hardship on the operation of its program. 29 C.F.R. **§ 32.13 (1979) (superseded)** .

to do the job assigned to him. Moreover, there is evidence in the record that the other intern was performing at a much higher level at Digital than Complainant and would, therefore, presumably have needed and received far less supervision. **See** cx 1-I. Accordingly, the ALJ, by refusing to admit evidence on this issue, committed at most harmless error.

The record suggests that the most significant factor in complainant's difficulties at Digital was not lack of training, but his own disruptive behavior which not only impeded his own development, but was a hindrance to other employees. T. at 152, 175, 224 and 231; CX **1-J**, L and N; RX 6; CX 9. In this regard, the Attorney General has declared, in an opinion concerning handicap discrimination, that "[a] person's behavioral manifestations of a disability may also be such that his employment would be unduly disruptive to others, and (applicable federal law] presumably would not require unrealistic accommodations in such a situation." 43 Op. **Att'y** Gen. No. 12 (1977).

In response to this situation, Project COPE suggested **counseling** in the hope that it would make Complainant **a better programmer and** more employable. T. at 181, 236, 245 and 246; **CX 9. Complainant, however,** never availed himself of these opportunities for help with his asserted behavioral problems. In my judgment, both Project COPE and Digital, by retaining Complainant in their respective programs and offering training

and counseling, fully met their obligations under CETA and neither is responsible for handicap discrimination under the Act.

CONCLUSION AND ORDER

For the foregoing reasons, I conclude that Project COPE made a reasonable accommodation to Complainant on the basis of any asserted handicaps and that he was not subjected to discrimination or unequal treatment in violation of CETA. The **ALJ's** D. and O. is therefore AFFIRMED as to the CETA complaint. For the reasons discussed supra, the complaint alleging violation of the Rehabilitation Act of 1973 is dismissed.

SO ORDERED.


Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: In the Matter of Irvins Siegel v. **Project COPE**,
Norwood CETA Consortium, Massachusetts Balance of
State Prime **Sponsor**, and U.S. **Department** of Labor

Case No. : 79-CETA-269

Document : Final Decision and Order

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