

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: September 26, 1991
CASE NO. 84-CPA-38

IN THE MATTER OF

WALTER B. NORWOOD,

COMPLAINANT,

v.

STATE OF ALABAMA DEPARTMENT
OF INDUSTRIAL RELATIONS, and
STATE OF ALABAMA DEPARTMENT
OF ECONOMIC AND COMMUNITY AFFAIRS,

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/} and regulations at 20 C.F.R. Parts 675-680 (1990). Respondents filed exceptions to the Decision and Order (D. and O.) of the Administrative Law Judge (ALJ) holding that their failure to select Complainant for a position in the 1983 Summer Youth Employment Program (SYEP) violated the requirement that such jobs be awarded among the most severely disadvantaged in an

^{1/} CETA was repealed effective October 12, 1982.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).

equitable manner. D. and O. at 7. Respondents also contested the **ALJ's** back pay order.

BACKGROUND

On May 6, 1983, Complainant, Walter B. **Norwood**, applied for the 1983 SYEP through the Alabama State Employment Service (ASES). Exhibit (**Ex.**) 2. Complainant had worked in the SYEP in 1982 at Leroy High School in Washington County, Alabama. **Id.**; Administrative File (A.F.) Tab H at 24. Respondents again selected that facility as one of the work sites for the 1983 SYEP. A.F. Tab H at 97. ASES certified Complainant as eligible for the 1983 SYEP, Ex. 2, but did not place him at Leroy High School or any other location.

Complainant filed a complaint on September 22, 1983, with the State Office of Employment and Training, challenging his **non-**selection and seeking back pay for the period he would have worked. A.F. Tab G. A hearing was held on October 31, 1983, and on November 16, 1983, the hearing officer issued a decision denying the complaint, finding that the failure to select Complainant did not violate CETA or any of its implementing regulations. **Id.** The Department of Labor's Regional Administrator upheld that decision, concluding that there was no evidence that Respondents acted improperly in not selecting Complainant for the 1983 SYEP. A.F. Tabs B, F.

Before the **ALJ**, the parties agreed to waive a full hearing and submit the case for decision on the record consisting of the administrative record, the pleadings and exhibits introduced at

the hearing. Transcript at 5. In his decision, the AU noted that 20 C.F.R. § 680.207(a) requires prime sponsors to submit a SYEP subpart incorporating the Youth Employment Training Program (YETP) requirements to describe the methods used to recruit, select and verify applicants. 20 C.F.R. § 680.207(d)(3)(iv). D. and O. at 5. The YETP regulations require that the subpart "describe the criteria to be used to select youth that are most in need. ..." 20 C.F.R. § 680.5(c)(3)(i).

Respondents' SYEP 1983 Guidelines, Ex. 1, required each participant to meet the eligibility criteria ^{2/} and to come from established target groups. Id. at 3. The target groups were: 1) high school dropouts, 2) handicapped youths, 3) minorities and 4)' most severely economically disadvantaged. Id. at 16.

The record includes Complainant's application as well as those of the four participants selected for employment in the 1983 SYEP at Leroy High School. Ex. 2; Ex. 3 at 40; A.F. Tab H at 97. Of the five, none was a high school dropout or handicapped and all are minorities. The **ALJ** found that Complainant was the "**most** severely economically disadvantaged" based on family income. D. and O. at 3, 6. See also A.F. Tab H at 40-41; Ex. 2. Thus, the AI.7 concluded, Complainant **equalled** or exceeded the needs of the others selected as established by the target groups. D. and O. at 6.

^{2/} For the SYEP, a participant had to be economically disadvantaged, see 20 C.F.R. § 675.4, and between the ages of 14 and 21. 20 C.F.R. § 675.5-10.

Because Complainant was economically the "**most** in need," the **ALJ** found it was incumbent on Respondents to show why he was not selected. ^{3/} They failed to do so because the individual in charge of selection did not know why Complainant was not selected. Id.; A.F. Tab H at 104. The **ALJ** concluded, based on 20 C.F.R. § 680.209(c), that Respondents had not proven that the jobs were awarded among the most severely disadvantaged in an equitable manner. He decided that Complainant was entitled to back pay for the period he would have worked while enrolled in the 1983 SYEP. D. and O. at 6.

DISCUSSION

I. Failure to Select Comolainant

Section 484 of CETA, 29 U.S.C. § 945, provides that the SYEP "**shall** meet such regulations, standards and guidelines as the Secretary shall establish." Under applicable Department of Labor regulations, prime sponsors are required to provide services "**to** those individuals most in need among its economically

^{3/} The **ALJ**, citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a Title VII discrimination case, also stated that Complainant established a prima facie case for selection which Respondents have not refuted. D. and O. at 7. Both Respondents and the Grant Officer argue that the **ALJ** thereby improperly shifted the burden of proof. Respondents' Initial Brief at 6; Grant Officer's Brief at 10. I disagree.

Although the elements necessary to establish a prima facie case may differ between CETA cases and discrimination cases, the effect of doing so is to shift only the burden of going forward with the evidence. See Black's Law Dictionary 1071 (5th ed. 1979). In CETA cases the party requesting the hearing -- in this case the Complainant -- has the burden of establishing facts and entitlement to relief. 20 C.F.R. § 676.90(b). I see no indication that the **ALJ** shifted the burden of proof to Respondents in this case.

disadvantaged youth [^{4/}] population. . . . Such services shall be provided on an equitable basis. . . ." 20 C.F.R. § 680.206(a). Additionally, each prime sponsor must "ensure . . . that jobs are awarded among the most severely disadvantaged in an equitable **fashion.**" 20 C.F.R. § 680.209(c).

Although the phrase "**most in need**" is not defined, the references in Sections 680.206(a) and 680.209(c) ^{5/} to services being "**provided on an equitable basis**" and jobs being awarded "**in an equitable fashion**" suggest, as argued by the Grant Officer and Respondents, Grant Officer's Brief (G.O. Br.) at 3, 7; Respondents' Initial Brief at 4-5, that there need not be a precise ranking of applicants. In this case, Respondents' Guidelines identified at least five applicants being considered for positions at Leroy High School ^{6/} who met the eligibility criteria and came from a target group and, therefore, met the threshold requirements for "**most in need.**" See Ex. 1 at 3.

The Guidelines Selection Criteria include the target groups, applicant interests/motivation and work site availability. The

^{4/} "**Economically disadvantaged youth**" describes the general eligibility criteria for the SYEP. See note 2 suora.

^{5/} While Section 680.209(c) does not include the phrase "**most in need,**" the phrase "most severely disadvantaged" seems functionally equivalent because each phrase describes a smaller category with similar, if not identical, attributes, among those applicants satisfying the general eligibility criteria.

^{6/} The record includes only the applications of Complainant and those selected, and is silent as to whether there were other applicants considered for positions at Leroy High School who met the criteria for most in need. See discussion at page 3 suora.

latter two factors do not differentiate Complainant from the selected applicants as the record demonstrates, and none of the parties disputes, that Complainant was interested in the work available at Leroy High School and could find transportation to the work site. As the **ALJ** found, D. and O. at 6, the four selected participants and Complainant are minorities and Complainant was the most severely economically disadvantaged. **U**

As a result of satisfying more of the selection criteria, Complainant was the best qualified under the Guidelines. **S**
 Because Complainant was best qualified under Respondents' Guidelines, and Respondents have offered no reason why failing to select him was equitable, he should have been awarded one of the 1983 SYEP jobs at Leroy High School. In this circumstance, Respondents' failure to select him constitutes a violation of the Act and the regulations. **See** 29 U.S.C. § 945; 20 C.F.R. § 680.209(c). **U**

U Complainant's total family annualized income at the time of application was \$0.00. The next most economically disadvantaged applicant had a total family annualized income of **\$5,162.00**.
 Ex. 2.

S The grantee's Guidelines' Selection Criteria provide that "[i]f two applicants are equally qualified in all other respects, the applicant who has not participated in past programs should receive preference." Ex. 1 at 16. Since Complainant was the best qualified, none of the other applicants would benefit from this preference, even though Complainant had prior participation. Moreover, one of the other applicants who was selected also had prior participation, **See** Ex. 2.

U Neither the Act nor the Department of Labor regulations mandated these particular selection criteria; they were determined and listed, but not otherwise defined, Ex. 1 at 16, by the grantee. Had Respondents adopted different selection
 (continued...)

II. Back Pay

An award of back pay is proper in CETA cases as a **remedy** to make whole an aggrieved party. 20 C.F.R. § 676.91(c); County of Monroe, Florida v. United States Department of Labor, 690 F.2d 1359, 1362 (11th Cir. 1982). Here the Grant Officer argues that Complainant is not aggrieved because he has shown, at most, procedural deprivations in the SYEP selection process. G.O. Br. at 13-17. He states that the test for whether back pay should be awarded is **"if** the proper procedures had been followed, would he [Complainant] have been **selected.**" G.O. Br. at 17.

I agree that this is the proper test for back pay, but conclude, contrary to the Grant Officer, that Complainant has satisfied its requirements. For the reasons stated supra, if Respondents' Guidelines had been applied properly, Complainant, as the best qualified applicant, would have been selected. The **ALJ's** award of back pay, therefore, was proper. ^{10/}

^{9/} (. . .continued)

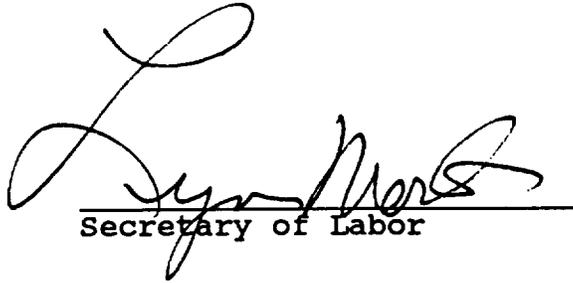
criteria or further explained or weighted these criteria, greater flexibility in selecting participants could have been preserved and this case might have been resolved differently.

^{10/} In addition to back pay, Complainant seeks pre-judgment interest on the award. Brief of Complainant at 17. The **ALJ** did not award interest and Complainant failed to file exceptions to that part of the ruling. Although, a prevailing party need not always file exceptions to contest certain aspects of an **ALJ's** decision, where, as here, he seeks to alter the judgment to enlarge his rights, filing exceptions is necessary. In the Matter of U.S. Department of Labor v. City of Tacoma, Washinaton, Case No. 83-CTA-288, Sec. Order, Oct. 24, 1990, slip op. at 3-4. Complainant, therefore, has waived his right to contest the **ALJ's** failure to award interest. See also 20 C.F.R. § 676.91(f).

CONCLUSION AND ORDER

For the foregoing reasons, I conclude that **Respondents** violated the Act and regulations by failing to select Complainant for the 1983 SYEP and that Complainant is entitled to back pay for the period he would have been employed. The **ALJ's** D. and O. is therefore AFFIRMED.

SO ORDERED.



Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: In the Matter of Walter B. Norwood v. State of Alabama Department of Industrial Relations and State of Alabama Department of Economic and Community Affairs

Case No. : **84-CPA-38**

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following persons on SEP 26 1991.

Kathleen Gorham

CERTIFIED MAIL

G. Marie Daniels
Legal Services Corp. of Alabama
103 Dauphin Street, Suite 601
Mobile, AL 36602

Walter B. **Norwood**
Route 1, Box 136
Wagarville, AL 36585

J. Thomas Smitherman
Counsel for Respondent
Alabama Department of Economic
and Community Affairs
3465 Norman Bridge Road
Montgomery, AL 36105

Craig A. Donley
Counsel for Respondent
Alabama Department of
Industrial Relations
649 Monroe Street
Montgomery, AL 36130

HAND DELIVERED

Charles D. Raymond
Associate Solicitor for Employment
and Training Legal Services
Attn: **Margrit** W. Vanderryn
U.S. Department of Labor
Room N-2101
200 Constitution Avenue, N.W.
Washington, DC 20210

REGULAR MAIL

David O. Williams
Office of Financial Administrative
Management
Charles Wood
Chief, Division of Audit Resolution
Linda Kontnier
Office of Debt Management
U.S. Department of Labor
200 Constitution Ave., N.W.
Room N-4671
Washington, DC 20210

Bobbye Spears
Regional Solicitor
U.S. Department of Labor
1371 Peachtree Street, N.E.
Atlanta, GA 30367

Hon. Nahum **Litt**
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Department of Labor
800 **K** Street, N.W., Suite 400
Washington, D.C. 20001-8002

Hon. John Vittone
Deputy Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Department of Labor
800 **K** Street, N.W., Suite 400
Washington, D.C. 20001-8002

Hon. Quentin P. **McColgin**
Administrative Law Judge
Office of Administrative Law Judge
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005