

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BOSTON, MASSACHUSETTS

**Issue Date: 14 May 2013**

CASE NO.: 2012-WIA-00011

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*In the Matter of:*

**THE WORKPLACE, INC.,**  
*Complainant*

v.

**U.S. DEPARTMENT OF LABOR,**  
*Respondent*

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*Before:* Jonathan C. Calianos, Administrative Law Judge

*Appearances:*

Alan J. Tyma, Esq. (Ryan & Tyma, LLP), Shelton, Connecticut, for the Complainant

Jonathan R. Hammer, Esq. (U.S. Department of Labor, Office of the Solicitor), Washington D.C., for the Respondent

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**DECISION AND ORDER DENYING CLAIM**

**I. Background on the Senior Community Service Employment Program**

This matter arises under the provisions of the Senior Community Service Employment Program (“SCSEP”), authorized by the Older Americans Act, as amended, 42 U.S.C. § 3056, *et seq.* and the applicable regulations found at 20 C.F.R. Part 641, 20 C.F.R. § 641.100 *et seq.* The SCSEP, which is administered by the U.S. Department of Labor (“DOL”), was created to aid unemployed, low-income individuals ages 55 or older, particularly those who have poor employment prospects, by placing them in part-time community service positions and assisting

with the transition to unsubsidized employment.<sup>1</sup> 42 U.S.C. § 3056(a)(1); 20 C.F.R. §§ 641.110, .120.

To carry out the SCSEP, the Secretary of Labor may make grants to public and nonprofit private agencies and organizations, agencies of a State, and tribal organizations. 42 U.S.C. § 3056(b)(1). The grant involved in this matter is a National grant, as opposed to a State grant. 20 C.F.R. §§ 641.140, .400. In order to apply for a National grant, an eligible entity must follow the application guidelines published by the DOL in a Solicitation for Grant Application (“SGA”) announcing the availability of SCSEP funds. 20 C.F.R. § 641.410. In selecting eligible grantees, the DOL takes into consideration the rating criteria described in the SGA. 20 C.F.R. § 641.420. The DOL may reject any application that the Grant Officer (“GO”) determines unacceptable based on “the contents of the application, rating score, past performance, fiscal management, or any other factor the [GO] believes services the best interest of the program, including the application’s comparative rating in a competition.” 20 C.F.R. § 641.465(b).

If an applicant is not selected for a grant, it may request from the GO a debriefing on why it was not selected, and may request a hearing with the Office of Administrative Law Judges (“OALJ”). 20 C.F.R. § 641.900(a). If an administrative law judge determines that a rejected organization should have been selected, and the organization continues to meet the requirements, the matter must be remanded to the GO. 20 C.F.R. § 641.470(c).

## **II. Statement of the Case**

On July 26, 2012, the DOL informed The Workplace Inc. (“The Workplace” or the “Complainant”) that it was not selected for the SCSEP National Grant, Funding Opportunity Number SGA/DFA PY-11-04. DOLX-B at 5. On July 27, 2012, The Workplace requested evaluative feedback on its application, which the DOL sent on July 30, 2012. DOLX-B at 1-4. On August 17, 2012, The Workplace appealed the DOL’s denial of its grant application, pursuant to 20 C.F.R. § 641.900. DOLX-A at 7.

The matter was referred to the Office of Administrative Law Judges for a formal hearing, which was held on December 6, 2012, in New London, Connecticut. The parties appeared at the hearing represented by counsel, and I heard testimony from Laura Patton Watson (the Chief Grant Officer for the Employment and Training Administration) and Adrienne Parkmond (the

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<sup>1</sup> The SCSEP is a required partner under the Workforce Investment Act (“WIA”); thus it is part of the One-Stop Delivery System, and SCSEP grantees are required to follow all applicable rules under the WIA and its regulations. 20 C.F.R. § 641.200.

Executive Vice President of The Workplace). The following exhibits were admitted as full exhibits: Administrative Law Judge Exhibits (“ALJX”) 1-3; Department of Labor’s Exhibits (“DOLX”) A-F, and Complainant’s Exhibits (“CX”) 1-2. Hr’g Tr. (“TR”) 5, 6, 120, 128. The record was left open following the hearing for 14 days to allow for the submission of additional evidence. On December 20, 2012, the Complainant submitted CX-2, CX-3 and CX-4, which were admitted into evidence in full, and the record is now closed. The Complainant submitted a Post-Trial Brief (“Compl. Br.”) on March 8, 2013, and the Respondent submitted a Post-Trial Brief (“Resp. Br.”) on March 11, 2013.

Upon consideration of the record as a whole, I find that The Workplace has failed to meet its burden of establishing that the GO’s denial of its grant application was arbitrary and capricious. As such, The Workplace’s appeal is denied.

### **III. Stipulations and Issues Presented**

The parties stipulated to the following facts: (1) All documents contained in the Administrative File are true and accurate representations of the documents they purport to be; (2) all applicants with a score over 75 points were selected for an award under the SCSEP Program and no applicants with a score under 75 points were selected for an award under the SCSEP Program; and (3) Complainant received a score of 72 points and did not receive an award under the SCSEP Program.<sup>2</sup> ALJX-3.

Although The Workplace initially claimed that the denial of the grant was in retaliation for testimony by an employee of The Workplace before Congress in May 2012, The Workplace withdrew that argument on appeal during the formal hearing. *See* TR 100, 109; Compl. Br. 2. Thus, the only issue before me is whether the GO’s decision not to award grant funds to The Workplace was reasonable and not arbitrary and capricious, considering the GO’s establishment of a minimum score of 75 points to receive an award and the panelists’ scoring of The Workplace’s application. ALJX-3.

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<sup>2</sup> The parties stipulated to additional facts regarding whether the denial was the result of alleged retaliatory conduct. During the trial, The Workplace withdrew the retaliation argument, and any factual stipulations regarding that ground for appeal are intentionally omitted from this decision.

## **IV. Factual Background**

### **A. Witnesses**

Laura Watson, as the Chief Grant Officer for the Employment and Training Administration (“ETA”) of the Department of Labor (“DOL”), oversaw the process of selection and awards for the grant competition in which The Workplace was an applicant. TR 20. She conducted a “high level” review of panel scoring of applications and was involved in determining the score cut-off for awarding grants.

Adrienne Parkmond is the Vice President of The Workplace. TR 110. Prior to The Workplace, Parkmond worked for the Connecticut Department of Labor’s Workforce Development and Unemployment Insurance Programs. TR 110. She testified that she has been rating grant proposals for 20 years. TR 110. She was involved in The Workplace’s application for the grant that is the subject of this appeal, including writing the application, reviewing the application and its exhibits, and overseeing its electronic submission. TR 110.

### **B. The Application Process**

The Workplace previously received a grant under the SCSEP for the state of Connecticut in the prior grant session and successively performed the grant for five years. TR 76, 100. On March 8, 2012, the DOL published a Solicitation for Grant Applications (“SGA”) for the SCSEP National Grant for Program Year 2012. TR 21; DOLX-A at 20-62. The Workplace was deemed eligible to submit an application for the new grant period, and it placed a bid for Connecticut and Rhode Island.<sup>3</sup> TR 21, 26; DOLX-A at 63-160; DOLX-C at 1.

Each applicant is scored based on certain criteria identified in the SGA. Thirty percent of the applicants’ overall score is based on past performance and the remaining seventy percent is based on the written application. TR 21, 77. Watson explained that the written portion is important because “it allows us to see the programmatic aspects that the applicant can describe in words.” TR 77.

Watson described the grant competition as a two-stage competition. The first stage is selecting organizations based on their overall scores, and the second stage is matching up a predetermined number of slots with the organizations that were selected. TR 39.

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<sup>3</sup> Under the SGA, applicants were required to bid for at least two states. TR 26.

### **C. Past Performance**

Past performance of current grantees is determined using data from the SCSEP Performance and Results QPR System (“SPARQ”) for Program Years (“PY”) 2007-2010<sup>4</sup> and customer satisfaction surveys. A formula set forth in the SGA is applied to the relevant data. TR 81; DOLX-A at 42-47. The Workplace’s score for past performance was 19.02 out of 30, placing it in the third quartile, or below the top 50 percent of applicants. TR 22, 79; DOLX-D at 337. The scores for other past grantees ranged from 11.4 to 24.1 out of 30. TR 22; DOLX-D at 337.

### **D. Written Application**

There is a three-person panel that reviews the written applications; one panelist is a federal employee and the two remaining panelists are private sector, contract employees. TR 29. To recruit the external panelists, the DOL encourages individuals with the requisite expertise to submit their resume and a contractor reviews the resumes to ensure that the potential panelists have workforce experience. TR 30. Selected panelists attend an orientation to review the SGA criteria. TR 78.

The panelists are instructed to review each proposal against the rating criterion and sub-criterion found in the SGA and to deduct points for any weaknesses found, “appropriate to both the degree of the weakness and the point value associated with the relevant sub criterion.” DOLX-D at 26, 250; *see* DOLX-A at 40-52. In their evaluations, the panelists’ comments should be “objective and refer to specific evaluation criteria.” DOLX-D at 251. After the panelists review the applications independently, there is a scheduled conference call, or “deliberation call,” with a Deliberation Specialist to discuss the panelists’ point deductions. TR 85. After the call, the panelists may adjust their comments or scores if appropriate. DOLX-D at 260. The final narrative score is determined by adding the three panelists’ scores and dividing by three. TR 63.

Watson testified that the application is graded by what is written in the narrative, and references to external knowledge of an organization are not appropriate. TR 31. She testified that panelists consider only the information contained within the four corners of the application to avoid any potential unfair advantage. TR 78.

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<sup>4</sup> Program Year 2011 data was not used because the year was still in progress. DOLX-A at 42.

The Workplace received a score of 53 out of 70 on the narrative portion of the application. TR 29, 80. After learning it was not selected, The Workplace requested, and received, evaluative feedback from the DOL on its written application. TR 33, 112; DOLX-B at 1-4. Parkmond asserted that there were deductions based on panelists' comments that did not relate to the SGA criteria. TR 112. Watson agreed that it would be improper to deduct points for questions that were not asked, but opined that the panelists' reasons for deductions in The Workplace's application were covered by the questions asked in the SGA. TR 33. Watson did not find any significant deficiencies in the overall review of The Workplace's written application.<sup>5</sup> TR 38.

Several applicants received perfect scores on the application narrative, including Easter Seals, who received an award for Eastern Connecticut, and Vermont Associates, who received an award for the remainder of Connecticut. TR 27-28. Watson testified that she has seen more perfect scores on narratives recently because the grant writing profession has grown significantly over the last several years, and increased technology enables organizations to make applications look more impressive. TR 104. Watson testified that the perfect scores in this competition were not out of the ordinary. TR 104. In contrast, Parkmond testified that in all her 20 years of rating proposals, she has never seen a perfect score. TR 131.

#### **E. Setting the Floor**

After all the applicants are scored, the DOL determines a floor-- the lowest score it will accept to award a grant. TR 39, 58. When determining the floor, the DOL is aware of the applicants' total scores. TR 58. In setting the floor, Watson testified that they routinely set the cut-off score initially at 80 and the DOL determines how many organizations would be funded at that level. TR 27, 87. In this case, there were 12 organizations that scored 80 or above. TR 40. The SGA was seeking a total of 10-20 organizations to be funded through this grant solicitation, and in order to meet that goal, the DOL reviewed the scores to determine whether they could fund additional organizations by slightly reducing the floor. TR 87. By reducing the floor to 75,

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<sup>5</sup> Watson testified that she oversees 10 to 14 grant competitions at one time. TR 36. As such, she only spot-checks panel scoring of applications at a high level for significant deficiencies and does not compare deduction rationales against the SGA. TR 36, 83. The Workplace was one of the organizations within the sample of applications that that she reviewed at a high level and the review did not raise any red flags. TR 84. Watson further testified that in preparation for this hearing she did a more thorough review and her opinion was that the panelists' comments were reasonable and the points deducted were not egregious. TR 84.

the DOL determined it could add two additional organizations that had a score of 77, bringing the total to 14. TR 38, 40; DOLX-A at 24.

The Workplace had the next highest score, with total points of 72. DOLX-D at 343. Watson testified that in order to accommodate The Workplace, they would have had to lower the floor by an additional five points. She testified that the agency was not comfortable doing so because there was a significant gap between The Workplace's score and the organizations that scored a 77. TR 87. Watson testified that it may have been different if there were more organizations in between The Workplace's score of 72 and the cut-off of 77; however Watson explained that they look for a natural split in the scores and there was a "significant jump" from 77 down to The Workplace's score of 72. TR 56, 107.

Watson also stated that it is "significantly different to fund a lower 70's score application." TR 87. She testified that it was a "rare" and "very unusual occurrence" to fund an organization with a score in the low 70's, because a low 70 score typically means that there is "some kind of weakness with the organization." TR 40, 102. Overall, she estimated that 10% of competition floors are in the 70s. TR 103. Watson testified that it was a judgment call and within the GO's discretion not to decrease the floor below 75 points. TR 40.

In setting the floor at 75 points for this competition, the DOL did not look at any outside factors besides the scores. TR 54. It did not consider transition expenses associated with replacing an organization assigned to a state, or past performance of applicants. TR 54-55, 58. Watson explained that transition expenses were not considered because it was not a factor in the SGA, and because the law requires competitions, which assumes that transitions should take place if appropriate. TR 56, 86-87. Watson agreed that the number of available slots and allocation of funds were not dependent on the number of successful applicants. TR 53. Watson also acknowledged that they would have still been within 10-20 organizations if they had added The Workplace as a grantee. TR 53.

## **V. Findings of Fact and Conclusions of Law**

### **A. Standard of Review**

The SCSEP statute and implementing regulations do not provide a standard of review for administrative law judges ("ALJ") nor is there any relevant case law that addresses the standard of review. With that said, the parties in this matter cite to cases arising under Workforce Investment Act as the closest equivalent to the case at Bench. I find that these WIA cases

involving a GO's denial of grant applications are similar in nature to the instant proceeding and provide appropriate guidance on the standard of review under the SCSEP.

Review of a GO's denial of a grant "is limited to determining whether the Grant Officer's decision was arbitrary and capricious, an abuse of discretion, or not in accordance with the law." *United Am. Indian Inv., Inc. v. USDOL*, 2004-WIA-00003, PDF at 3 (ALJ June 13, 2005) (citations omitted); *Lifelines Found. v. USDOL*, 2004-WIA-00002 (ALJ Mar. 23, 2005); *United Tribes of Kansas and Se. Nebraska, Inc. v. USDOL*, ALJ No. 2000-WIA-00003, ARB No. 01-026 (ARB Aug. 6, 2001). This standard of review sets a very high threshold and is only overcome when a decision is based on an erroneous view of the law or a clearly erroneous assessment of the evidence. *United Am. Indian Inv., Inc.*, 2004-WIA-00003, PDF at 3. The role of the ALJ is to determine whether there is a basis in the record to support the GO's decision. *Commonwealth of Puerto Rico Dep't of Labor and Human Res., Right to Emp't Admin. v. USDOL*, 2008-WIA-00004, PDF at 8 (ALJ Sept. 26, 2008) (citing 20 C.F.R. § 667.825(c)). An ALJ may not substitute his or her own judgment for that of the GO; even if an ALJ disagrees with the GO's decision, the ALJ must uphold the GO's decision if it is determined to be reasonable. *Lifelines Found.*, 2004-WIA-00002, PDF at 7; *Commonwealth of Puerto Rico Dep't of Labor and Human Res.*, 2008-WIA-00004, PDF at 8; *Miss. v. Opportunities Work, Inc. v. Emp't and Training Admin.*, 2012-WIA-00001, PDF at 6 (ALJ June 26, 2012); *United Tribes of Kansas*, ARB No. 01-026, PDF at 5.

The burden on the GO is one of production, and to that end, the submission of the Administrative Record shifts the burden of persuasion to the complainant to overturn the GO's decision. *Our Savior's Business, Inc. v. USDOL*, 2010-WIA-00003, PDF at 4 (Oct. 21, 2010). The complainant's burden "is a heavy one." *Id.*

#### **B. Narrative Score**

The Workplace does not question the system established by the SGA for the panel review process; however it argues that the panelists failed to follow the process mandated. Compl. Br. 6. Specifically, The Workplace argues that there were at least 4 points deducted from its narrative for weaknesses not based on the criteria listed in the SGA. Compl. Br. 4. Despite The Workplace's contention, I find that the comments and deductions by the panelists were grounded in the SGA criteria, as discussed below.

Points were deducted because The Workplace “did not adequately identify methods of recruiting host agencies.” DOLX-B at 2. The Workplace argues that the SGA did not ask for methods of recruiting host agencies. Compl. Br. 6. However, Factor 2 of the Program Design criteria specifically asks about “recruiting host agencies to serve as training sites for older workers.” TR 60; DOLX-A at 41. Parkmond acknowledged that on page 3 and 4 of The Workplace’s application, it addressed the methods of recruiting, suggesting that The Workplace was aware that the SGA sought such information.<sup>6</sup> TR 133.

Points were also deducted because The Workplace did “not clearly identify bi-lingual staff.” DOLX-B at 2. Although The Workplace argues that the SGA did not ask about bilingual staff, Factor 3 of Program Design specifically requires information on “engaging bilingual staff in the local offices to serve a diverse population where applicable.” Compl. Br. 7; DOLX-A at 42. Parkmond conceded that the SGA asked for information regarding bilingual staff, but argued that the deduction was unfair because the SGA refers to bilingual staff “if applicable.” TR 115. She said it was not applicable, because all their participants speak English, and if they do not speak English, they are required to provide a translator. TR 114, 116. I do not find this argument persuasive. Without including any information regarding bilingual staff, even to say that is not applicable, the panelists cannot ascertain whether The Workplace met the criteria in Factor 3.

There was also a deduction because The Workplace “did not adequately identify the network of service providers or adequately describe how the participants will access these services.” DOLX-B at 2. Again, The Workplace argues that the SGA did not require this information. Compl. Br. 7. However, the panelist’s comment reasonably falls under Factor 3 of Program Design which requires applicants to describe how it “provide[s] or arrange[s] for supportive services that are necessary to successfully participate in a SCSEP project.” DOLX-A at 42.

Points were also deducted because The Workplace did “not adequately identify the measures it will take to address the needs of the minority populations served” and did “not address concise strategies for engaging the minority population.” DOLX-B at 2-3. Specifically,

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<sup>6</sup> The Workplace argues that Vermont Associates, who won the award for Connecticut, replacing The Workplace, did not mention methods of recruiting host agencies in its proposal, yet no points were deducted. TR 113-14. Contrary to The Workplace’s assertion, Vermont Associates did address methods of recruiting host agencies; specifically it discusses its use of information derived from employers and labor market analysis as its basis for selecting host agencies and host agency development. CX-2 at 1-3.

one panelist explained that although The Workplace acknowledged that its work with minority participants is a weakness, it failed “to create a stronger plan to address this weakness.” DOLX-D at 20, 23. Factor 3 under the criteria “Ability to Administer the Program” asks the applicant to provide at least one instance where it seeks to improve performance, such as service to minorities.<sup>7</sup> TR 68; DOLX-A at 48. At trial, Parkmond conceded that the SGA addresses “service to minorities” and The Workplace chose to address the service to minorities as its area for improvement. TR 117, 136.

The Workplace also argues that the SGA did not require it to “provide sufficient details on the frequency of monitoring participants work performance.” DOLX-B at 2. I find persuasive Watson’s explanation that this deduction is covered by Factor 3 of Program Design, which requires information on “assessing and developing IEPs for participants, ensuring training and assignments and any host rotations are consistent with participant’s IEPs” because these are all forms of monitoring participants. TR 37, 50; DOLX-A at 42.

Lastly, The Workplace argues that a panelist inappropriately deducted points for failing to “provide detailed information on outreach and recruitment efforts designed to attract program participants.” DOLX-B at 2. Watson testified that the deduction falls within the parameters of Factor 3 of “Ability to Administer the Program” regarding managing core services, although not explicitly stated. TR 65, 68; DOLX-B at 2. Upon my own review of the SGA, I find that the panelist’s cite to Factor 2—the “Ability to Administer the Program”—is not unreasonable. This factor requires information on how the applicant will select sub-recipients with expertise on serving participants with barriers to employment. Although the language is admittedly not an exact match, I do find that this Factor addresses a concern to reach out to participants, particularly those with employment barriers.

The Workplace has failed to establish that the panelists deducted points for criteria not found in the SGA, and therefore this is not a valid reason for reversing the GO’s decision. The panelists’ identified weaknesses were reasonably based on the SGA criteria, and the GO’s reliance on these scores did not lead to a decision that was arbitrary and capricious.

The panelists’ deductions went to the sufficiency of The Workplace’s responses, which was well within their discretion as reviewers. It is expected that the panelists, exercising their

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<sup>7</sup> Although one panelist mentioned “strategies” in the plural, as opposed to “one instance,” the deduction clearly falls within Factor 3, and goes to the sufficiency of The Workplace’s response.

own judgment, will score applications differently. The differences in various point deductions are natural given the individual personalities of the different scorers, and the somewhat subjective nature of determining the sufficiency of responses. These differences are accounted for by averaging the three panelists' scores.

The SGA states that in order to receive full credit “applicants must provide detailed information that does more than reiterate the requirement statement. Responses must be thoughtful and reflect a strategic vision for how applicants will meet these requirements.” DOLX-A at 41. Thus, detail is important in the application, and the panelists appropriately considered the adequacy of the statements provided in scoring the narrative, and reasonably relied on the criteria set forth in the SGA in doing so. The panelists provided reasons for their deductions and referred back to The Workplace’s application and the SGA. Determinations of whether the statements were sufficiently detailed are judgment calls solely for the panelists.<sup>8</sup> TR 51. It is not my place to conduct a second review of the application and rescore it, substituting my own judgment for that of the panelists.<sup>9</sup> See *United Am. Indian Inv., Inc. v. USDOL*, 2004-WIA-00003, PDF at 5-6 (June 13, 2005).

The Workplace relies on *Commonwealth of Puerto Rico v. USDOL*, 2007-WIA-00010 (ALJ Nov. 13, 2007), for the proposition that a misapplication of solicitation criteria results in a record that is not rational or legitimate. The case cited by The Workplace is inapposite because I have already found no misapplication of the SGA solicitation criteria when The Workplace’s application was scored. Additionally, in the cited case, the GO conceded that the grant denial decision was invalid because the panelists misapplied the SGA criteria by relying on standards

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<sup>8</sup> The Workplace points out that several applicants received perfect scores on the narrative portion of the scoring. I do not find this to be an issue of concern; Watson testified credibly that there are more perfect scores today, especially in light of the fact that many professional grant writers prepare the applications. Parkmond acknowledged that The Workplace wrote the proposal itself without the aid of a professional grant writer, perhaps accounting for its less than perfect score. TR 104, 110-11.

<sup>9</sup> While it is not my place to re-score the applications, even if I were to reconsider each individual deduction, there are clearly sections in the proposal that lacked the requisite amount of detail and did not explain how The Workplace would carry out certain goals, plans, or strategies. As just one example, in answering how they would improve the program through service to minorities, The Workplace conclusively wrote: “the service to minorities policy was reviewed with staff and priority of service was given to Hispanics until the appropriate enrollment levels could be achieved.” DOLX-A at 13. The Workplace did not discuss how they will target or attract the Hispanic population, and did not provide any specific plans or strategies. Even giving The Workplace the benefit of many doubts by looking at the actual deductions compared to the answers it provided, I agree with the panel’s reasoning for point deductions on account of lack of specificity or detail.

for non-state applicants while scoring a state applicant. *Id.* at 3-4, 6. The GO did not oppose summary judgment and supported the applicant's request to remand the case to DOL. *Id.*

### C. Scoring Floor

From what I can gather, The Workplace does not allege that the DOL's implementation of a scoring floor is unreasonable *per se*, but rather that DOL's decision to set the floor at 75 was arbitrary and lacked rationality.<sup>10</sup> Compl. Br. 12-13. I find that the DOL's use of a cut-off score set at 75 points was not arbitrary and capricious. Watson testified credibly<sup>11</sup> and provided a rational explanation for why the DOL decided to set the floor at 75, rather than reducing it further to 72 to include The Workplace as a grantee. The SGA provided a range of 10-20 organizations to be funded. TR 87; DOLX-A at 24. Watson testified that the DOL typically starts with a score of 80 as the floor and looks to see how many organizations would be funded at this level. In this case, there were 12 organizations that scored 80 or above, and given the mandate for 10-20 organizations, the DOL evaluated the scores to assess whether there were any organizations just below the 80 mark that could be funded. TR 40, 87. Upon review of the scores, DOL determined that it could gain two more organizations that had a score of 77 by reducing the floor by only 3 points. TR 38, 40; DOLX-A at 24. In doing so, DOL provided

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<sup>10</sup> The only WIA case addressing the validity of scoring floors is *Northwest Community Action Programs of Wyoming, Inc.[NCAPW] v. USDOL*, 2003-WIA-00005, PDF at 9 (ALJ Jan. 20, 2004). In that case, the SGA required the grant competition to be on a state by state basis; however, all applicants competed together in the scoring process irrespective of geographic location and needed to meet a minimum score to be a successful grant applicant. *Id.* at 7, 9. The ALJ found that the GO's use of a floor was inappropriate because it "converts the process to a nationwide competition, by comparing scores of applicants in one service area with scores of applicants in another service area." *Id.* at 7, 9. Because the competition in this matter is a nationwide competition and applicants had to apply for more than one state, the *NCAPW* case is not on point, and if anything, suggests that setting a floor is acceptable for a national grant competition.

<sup>11</sup> Credibility is not a major issue in this case, but to the extent that there are any credibility issues, I resolve them all in favor of Watson. Parkmond is the vice president of The Workplace and the author of the grant proposal in question. Her testimony at times appeared self-serving and biased. For example, when discussing the performance data from 2011 presented by The Workplace, Parkmond testified that The Workplace's performance results in 2011 were similar to and representative of its performance during the grant period of 2007-2010. TR 119. However, on cross-examination she admitted that she really had no idea where The Workplace ranked in various performance categories in the prior, applicable years. TR 129-30. Additionally, Parkmond initially testified that the SGA did not ask about methods of recruiting host agencies, and said that if she was asked about such methods, she would have provided an appropriate answer in the application. TR 113. However, when opposing counsel pointed to language in the SGA about "recruiting host agencies to serve as training sites for older workers," Parkmond testified that she did in fact identify methods for recruiting host agencies in the proposal. TR 133. Her answers are inconsistent and that weakens her credibility.

grants to 14 organizations, plus two set-aside organizations,<sup>12</sup> for a total of 16 organizations. This exceeds the midway point of the SGA mandate of 10-20 organizations. Watson explained that the DOL did not feel comfortable reducing the floor an additional 5 points to gain only one more applicant with a score in the low 70's. She testified that it was a "significant jump" with an unnatural break in numbers, as they would only pick up one additional applicant by lowering the floor 5 points. TR 40, 56, 87, 102. She also said it was rare to fund organizations with a score in the low 70's because that typically indicated that there is "some kind of weakness with the organization." TR 40, 102. Watson testified that it was a judgment call within the GO's discretion and it did not make sense to lower the bar any further in this instance. TR 40.

The Workplace argues that the DOL accepted 18 organizations for the prior grant period, and DOL could have easily added The Workplace, for a total of 17 organizations for this grant period. TR 106. However, there is no evidence of what the scores were in the last grant period, how close the scores were, what the cut off was, or how many organizations the SGA was looking to fund. Thus, I cannot infer anything from the number of organizations selected in the previous grant period.

The Workplace also argues that the DOL should have considered its past successful performance as an SCSEP grantee and possible transition concerns when determining whether to lower the floor to at least 72. However, the DOL already accounted for performance by dedicating 30% of the overall score to past performance ratings.<sup>13</sup> Additionally, nowhere in the SGA does it require the GO to consider transition costs or past performance following the scoring process, and in fact provides that "the ranked scores will serve as the primary basis for selection of applications for funding." DOLX-A at 52; TR 56. The DOL purposely chose to balance past performance with plans for future grants so as to not exclude new applicants from participating. TR 86-87.

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<sup>12</sup> The SGA states that the DOL will fund at least one Native American organization and at least one Asian and Pacific Islander organization, known as "set-aside applicants." DOLX-A at 24-25. As such, Watson explained that the highest scoring Native American and Asian and Pacific Islander organizations automatically receive funding, even if their score is below the floor. TR 88.

<sup>13</sup> The Workplace in its brief stated that the calculation of the performance score was "questionable and unclear"; however the performance score is not an issue in dispute, and The Workplace did not provide any evidence that the formula used by DOL in calculating the performance score was improper, or that the data relied on for the score was invalid or inappropriate. Thus it is unnecessary to address The Workplace's past performance data and score in any depth. *See* Compl. Br. 11-12; Resp. Br. 7-8 & n.4.

I find that it was within the GO's discretion to establish a scoring floor, and it was reasonable for the GO to set the floor at 75 points. I also agree with the decision not to reduce the floor by an additional 5 points, lowering the score for grant acceptance to an uncomfortable 70 points. Lowering the score would have allowed for only one more applicant (The Workplace) when it already had an acceptable number of organizations selected, and it would have created an exception to DOL's standard practice of denying grants to applicants with scores in the low 70s. Accordingly, I find that setting the floor at a score of 75 was not arbitrary and capricious.

**ORDER**

Based on the foregoing findings of fact and conclusions of law, I find that the GO's denial of the Complainant's grant application was reasonable, and not arbitrary and capricious. Accordingly, it is hereby ORDERED that the GO's denial of the grant application is AFFIRMED and the Complainant's appeal is DENIED.

**SO ORDERED.**

**JONATHAN C. CALIANOS**  
Administrative Law Judge

Boston, Massachusetts

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file exceptions (“Exception”) with the Administrative Review Board (“Board”) within twenty (20) days of the date of issuance of the administrative law judge’s decision. *See* 20 C.F.R. § 667.830. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Exception must specifically identify the procedure, fact, law, or policy to which exception is taken. You waive any exceptions that are not specifically stated. Any request for an extension of time to file the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the Exception is due. *See* 20 C.F.R. § 667.830; Secretary’s Order 1-2002, ¶4.c.(42), 67 Fed. Reg. 64272 (2002).

A copy of the Exception must be served on the opposing party. *See* 20 C.F.R. § 667.830(b). Within forty-five (45) days of the date of an Exception by a party, the opposing party may submit a reply to the Exception with the Board. Any request for an extension of time to file a reply to the Exception must be filed with the Board, and a copy served on the other party, no later than three (3) days before the reply is due. *See* 20 C.F.R. § 667.830(b).

If no Exception is timely filed, the administrative law judge’s decision becomes the Final Decision and Order of the Secretary of Labor pursuant to 20 C.F.R. § 667.830(b) unless the Board notifies the parties within thirty (30) days of the date of issuance of the administrative law judge’s decision that it will review the decision. Even if an Exception is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the filing of the Petition notifying the parties that it has accepted the case for review. *See* 20 C.F.R. § 667.830(b).