

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 November 2020

Case No: 2020-WIA-00005

In the Matter of:

AUXILIUM MANUS DEO CORP.

Complainant,

v.

**EMPLOYMENT AND TRAINING ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR,**

Respondent.

**DECISION AND ORDER DISMISSING APPEAL
FOR LACK OF JURISDICTION**

This matter involves an application for grant funding under the Homeless Veterans' Reintegration Program, the Incarcerated Veterans' Transition Program, and the Homeless Female Veterans and Veterans with Families Program (collectively, "HVRP"), authorized by 38 U.S.C. §§ 2021, 2021A, and 2023. For the reasons that follow, I dismiss Complainant's request for review for lack of jurisdiction.

Background

On March 27, 2020, the Employment and Training Administration, U.S. Department of Labor ("Respondent"), opened a Funding Opportunity Announcement ("FOA") for HVRP, FOA-VETS-20-01, with a closing date of April 27, 2020.¹ In response to this funding

¹ I take judicial notice of FOA-VETS-20-01, available at <https://www.grants.gov/web/grants/view-opportunity.html?oppId=325828> (last accessed October 29, 2020). See 29 C.F.R. § 18.84. I find, in accordance with 29 C.F.R. § 18.84, that the parties have had adequate notice of the FOA as both parties referenced it multiple times in their respective pleadings. According to the FOA, HVRP's purposes are "to provide services to reintegrate homeless veterans into the labor force by placing them into family-sustaining employment and to stimulate the development of effective service delivery systems that will address the complex problems facing homeless veterans."

opportunity, Auxilium Manus Deo Corporation (“Complainant”)² submitted a grant application by mail on April 27, 2020.³

On May 12, 2020, Respondent, through a Grant Officer, sent a letter to Complainant stating that its application for funding did not meet all of the screening criteria listed in the funding opportunity announcement. The letter informed Complainant that “the application will not move forward through the merit review process and will not be considered for funding.”⁴

By letter dated May 18, 2020, and addressed to the Chief Administrative Law Judge, Complainant requested “a hearing with the Grant Officer, Kia Mason, in appeal of the decision that our application will not move forward through the merit review process and will not be considered for funding.” In the letter, Complainant appeared to agree that its application was not submitted electronically as specified in Amendment One of the FOA.

Because it was unclear if the Office of Administrative Law Judges (“OALJ”), U.S. Department of Labor, had jurisdiction to hear the appeal, the undersigned issued a *Notice of Docketing and Order to Show Cause* (“Order”) on August 25, 2020. The Order instructed Complainant to confirm whether it disputes that its grant application failed to meet the screening criteria of the FOA; and to show cause why the case should not be dismissed as a matter of law because OALJ lacks authority to review the Grant Officer’s action. On September 25, 2020, Complainant submitted a response to the Order (“Response”). On October 26, 2020, the Grant Officer, through counsel, submitted *Motion to Dismiss and Answer to Auxilium Manus Deo’s Response to Order to Show Cause* (“Motion to Dismiss”). To date, Complainant has not responded to the Motion to Dismiss, and the time for filing a response has expired.⁵

Discussion

Jurisdiction Over Appeals of Grant Officer Decisions Related to HVRP Funding Opportunities

OALJ is an administrative court of limited jurisdiction. It obtains jurisdiction only when expressly provided for by statute, regulation, or executive order. In this case, Complainant seeks OALJ review of a Grant Officer’s determination that Complainant did not satisfy FOA screening criteria. Complainant’s Response cites to no specific regulation or authority that might confer

² Complainant is a faith-based non-profit career development services organization.

³ Applications were to be received by 4 p.m. on April 27, 2020. Complainant indicated in its hearing request that its application was delivered by the United States Postal Service to DOL on April 27, 2020 “around 12:30 pm.” However, Amendment One to the FOA required applications to be submitted electronically using grants.gov and informed the public that that “no applications submitted in hardcopy by mail or hand delivery (including overnight mail) will be accepted for this funding opportunity.”

⁴ Respondent determined that Complainant’s application was not submitted electronically on Grants.gov as specified in Amendment One to the FOA.

⁵ A party to the proceeding may file an opposition or other response to the motion within 14 days after the motion was served. 29 C.F.R. § 18.33(d).

jurisdiction upon OALJ.⁶ And Respondent posits that OALJ lacks jurisdiction to review the decisions of Grant Officers under the HVRP because there is no statute or other regulation or authority specifically allowing for such review. I agree.

38 U.S.C. §§ 2021 and 2021A, authorizes the Secretary of Labor, acting through the Assistant Secretary of Labor for Veterans' Employment and Training, to administer HVAP grants. The HVRP authorizing statutes do not, however, provide appeal procedures for grant applicants or assign review authority to OALJ. 38 U.S.C. §§ 2021, 2023. Additionally, there are no program-specific regulations for 38 U.S.C. §§ 2021 or 2023. Finally, the regulations that pertain generally to federal or DOL grants do not assign appeal rights to grant applicants. *See* 29 C.F.R. Part 95, 29 C.F.R. Part 96, and 2 C.F.R. Part 200. Section 95.62 provides, in pertinent part:

In taking an enforcement action, DOL shall provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved.

29 C.F.R. § 95.62(b) (emphasis added).

Section 95.62 does not itself provide for review of an enforcement action but simply advises that such a review exists when other statutory or regulatory authorization so provides. Nothing in the HVRP legislation under which this matter arises provides for administrative review of a grant officer's decision to award grant funding and, as such, Section 95.62(b) does not independently establish OALJ jurisdiction.

Likewise, 29 C.F.R. § 96.63 does not establish jurisdiction, as the scope of Section 96 is limited to identifying "the audit requirements for recipients and subrecipients of Department of Labor (DOL) awards," and "procedures for the resolution of audits." 29 C.F.R. § 96.0. While § 96.63(b) allows a recipient to appeal a grant officer's final determination by requesting a hearing before OALJ, this provision applies only to a Section 96 audit finding. Because Complainant seeks to appeal a HVRP grant funding denial, rather than a Section 96 audit finding, 29 C.F.R. § 96.63 is inapplicable.

Similarly, 2 C.F.R. § 200.341 provides that a granting agency "must comply with any requirements for hearings, appeals or other administrative proceedings to which the non-Federal entity is entitled under any statute or regulation applicable to the action involved." It too does not independently confer a right of review.⁷

Finally, a Federal awarding agency is required to design a review process for applications that is "described or incorporated by reference" in the FOA. 2 C.F.R. § 200.204.

⁶ Complainant states that in its "research, [OALJ] was the authority to send in an appeal" and that its "SCORE mentor, Peter McGhee (expert on Federal Grants)" informed it that it has "the right to appeal the decision of the grant officer/writer." Complainant further states that "if [OALJ] is not the designated authority to review an appeal, there is misinformation on the DOL site." Complainant does not specify a webpage or provide further detail.

⁷ Additionally, § 200.341 appears to apply to post-award recipients and not applicants at the pre-award stage.

This FOA includes a section entitled “Application Screening Criteria,” which cautions that “[i]f your application does not meet all of the screening criteria, it will not move forward through the merit review process.” This FOA does not contain instructions either for review or appeal in the event that the Grant Officer rejects an application for failing to meet screening criteria or if the Grant Officer declines to award funding after merit review of an application.⁸

Because no specific statutory, regulatory, or other authorization exists to review an ETA grant officer’s decision not to fund an HVRP grant, I find that the OALJ lacks jurisdiction to hear Complainant’s appeal. Alternatively, as explained below, even if OALJ has jurisdiction to review an ETA grant officer’s decision not to fund an HVRP grant, Complainant’s failure to satisfy the FOA screening criteria in this case itself precludes review.

Jurisdiction to Review a Grant Officer’s Decision that An Application Has Not Satisfied Screening Criteria and Will Not Move to Merit Review

OALJ generally has authority to review a grant officer’s decision not to award funding to a grant applicant. Respondent submits, however, that the Grant Officer here never issued a final determination on the merits of Complainant’s application because, as it “failed to comply with an essential element of the screening criteria of the FOA, its application was returned precluding a final merit determination.” (Answer at 6.) Respondent further submits that OALJ is precluded from reviewing a Grant Officer’s decision that a Complainant did not meet the screening criteria because that finding is not a final determination by ETA. (Answer at 5.) I agree. *See generally Iowa Workforce Development, 2017-WIA-001 (Mar. 27, 2018).*

I find that the Grant Officer’s decision that Respondent’s failure to submit the application electronically, as required by Amendment One to the FOA, precluded a final determination by the Grant Officer on Complainant’s application. In other words, Complainant’s application was returned prior to the merits review stage, and therefore did not receive a final determination, a necessary predicate in order to establish jurisdiction for OALJ review.

Conclusion

After considering the regulations and the arguments submitted by the parties, I find that OALJ does not have jurisdiction to review an ETA Grant Officer’s decision to return a grant application for HVRP funding because the application did not satisfy the screening criteria. Even if OALJ has the authority to review a Grant Officer decisions on HVRP grant funding, I find that OALJ lacks jurisdiction to review the Grant Officer’s determination here not to move an application forward through the merit review process for noncompliance with mandatory filing requirements.

⁸ The FOA provides only that applicants that have gone through the merit review process “may request a written debriefing on the significant weaknesses of their application.”

Because I find that OALJ lacks jurisdiction to review the Grant Officer's decision not to move Complainant's application through the merit review process, I need not discuss or address Complainant's argument that it should have been moved through the merit review process.⁹

ORDER

In light of the foregoing, it is hereby **ORDERED** that Respondent's Motion to Dismiss is **GRANTED**. Complainant's request for hearing is hereby **DISMISSED**.

SO ORDERED:

STEPHEN R. HENLEY

Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file exceptions ("Exception") with the Administrative Review Board ("Board") within twenty (20) days after receipt of the administrative law judge's decision. *See* 20 C.F.R. § 667.830.

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; *See* Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (March 6, 2020).

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

⁹ Although I do not address the merits of Complainant's complaint related to its satisfaction of the screening criteria, I note that my August 25, 2020 Order appears to have misconstrued Complainant's arguments in this regard. In particular, footnote four of the Order assumed that Complainant was positing that it forgot to include a thumb drive in its filing. Complainant's Response to this Order included submissions attesting to the inclusion of a thumb drive and interpreted my footnote as an "allegation" originating from the Grant Officer. To be clear, this footnote was based solely on my misinterpretation of statements made by Complainant in its original filing; Respondent had not yet filed its Answer, nor has it averred that a thumb or flash drive was missing.

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).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for electronic filing is changing beginning on Monday, December 7, 2020, at 8:30 a.m.

Thus, if you intend to e-file your appeal online on or after December 7, 2020, at 8:30 a.m., be sure to allow sufficient time to register under the new system and to learn how to file an appeal.

You may pre-register to use the new system from November 9, 2020, until 5:00 pm EST on December 3, 2020. As part of the migration to EFS, the Board's current EFSR system will go offline permanently at 5:00 pm Eastern Standard Time (EST) on December 3, 2020. This means that you will not be able to e-file any appeals or other documents with the ARB after 5:00 pm EST on December 3rd through December 7th, at 8:30 a.m. If you intend to file on these dates, please plan to file by other means (conventional mail, hand delivery, etc.).

Although you may pre-register earlier, you will not be able to file using the new system until December 7, 2020, at 8:30 a.m.

Filing Your Appeal Online

If you e-file your appeal on or before 5 p.m. on December 3, 2020, you must use the Board's current Electronic File and Service Request (EFSR) system at dol-appeals.entellitrak.com. Again, the Board's current EFSR system will go offline at 5 p.m. Eastern Time on December 3, 2020, for deployment related activities. Please plan your filings accordingly. Information regarding registration for access to the EFSR system, a step by step user guide, and answers to FAQs are found at that website link. If you have any questions or comments, please contact Boards-EFSR-Help@dol.gov

Beginning on Monday, December 7, 2020, at 8:30 a.m., the U.S. Department of Labor will implement a new eFile/eServe system ("EFS") at <https://efile.dol.gov/>. If you use the current website link, dol-appeals.entellitrak.com, you will be directed to the new system. Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at <https://efile.dol.gov/support/>.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the current EFSR system, will need to create an account at login.gov (if they do not have one already). Second, users who have not previously registered with the EFSR system will then have to create a profile with EFS using their login.gov username and password. Existing EFSR system users will not have to create a new EFS profile. All users can learn how to file an appeal

to the Board using EFS by consulting the written guide at <https://efile.dol.gov/system/files/2020-11/file-new-appeal-brb.pdf> and the video tutorial at <https://efile.dol.gov/support/boards/new-appeal-brb>.

BE SURE TO REGISTER IN ADVANCE! Again, you may preregister for EFS from November 9, 2020, until 5:00 pm EST on December 3, 2020. Establishing an EFS account under the new system should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at <https://efile.dol.gov/contact>.

If you file your appeal online, no paper copies need be filed. **You are still responsible for serving the notice of appeal on the other parties to the case.**

Filing Your Appeal by Mail

You may, in the alternative, including the period when EFSR and EFS are not available, file your appeal using regular mail to this address:

U.S. Department of Labor
Administrative Review Board
ATTN: Office of the Clerk of the Appellate Boards (OCAB)
200 Constitution Ave. NW
Washington, DC 20210-0001

Access to EFS for Non-Appealing Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and creating an EFS profile. Written directions and a video tutorial on how to request access to an appeal are located at:

<https://efile.dol.gov/support/boards/request-access-an-appeal>

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered users of EFS will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, on or after December 7, 2020, at 8:30 a.m., you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail. At this time, EFS will not electronically serve other parties. You are still responsible for serving the notice of appeal on the other parties to the case.