CASE NO.: 2021-WIA-00001

In the Matter of:

SELF-HELP ENTERPRISES, 
Complainant,

v.

EMPLOYMENT AND TRAINING ADMINISTRATION, 
UNITED STATES DEPARTMENT OF LABOR, 
Respondent.

Appearances: Russell Burke, Esq. 
For Complainant

Sarah M. Tunney, Esq. 
Heather Vitale, Esq. 
For Respondent

Before: Evan H. Nordby 
Administrative Law Judge

DECISION AND ORDER DENYING COMPLAINT

This is a claim for review of the decision by a Grant Officer (“GO”) in the Employment and Training Administration (“ETA” or “Respondent”), U.S. Department of Labor declining to award Self-Help Enterprises (“Complainant”) a grant for permanent housing services under the National Farmworker Jobs Program (“NFJP”). Authorization for current NFJP grants arises under Title I of the Workforce Innovation and Opportunity Act (“WIOA”). I have jurisdiction to review final determinations denying financial assistance for applicants to this program. 20 C.F.R. § 683.800.1

1 All regulatory citations are to Title 20 of the Code of Federal Regulations (20 C.F.R.) unless otherwise noted. The Administrative File in this case, which is also Respondent’s Exhibit 1, is referred to as “AF.” Respondent’s Exhibits 2 to 14 is “RX” 2 to 14; Complainant’s Rebuttal Exhibit 1 is “CX 1.” The Hearing Transcript is “HT.”
For the reasons discussed below, I find that the GO’s decision not to award funding to Self-Help Enterprises was not arbitrary and capricious. Accordingly, I DENY the complaint.

I. Procedural History

I held the hearing in this case on August 18, 2021 via Microsoft Teams. Counsel for both parties appeared. Charles L. Cox, a GO in ETA’s Office of Grants Management, attended as the agency’s representative. HT 52-53. Tom Collishaw, President and CEO of Self-Help Enterprises, attended as Complainant’s representative. HT 52.

At hearing, Complainant called Collishaw both in its case-in-chief and on rebuttal. Respondent called Cox; Krister Engdahl, a Federal Project Officer for grants at ETA and the Regional Monitor Advocate for Migrant Seasonal Farmworkers Services for State Workforce Agencies, HT 93; and Laura Ibanez, Supervisory Workforce Analyst and Unit Chief for Specialty National Programs in ETA’s Office of Workforce Investment, Specialty National Programs Unit, HT 120.

I admitted Respondent’s Exhibits 1 to 14 without objection. HT 5-6. Respondent’s Exhibit 1 was the Administrative File. Id. The Administrative File is indexed as follows:

Tab A: Appeal Documentation

A.1 Email: Notice of Office of the Administrative Law Judge's eService for Case Number 2021WIA00001
A.2 Email: Notice of Office of the Administrative Law Judge's eService for Case Number 2021WIA00001 - Issued Document
A.3-.5 Office of the Administrative Law Judge's Notice of Docketing

Tab B. Decision and Notification Documentation

B.1-.2 Email from SHE requesting evaluative feedback (8/27/2020)
B.3 Email to SHE with attachments (10/1/2020)
B.4 Letter of Final Determination
B.5 Evaluative Feedback
B.6 Pre-Screen Checklist
B.7-.17 Selection Memo to the Assistant Secretary (7/27/2020)
B.18 Attachment 1: Map of Awardees by Organization Type - CST and Housing
Attachment 2: List of Career Services and Training Applicants - Sorted by Score (omitted)
Attachment 3: List of Career Services and Training Applicants - Sorted by Service Areas (omitted)
B.19 Attachment 4: List of Applicants (Sorted by Score) – Housing
B.20 Attachment 5: List of Applicants (Sorted by State) – Housing

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2 The hearing transcript (“HT”) erroneously states Administrative Law Judge Christopher Larsen held the hearing. HT 1. I hereby correct the record to reflect that I, Administrative Law Judge Evan H. Nordby, held this hearing. I know this, because I was there on the video hearing. See Alamillo v. BAE Systems San Diego Ship Repair, Inc., 2018-LHC-00487, slip op. at 2 (Mar. 4, 2019).
Attachment 6: Career Services and Training Grant Award Abstracts – Alphabetical by Organization Name (omitted)
B.27-.37 Attachment 7: Abstracts - Housing
Attachment 8: Funding Opportunity Announcement and Amendments (Included in Tab F)
B.38-.42 Notice to the Secretary (7/27/2020)
B.43-.98 Attachment 1: Grant Project Descriptions

**Tab C: Application Review Documentation**

| C.1-.4 | Rankings Pre and Post Panel Normalization |
| C.5   | Total Scores                             |
| C.6   | Housing Scores                           |
| C.7   | Performance Scores                       |
| C.8-.10 | SHE Finalized Workbook - Panelist 1, Application Housing (Redacted) |
| C.11-.15 | SHE Finalized Workbook - Panelist 2, Application Housing (Redacted) |
| C.16-21 | SHE Finalized Workbook - Panelist 3, Application Housing (Redacted) |

**Tab D: Panel Materials**

| D.1-.35 | Panelist Orientation Slides               |
| D.36-.51 | User Guide-Online Panel Review System for Panelists |
| D.52    | Panelist Tips and Reminders               |
| D.53    | Opportunity Zone Determination            |

*(Funding Opportunity Announcement and Amendments included in Tab F)*

**Tab E: SHE Application: Housing**

| E.1-.3  | SF-424                                 |
| E.4-.6   | SF-424a                                |
| E.7-.12   | Budget Narrative                      |
| E.13-.14  | Abstract                              |
| E.15-.44  | Project Narrative                     |
| E.45-.49  | Project/Performance Site Locations    |
| E.50-.53  | Financial System Assessment Form      |
| E.54-.56  | Indirect Cost Rate Agreement          |
| E.57      | Areas Affected                        |
| E.58-.61  | Qualified Opportunity Zones           |
| E.62-.120 | SHE Audit                             |
| E.121     | SHE Organization Chart                |
| E.122-.129 | Letters of Commitment & MOUs          |

**Tab F: Funding Opportunity Announcement and Amendments**

| F.1-.57 | Funding Opportunity Announcement FOA-ETA-20-08 04/14/2020) |
| F.58     | Amendment One (04/14/2020)                                |
| F.59     | Amendment Two (4/15/2020)                                |
Complainant did not submit any additional exhibits in its case-in-chief, as the exhibits on which it relied were part of the Administrative File. HT 6. However, Complainant submitted one exhibit in rebuttal: the Planning Service Breakdown for Housing Grantees Example Form and Instructions (“CX 1”). HT 187. I admitted the rebuttal exhibit over Respondent’s objection. HT 216.

Both parties submitted opening and reply briefs. I have considered all of the evidence and briefing.

II. Stipulations

On July 19, 2021, Respondent submitted an Amended Prehearing Statement, which included a set of stipulated facts. The parties have stipulated, see HT 5, and I find, that:

1. DOL administers the NFJP by awarding grants through a competitive process to organizations providing career services, training services, youth services, related assistance services, and housing assistance to eligible migrant and seasonal farmworkers (“MSFWs”) and their dependents.

2. NFJP housing grants provide housing assistance services including temporary and permanent housing, and related assistance services, such as emergency assistance.

3. NFJP housing grants are intended to increase the living options available to MSFWs and their families so they can retain their employment and have a decent quality of life.

4. Awards made under the NFJP program have a 51-month period of performance and are renewable for a total of four years based on annual application requirements and subject to the availability of funds.


6. In Program Year (“PY”) 2020, an FOA, FOA-ETA-20-08, solicited projects to serve MSFWs and their dependents, with an anticipated award date of July 1, 2020.

7. FOA-ETA-20-08 explained that applicants for NFJP grants were required to have (1) an understanding of the problems of eligible MSFWs and their dependents; (2) a familiarity with the agricultural industries and the labor market needs of the proposed service area; and (3) the ability to demonstrate a capacity to administer and effectively deliver a diversified program of workforce investment activities and related assistance for eligible MSFWs.
8. According to FOA-ETA-20-08, grantees providing permanent housing assistance were to prioritize eligible MSFW individuals and families, but non-MSFW individuals and families were also eligible to receive permanent housing services.

9. Prior to the competition, ETA expected approximately $6,122,000 to fund approximately seven to 20 housing grants.

10. The NFJP appropriation required at least 70 percent of the housing grant funding to be spent on permanent, as opposed to temporary, housing services.

11. Complainant timely submitted an application for a housing grant, seeking one grant of $300,000 per program year.

12. Complainant’s application proposed to serve 3,359 MSFW participants with permanent housing in California’s San Joaquin Valley, which includes Kings, Tulare, Merced, Madera, Kern, Fresno, and Stanislaus Counties.

13. Applications submitted in response to FOA-ETA-20-08 were to consist of four parts: (1) SF-424, “Application for Federal Assistance”; (2) Project Budget, composed of the SF-424A and Budget Narrative; (3) Project Narrative; and (4) Attachments to the Project Narrative.

14. FOA-ETA-20-08 contained instructions for how to complete each part of the application and how applications would be scored.

15. One panel reviewed and evaluated all of the applications for both temporary and permanent housing grants and made score recommendations to the Grant Officer.

16. The final panel scores [combined with the past performance scores, discussed below] served as the primary basis for selection of awards, but the Grant Officer could consider other factors, such as geographic distribution of funds.\(^3\)

17. The panel was comprised of 3 panelists, each of whom produced scores using the criteria described in the FOA.

18. Complainant received full points on all criteria assessed by the panelists except for two—(1) case management and (2) outreach and enrollment.

19. According to FOA-ETA-20-08, the case management criterion carried a maximum value of 8 points. Complainant received 6 points.

\(^3\) I have added the portion in brackets, which I find to be consistent with the stipulations in ¶ 25 to 31, to clarify this stipulation, which appeared to me to be misleading, standing alone. To the extent the parties have not stipulated to the portion in brackets in ¶ 25 to 31, I find that it is nonetheless supported by the record evidence. See AF at F.25.
20. According to FOA-ETA-20-08, the outreach and enrollment criterion carried a maximum value of 6 points. Complainant received 4.67 points.

21. With respect to case management, the FOA-ETA-20-08 stated that panelists should evaluate housing grant applications for the following:
   • Case Management must begin at the time of enrollment and continue throughout the participants’ participation in the program, including through the follow-up period. Identify an effective strategy for tracking participants from enrollment to placement in a job or further education;
   • Identify and provide justification for the ratio of case managers to participants, including the frequency of their interactions; and
   • Identify, justify, and describe the evidence-informed types of case management services and/or activities that will be provided.

22. With respect to outreach and enrollment, the FOA-ETA-20-08 stated that panelists should evaluate housing grant applications for the following:
   • Provide an effective and feasible participant outreach plan to cover the proposed State service area and describe how you will efficiently refer individuals who are deemed ineligible to other one-stop partners or other partners, including the frequency of outreach efforts and quarterly and annual target number of contacts over the 51 month period of performance; and
   • As a result of your established partnerships and outreach efforts, provide your organization’s quarterly and annual targets to enroll participants over the 51 month period of performance.

23. With respect to case management, panelists identified the following weaknesses:
   • The application does not identify and provide justification for the ratio of case managers to participants. (Narrative p[.] 18; FOA p[.] 22).
   • Applicant does not identify an effective strategy for tracking participants from enrollment to placement in a job or further education. (Case Management, pages 18-20)
   • Applicant does not identify nor provide justification for the ratio of case managers to participants, to include the frequency of interactions. (Case Management, pages 18-20)
   • Applicant does not describe the process [sic] case management that begins at time of enrollment and continue [sic] throughout the program into follow up. (Case Management, pages 18-20)

24. With respect to outreach and enrollment, panelists identified the following weaknesses:
   • The application does not describe how the project will efficiently refer ineligible individuals to other one-stop partners or other partners. (FOA page 21)
   • The application does not provide the organization’s quarterly targets to enroll participants over the 51 month period of performance. (Narrative p[.] 20; FOA p[.] 23)
   • Applicant does not describe how individuals who are deemed ineligible will be referred to other one-stop partners or other partners. (Outreach and Enrollment, page 17-18)
   • Applicant does not include the frequency of outreach efforts nor quarterly and annual target numbers of contacts over the 51 month period of performance. (Outreach and Enrollment, page 17-18)
25. ETA averaged the panelists’ scores for each application and combined them with Complainant’s “past performance” score to arrive at a final score for each application.

26. FOA-ETA-20-08 explained that for housing grant applicants with a current NFJP award, ETA would use the grantees’ actual outcomes for the WIOA performance measures based on the Quarterly Narrative Report data submitted for PY 2018 for the following permanent housing performance measures:
   • Total number of eligible migrant and seasonal farmworkers served;
   • Total number of eligible migrant and seasonal farmworker families served;
   • Total number of individuals served; and
   • Total number of families served.

27. The highest possible score an applicant could receive was 102 points, consisting of up to 76 points for the average panel score, 24 points for the past performance score, and two bonus points.

28. Complainant received an average panel score of 74.67, including two bonus points, and a past performance score of 3.

29. ETA received 13 applications for housing grants.

30. The Grant Officer made nine awards for housing grants totaling $6,122,000.

31. Complainant’s average panel score of 74.67 was higher than five of the nine applications that received housing grants, but when combined with the past performance score of 3, Complainant placed 13th out of the 13 applications submitted for housing grants.

32. On June 27, 2018, the Grant Officer informed Complainant that its application had not been selected for funding.

33. On August 27, 2020, Complainant sent a request for evaluative feedback on its application.

34. On September 24, 2020, in response to Complainant’s request, the Grant Officer provided a final determination that included the panelists’ statements describing the weaknesses of Complainant’s application.

35. For purposes of Complainant’s appeal, the Grant Officer compiled an accurate administrative file containing documents on which his award decisions were based.

III. Other Issues Decided Prior to Hearing

On June 28, 2021, I issued an Order Granting in Part and Denying in Part Respondent’s Motion for Summary Decision. In the June 28, 2021 Order, I found that Respondent’s decision to measure past performance scores based on the percentage of projections achieved rather than based
on efficiency or total numbers served was reasonable as a matter of law. I denied Respondent’s Motion for Summary Decision in all other respects.

Additionally, in the June 28, 2021 Order, I found that I had jurisdiction to hear Complainant’s appeal of its past performance score, even though it was not explicitly listed as a ground for appeal in Complainant’s Request for Hearing.

I adopt my findings in the June 28, 2021 Order on both the jurisdictional issue and the reasonableness of Respondent’s decision to measure past performance based on percentage of projections rather than total number served or efficiency of use of grant money.

IV. Disputed Issues

The parties identified the following issues for hearing:

1. Whether Complainant’s past performance was evaluated in an arbitrary and capricious manner.  

2. Whether Respondent should have considered Complainant’s supplemental past performance data submitted with its NFJP application for FOA-ETA-20-08.

3. Whether Respondent’s denial of Complainant’s application was arbitrary and capricious with respect to geographic distribution of funds.

4. Whether the panelists improperly deducted points for the case management and the outreach and enrollment criteria described in the FOA.

V. Analysis

A. Workforce Innovation and Opportunity Act


4 In the June 28, 2021 Order, I found that it was reasonable for the ETA to evaluate past performance for housing grants using percentage of projection achieved rather than efficiency or total number served. In its briefing, Complainant again argues that it was arbitrary and capricious to measure past performance by awarding points based on the percentage of its goal an applicant achieved. Complainant’s Br. at 10; see also RX 13 at 3-4. I decline to reconsider my previous ruling on this point. However, I do consider whether it was arbitrary and capricious for Respondent to ignore the effects of the two counting methods grantees were using and to rely so heavily on projections that grantees had significant leeway to shape.

Under the migrant and seasonal farmworker program provisions of WIOA – also known as the National Farmworker Jobs Program (“NFJP”) – “[e]very 4 years, the Secretary shall, on a competitive basis, make grants to, or enter into contracts with, eligible entities to carry out” certain activities. 29 U.S.C. § 3222(a). These activities include “assistance for eligible migrant and seasonal farmworkers” for “housing (including permanent housing)[.]” 29 U.S.C. § 3222(d)(1); 20 C.F.R. Part 685. WIOA and its implementing regulations establish criteria for applications and review. Id.

The ETA administers the NFJP. 20 C.F.R. § 685.120. Grantees are selected “using procedures consistent with standard Federal government competitive processes.” 20 C.F.R. §§ 685.120, .210.

To receive a grant, grantees must first meet eligibility criteria. 20 C.F.R. § 685.200. To receive funding, eligible applicants must respond to a Funding Opportunity Announcement (“FOA”). 20 C.F.R. § 685.210. When an application is denied or partially denied, the applicant can request review before an ALJ. 20 C.F.R. § 683.800.

To receive a housing grant, an entity “must provide housing services to eligible MSFWs.” 20 C.F.R. § 685.360(a). Housing grants can be for temporary or permanent housing, or a combination. See 20 C.F.R. § 685.360(c). The regulations list different types of “[p]ermanent housing services” and management that may be provided by grantees. 20 C.F.R. § 685.360(c)(1)(ii).

The regulations provide for indicators of performance for specific types of grantees of the NFJP:

For grantees providing housing services only, grantees will use the total number of eligible MSFWs served and the total number of eligible MSFW families served as indicators of performance. Additionally, grantees providing permanent housing development activities will use the total number of individuals served and the total number of families served as indicators of performance.

20 C.F.R. § 685.400(c). However, there are also provisions for more flexible evaluation. The Department may negotiate additional indicators reflecting “appropriate factors” with grantees and include them in the approved program plan. 20 C.F.R. § 685.400(d). Further, “[g]rantees may develop additional performance indicators and include them in the program plan or in periodic performance reports.” 20 C.F.R. § 685.400(e); see also HT 126.

A grantee’s program plan must include the information enumerated in 20 C.F.R. § 685.420 and other information required by instructions issued by the Secretary. 20 C.F.R. §§ 685.410-420. Among other things, the performance plan must include “performance accountability measures that will be used to assess the performance of the entity in carrying out the NFJP program activities, including the expected levels of performance for the primary indicators of performance described in § 685.400.” 20 C.F.R. § 685.420.
NFJP grant applicants “may request a hearing before an administrative law judge of the Department of Labor” to review “a determination not to award financial assistance in whole or in part to such applicant.”” 29 U.S.C. § 3246; 20 C.F.R. § 683.800. The regulations provide that

[a] request for a hearing . . . must specifically state those issues or findings in the final determination upon which review is requested. Issues or findings in the final determination not specified for review, or the entire final determination when no hearing has been requested within the 21 days, are considered resolved and not subject to further review.

20 C.F.R. § 683.800(c).

An ALJ may review “[o]nly alleged violations of WIOA, its regulations, the grant or other agreement under WIOA raised in the final determination and the request for hearing[.]” Id. ALJs review grant officers’ determinations using an “arbitrary and capricious” standard of review. See Compare 29 U.S.C. § 3246 (administrative adjudication provisions under WIOA) with 29 U.S.C. § 2936 (identical provisions under WIA); Iowa Workforce Development v. U.S. Dep’t of Labor, 2017-WIA-00001, slip op. at 2 n.1 (Mar. 27, 2018) (adopting WIA standard under WIOA); Mississippi Opportunities Work, Inc. v. U.S. Dep’t of Labor, 2012-WIA-00001, slip op. at 7 (June 26, 2012); see also The Workplace, Inc. v. U.S. Dep’t of Labor, 2012-WIA-00011, slip op. at 8 (May 14, 2013), aff’d ARB No. 13-064 (ARB Nov. 14, 2013).

Under the “arbitrary and capricious” standard, the reviewing judge or panel determines whether the initial decision maker examined “the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)). “[I]f the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise[,]” then it is arbitrary and capricious. Id.

An agency may act rationally even if it does not “explore ‘every alternative device and thought conceivable by the mind of man.’” Dep’t of Homeland Security v. Regents of the University of California, 140 S.Ct. 1891, 1914-15 (2020) (quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978)). At the same time, if an agency acted for improper reasons, that action is arbitrary and capricious despite any post-hoc rationalizations the agency may be able to provide. Id. at 1909. Arbitrary and capricious review “is deferential, but [judges] are ‘not required to exhibit a naiveté from which ordinary citizens are free.’” Dep’t of Commerce v. New York, 139 S.Ct. 2551, 2575 (2019).

In the WIOA context, a GO’s decision must be “affirmed unless the party challenging the decision can demonstrate that the decision lacked any rational basis.” United Tribe of Kansas & Se. Nebraska, Inc. v. U.S. Dep’t of Labor, ARB No. 01-026, 2000-WIA-003, at *5 (ARB Aug. 6, 2001); § 683.810(e). “This is a difficult standard and properly so, because there must be considerable discretion exercised in determining the award of Department funds among multiple

An ALJ has suggested that to prove that a past performance score was arbitrary and capricious, a complainant would at least need to provide some “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.” The Workplace, Inc., 2012-WIA-00011, slip op. at 13 n.13.

B. Credibility of witnesses

As a trier-of-fact, an ALJ must evaluate the credibility of all witnesses, weigh the evidence and draw inferences and conclusions. See, e.g., Banks, 290 U.S. at 467; John W. McGrath Corp. v. Hughes, 289 F.2d 403, 405 (2d Cir. 1961); Stevedoring Services of America v. Director, OWCP, 10 Fed. App’x 440, 442 (9th Cir. 2001). It is solely within the discretion of the ALJ to accept or reject all or any part of any testimony. Mijangos v. Avondale Shipyards, Inc., 948 F.2d 941, 944-45 (5th Cir. 1991); Grimes v. George Hyman Constr. Co., 8 BRBS 483 (1978), aff’d mem. 600 F.2d 280 (D.C. Cir. 1979).

Credibility “has been termed as ‘the quality or power of inspiring belief.’” Indiana Metal Products v. NLRB, 442 F.2d 46, 51-52 (7th Cir. 1971) (citation omitted). “Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.” Id. at 52 (quoting Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963)). Credible testimony must not only come from a truthful source but “be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it,” as well as “meet[] the test of plausibility.” Id. (internal quotations omitted).

In weighing testimony, the ALJ may consider the witnesses’ demeanor while testifying, the witnesses’ interest in the outcome of the proceedings, the witnesses’ opportunity to observe or acquire knowledge about the subject of the testimony, and “whether or not a witness’ testimony is internally consistent, inherently improbable, or either corroborated or contradicted by other evidence.” Williams v. Mason & Hanger Corp., ARB No. 98-030, 1997-ERA-14, at *13 (Nov. 13, 2002), aff’d in pert. part sub nom. Williams v. U.S. Dep’t of Labor, 376 F.3d 471, 478 (5th Cir. 2004); Gary v. Chautauqua Airlines, ARB No. 04-112, 2003-AIR-038, at *4 (ARB Jan. 31, 2006).

I have considered the testimony of all of the witnesses at the hearing. I base my credibility findings on a review of the entire record, giving due regard to the demeanor of the witnesses who testified before me.

I find that everyone who testified at hearing was fully credible as to what they knew. Each witness who testified was straightforward, forthright, and admitted when they did not know the answer to a question. Moreover, the witnesses were generally knowledgeable. Many had years or even decades of experience with the NFJP. One caveat is that, Cox, although the GO, had limited knowledge of the early grant selection process under FOA-ETA-20-08 because he only became the GO part-way through the competition. HT 63-65. Thus, his role in selection was limited to reviewing score sheets and entering the past performance score. HT 65.
1. Whether Complainant’s past performance was evaluated in an arbitrary and capricious manner.

The NFJP Program Officer develops the FOA. HT 61. The GO reads the FOA before issuance to ensure that it contains all the required elements. HT 62. Ibanez, as the Program Officer, oversaw the past performance assessment and helped develop the FOA. HT 122-23

A. “Single-counting” and “double-counting” methods

The Program Office provides the past performance score. HT 59-60. The GO entered the information provided by the Program Office. Id. For most permanent housing applicants applying for a grant under FOA-ETA-20-08, the past performance score was divided into four categories: (1) eligible migrant and seasonal farmworkers served; (2) eligible migrant and seasonal farmworker families served; (3) other individuals served; and (4) other families served. AF at F.25-26. The actual score was based on the four quarters of performance data for PY 2018. RX 14; see also RX 6-9 (Complainant’s quarterly reports for this period); RX 5. To calculate the score, ETA awarded points based on the percentage of a target goal that the applicant met in each category. RX 14 at 3-4.

WIOA is a relatively new statute. Although it shares case law with predecessor statutes, most recently WIA, certain aspects of the NFJP program under WIOA were in flux as of PY 2018 to 2019. HT 153. Initially, under FOA-ETA-16-02, ETA required mutually exclusive counting in the individual and family categories. See id.; CX 1; see also RX 2. MSFW families were counted a single time in the family count and zero times in the individual count (“single-counting”). Id.

However, there was confusion among grantees about how to count MSFW individuals and other individuals. HT 115, 167-68. For PY 2018, although grantees were supposed to use the single-counting method, only some actually used the single-counting method. HT 164, 167-68, 190. Others counted individuals who were part of families in both the individual and family categories when reporting past performance (“double-counting”). Id. Complainant used the single-counting method for both the projections for PY 2018 and PY 2018 quarterly reports. HT 221.

The PY 2018 data collected from FOA-ETA-16-02 grantees was the past performance data used for current grantees under FOA-ETA-20-08. RX 14. Ibanez testified that it is possible to tell from the data whether a grantee used the single-counting or double-counting method by determining whether the individual count or the family count is higher. See HT 160-63; see also AF at 26 (under the double-counting method, “[t]he family count is a subset of the individual count. Housing grantees will be allowed to report an individual and their family members under both categories simultaneously.”). From this, Ibanez concluded that some organizations used the

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6 I am not sure this is correct. Under the double-counting method, because the family count is a subset of the individual count, the individual count is always greater than or equal to the family count. But under the single-counting method, it should be possible to have an individual number that is higher or lower than the family number. Thus, if the family count is higher than the
Grantees asked ETA questions and gave ETA feedback about the reporting method. HT 155. Grantees indicated that the single-counting method was not in line with how they had been reporting. HT 158. Further, grantees provided feedback that a change was necessary to “get the full impact of the program overall when you’re talking about performance for housing.” HT 156. For example, for a single family with five individuals, the single-counting method would count only one family, whereas the double-counting method would count one family and five individuals. HT 158; AF at F.26 n.10-12; see also RX 11. This means that the double-counting method gives a better sense of how many individuals are served because under the single-counting method, “[i]ndividuals weren’t being counted because they were just being tucked away in the [f]amilies.” HT 159.

Beginning with PY 2019, ETA adopted the double-counting method, though it did so through a retroactive mid-year revision. On May 17, 2019, ETA issued Training and Employment Guidance Letter (“TEGL”) No. 19-18. RX 10. An attachment to TEGL 19-18 advised permanent housing grantees that they were not to use the double-counting method. Id. at Attachment VI-2. However, on July 30, 2020, the beginning of PY 2020, the ETA issued Change 1 to TEGL 19-18. RX 11; HT 158. Change 1 identified ETA’s revised interpretation of the “individual” performance indicators. HT 157; RX 11. Under the new interpretation, organizations were to use the double-counting method, under which the family count is a subset of the individual count. RX 11, Attachment VI-2. Although Change 1 was issued at the beginning of PY 2020, it applied retroactively to PY 2019, though not to PY 2018. RX 11; HT 158. ETA told grantees that they could correct their data from PY 2019 to use the double-counting method. HT 158.

FOA-ETA-20-08 indicated that the past performance scores would be calculated using the double-counting method. AF at F. 26 n. 10-12. Ibanez indicated that this was a mistake, as the past performance scores were in fact calculated based on PY 2018 data, which used the single-counting method. HT 168; RX 13. However, she asserted that the mistake did not affect scores because the past performance scores did not rely on data submitted with the application, but instead, relied on data that had been submitted in PY 2018. HT 168. The official change to the method of reporting to double-counting only affected data back to PY 2019. HT 160; RX 10-11.

Respondent argues that it does not matter which method grantees used to count eligible individuals. Respondent’s Br. at 11; see also HT 158 (the double-counting method “wasn’t going to change . . . the extent that they had reached their target”), 164-65. While the counting method changes the count, it also changes the appropriate projection and thus, per Respondent, does not change the percentage by which the grantee meets their target. Id. at 158, 164-65, 209.

Respondent’s conclusion that the counting method never makes a difference is an erroneous generalization from a single example. While the counting method does not impact the scores in the specific example Respondent cites in the brief, see Respondent’s Br. at 11, it does

individual count, the grantee used the single-counting method. But if the individual count is higher than the family count, the grantee could have used either method. But see HT 162.
impact the score in other circumstances. Suppose, for example, that under the single-counting method, an applicant proposes to serve 100 MSFW families and 2 individuals. In the simple case where there is only one MSFW individual per family – an assumption that Respondent makes in the brief but is not always true, see HT 158, 198, 207-9 – the proper goals under the double-counting method would be 100 MSFW families and 102 MSFW individuals.

Suppose the applicant actually serves, under the single-counting method, 110 MSFW families and 1 MSFW individual. Again, if there is only one MSFW individual per family, this amounts to 110 MSFW families and 111 MSFW individuals served under the double-counting method.

Under either the single-counting or double-counting method, the applicant would have served 110 out of a projected 100 MSFW families and get 6 points for that category. However, under the single-counting method, the applicant would have served 1 out of 2 MSFW individuals and get 0 points for attaining 50 percent of its target. But under the double-counting method, the applicant would have served 111 out of the projected 102 MSFW individuals and would get 6 points for attaining more than 100 percent of its target.

Slight deviations from projections will thus yield different scores when double-counting versus single-counting for the “MSFW individuals” and “other individuals” metrics, even when the target is measured using the same method as the outcome. But see HT 165-66 (suggesting otherwise). And some deviation from projections is inevitable. Projections are developed by the grant applicants. HT 158, 198. While the ETA engages in some scrutiny of whether projections are realistic, see HT 185, applicants have considerable leeway. See HT 158, 198. Second, there are constraints on how permanent housing grantees, in particular, can provide services. See HT 218-19; AF at F.11 n.4. They may be unable to predict whether a particular service will be provided to an MSFW, see id., let alone the exact number of individuals in a family that they will serve. See HT 158, 198, 207. Finally, housing and permanent housing more especially are “very project oriented”; because of this, the ETA has traditionally relied more on narrative in evaluating performance. HT 115.

I have concerns about Respondent’s failure to acknowledge the effects of the different counting methods. Nonetheless, Complainant has failed to show that the methodology impacted the decision in this case. Complainant bears the burden to show that Respondent’s selection was arbitrary and capricious. 20 C.F.R. § 683.810 Complainant’s two family-category scores would have remained the same regardless of counting method. Under the double-counting method, the two individual scores depend on the actual number of individuals per family. See RX 11, Attachment VI; HT 198, 207-9. But Complainant did not provide sufficient evidence of the number of individuals it served using the double-counting method or how that would affect its score.

B. Effects of projections

Complainant also raises the concern that grantees were rewarded for creating unambitious projections. HT 15 (the FOA “seems to have disadvantaged folks like us who aim high and occasionally achieve less than what we aimed for, but . . . our overall performance stacks up with virtually all of the funded grantees.”). Grantees define and develop their own targets. HT 126, 198.
Permanent housing applicants who were then-funded under an NFJP grant received 6 points for a past performance metric if they met 100 percent of their target; 5 points if they met 90 to 99.9 percent of their target; 3 points if they met 75 to 89.99 percent of their target; and 0 points if they met below 75 percent of their target. RX 13 at 3-4; HT 126.

If, for example, a grantee projected that they would serve two individuals and in fact served two, it would get 6 points on that metric. However, if the grantee projected that it would serve 100 individuals but in fact served 74, it would receive 0 points. Moreover, this discrepancy would occur even if the second grantee’s actual use of funds was far more efficient than the first grantee’s use of funds. Obstacles to accurate prediction, discussed above, exacerbate the issue. The grantee defines and develops their own targets, theoretically leaving room for grantees to manipulate targets to make it easier to achieve high past performance scores. See HT 198.

Additionally, the scoring process could have advantaged new applicants. New applicants’ past performance was assessed using “a federally- and/or non-federally-funded assistance agreement that is similar in size, scope, and relevance to the proposed project and was completed within the last five years of the closing date of” FOA-ETA-20-08. RX 13 at 5. But if a new applicant to the NFJP permanent housing grants received multiple grants of this type in the past five years, they could select a past grant under which they performed better. Current grantees, by contrast, were constrained to their past performance under FOA-ETA-20-08.

When asked if Complainant would have received more past performance points if it set a lower goal, Ibanez responded:

I think if they would have set different goals and attained them, they would have achieved points – full points. But . . . that’s a part of their application. Right? In their Program Plans, they have to describe the need. They have to describe this much funding, what they can do. And so, all of that is a part of that process to develop their Project Narrative and response to [c]ompetition.

HT 185. This implies that although lower goals could result in a higher past performance score, they could result in a lower panel score in applying for funding. See id. This may not fully explain limits on manipulation of target-setting, though, as performance goals are not finalized until after grantees are selected, see RX 2 at 4-5, and can be amended. HT 117.

Complainant’s concern is relevant to whether the Department arrived at the best method (within statutory and regulatory constraints) to measure past performance. Despite Complainant’s very low past performance score, the FPO determined that Complainant was meeting its milestones under FOA-ETA-16-02. HT 113-14.

But my review does not extend to whether Respondent’s method was the best method or even a good one. Rather, I evaluate only whether Respondent was within the bounds of its discretion. See United Tribe of Kansas & Se. Nebraska, Inc., ARB No. 01-026, at *5. Despite grantees’ inability to foresee every complication that may come up, it is reasonable to require a grantee to set goals and determine performance based on whether they meet those goals.
The outsized role that past performance played in selection, despite making up only 24 of 102 possible points, is somewhat counterintuitive, see AF at C.6, especially when past performance – because it is not based on an efficiency metric – does not necessarily indicate how well grantees have made use of funds in the past. But as discussed in the order on Respondent’s Motion for Summary Decision, “efficiency” in this context is not as clean a metric as Complainant implies. Housing grants are project-based, HT 115, and different types of projects are funded by NFJP permanent housing grants. See 20 C.F.R. § 685.360(c)(1)(ii). Spending more money to serve a particular individual may mean providing more services or services of a different kind, rather than being less efficient with money. See AF at E.23-30 (detailing different services provided on different projects); AF at B.21-37. Moreover, the price of any given service likely varies by region.

To prevail, Complainant must show that Respondent’s process was arbitrary and capricious. To do so, Complainant must do more than show that Respondent’s process was imperfect or that there was a better method. I find that Complainant has not met its burden to show that Respondent’s methodology for calculating the past performance score was arbitrary and capricious.

2. Whether Respondent should have considered the East Orosi project numbers submitted with the NFJP application for PY 2020

I find that it was reasonable that the GO did not to consider the supplemental East Orosi numbers submitted with the grant application. The GO argues that not considering these numbers was reasonable on four grounds: (1) the FOA precluded consideration of the East Orosi numbers; (2) if the GO could consider the East Orosi numbers, doing so was discretionary; (3) there was a process for amending quarterly numbers that Complainant did not follow; and (4) it would have been improper to count the East Orosi numbers because the East Orosi project did not use NFJP funding (and use of NFJP funds for this project would have required advance approval).

I find that, at the very least, it was not arbitrary and capricious for the GO to decline to consider the East Orosi numbers.

Applicants’ past performance scores were based on quarterly reports (ETA Form 9179). HT 128, 133; RX 13. The Federal Project Officer enters performance numbers reported by grantees in the quarterly reports system. HT 100. Complainant knew that it could reach out to the FPO to receive more time to initially report. HT 130.

If there is a mistake with the initial number, the grantee can amend the quarterly report by reaching out to the Federal Project Officer and/or program staff. HT 129. The system is only open for 30 days, but the FPO can make notes in the system after it locks. HT 102. If a grantee realizes there is a mistake with the quarterly reports after the system locks, they can contact the Federal Project Officer or the National Office. HT 78-79, 103-4, 116, 130. Grantees have amended after 30 days. HT 130. There is no specific time frame to make the amendment. Id. Indeed, grantees have amended quarterly numbers even after the relevant program year has passed. Id. at 201.

As a practical matter, Ibanez testified that the deadline for amendment is before the application for the next competition. HT 134. FOA-ETA-20-08 calculated an applicant’s past
performance score from data from PY 2018. Id. at 134-35. The contest was conducted toward the end of PY 2019, which means that Complainant had about a year to supplement its data. Id. A grantee is responsible for providing accurate data to the Grant Office and Federal Project Officer. Id. at 135.

Ibanez was not aware of a time when ETA explicitly told grantees that they had a specific time period within which to correct quarterly report data. HT 200. However, Ibanez testified that, especially during the first years of WIOA implementation, grantees were told that they could reach out to make amendments. Id.; see also HT 111. Collishaw did not recall hearing such advisements. HT 214. He knew quarterly reports could be amended when the FPO reached out about an error in reporting. HT 110, 214; RX 5. But he could not “remember another time that we were told we could amend something that was already reported.” Id.

Regardless of the timeline, it was reasonable to require an organization to amend their past performance numbers by amending the quarterly reports themselves rather than through its application in the next grant cycle. See HT 202.

Complainant questioned whether it was clear to applicants that the amendment process was available. Collishaw, despite his decades of experience with the NFJP, testified that he was not aware of any process for amending quarterly reports or amending projections in the planning document. HT 212-214, 222. Engdahl and Ibanez both indicated that grantees could amend their numbers, but the exact mechanism for doing so was somewhat unclear. HT 78-79, 103-4, 116, 130. While ETA likely could have done a better job of explaining any amendment procedure to organizational stakeholders, Complainant knew how to reach ETA if they had a question about a particular procedure. HT 146.

Respondent argues that it would be improper to include the East Orosi numbers in Complainant’s past performance score even if they had been reported through the proper channels. The argument has two parts. First, Respondent argues that if Complainant did not use NFJP funding for the East Orosi project, the East Orosi housing did not involve past performance under an NFJP grant. Second, if by contrast Complainant did use NFJP funding, Complainant was required to notify the Department before using grant funding for “a brand-new project that wasn’t in the statement of work for a particular year[.]” See HT 116-18. But cf. HT 211 (separate East Orosi project was in the Statement of Work for PY 2018); HT 213-14 (same). Collishaw testified that the East Orosi emergency sewer project did not use NFJP grant funding. See HT 211 (“We did not charge anything to the DOL grant[.]”); id. at 25-26, 221-22; see also AF at E.30. This was not unusual, as ETA encouraged organizations to use “other resources” where available to serve MSFWs. HT 212-13.

I find that Respondent’s justifications for not considering the East Orosi numbers are reasonable.

I am less convinced by Respondent’s argument that the language of the FOA means that it could not consider additional data. Cox testified that, as a matter of ETA policy, the ETA does not consider supplemental performance data submitted with the grant application. HT 62-63, 89. According to Cox, this ensures a “level playing field”; “[i]f one applicant were to, you know,
supply additional information, that could, potentially, give them undue advantage over other applicants. HT 63. In making selections, ETA strives “to be consistent and be aligned” with the FOA. HT 133. Ibanez testified that:

The Funding Opportunity Announcement said that the Employment and Training Administration reviews data that was submitted in the PY, program year, 2018 quarterly narrative report, which is the Employment and Training Administration [F]orm 9179. And so, when we conduct past performance during a [c]ompetition, it’s important for the Program Office to stay close to the Funding Opportunity Announcement, and to be consistent. And so, considering Self-Help Enterprises’ supplemented data in this situation[] would have created a disadvantage for other incumbent housing grantees who followed the instructions and the Funding Opportunity Announcement.

HT 132-33.

It would be arbitrary and capricious to allow amendments from one organization but not other organizations. But I disagree with Respondent that language of the FOA itself clearly established that amendments were not allowed. While the FOA stated that the GO would calculate the past performance score using the Quarterly Narrative Report (ETA-9179) data submitted to the National Office for PY 2018, AF at F.25; see also HT 88-89; RX 13, it also stated elsewhere that the GO had discretion to consider “other relevant factors when applicable” as well as “any information that comes to their attention.” AF at F.42; see also HT 202. The FOA could be interpreted to allow the GO to consider additional past performance data for current grantees, as long as it did so consistently. See AF at F.42.

But even so, there is no requirement that the GO consider anything beyond past performance numbers for current grantees, nor is there any indication that the GO did consider such additional information for applicants other than Complainant. Indeed, because the panelists rather than the GO review the project narrative, the GO will not necessarily be aware of supplemental information submitted in the narrative. See HT 80; see also HT 65 (Cox’s explanation of his role given his onboarding during the selection process).

For the reasons discussed above, it was reasonable for the GO to not consider the East Orosi numbers even if the GO had the discretion to consider them. Moreover, the East Orosi numbers, at least in isolation, would not have affected Complainant’s non-selection. AF at E.30; HT 143-44; RX 14.

3. Whether Respondent’s denial of Complainant’s application was arbitrary and capricious with respect to geographic distribution of funds.

The GO’s funding decisions “are based primarily on score, but they can take additional information in, such as geographic distribution.” HT 67. According to Cox, the ETA’s goal is to ensure that “as many states and people are covered” in areas served by selected organizations. HT 68; see also AF at B.18. However, unlike the Career Service and Training grants, which require a certain geographic distribution, HT 179, there is no formula or requirement to consider geographic distribution in the housing grants generally or in the permanent housing grants in particular. HT
Complainant argues that the limited funding provided for California housing grants, especially permanent housing, was arbitrary and capricious given California’s share – disproportionately high even given its large population – of MSFWs. I denied summary decision on this issue because finding for Respondent would have required me to make an inference against the non-moving party. For example, it would be arbitrary and capricious to use the particular need of a state or region as a minus factor in selection. Evidence in support of the non-moving party on summary decision must generally be more than merely speculative. But given the role of Respondent’s rationale in assessing whether they acted arbitrarily and capriciously and the scant evidence about the past performance score in the record at that time, I denied summary decision on this issue.

When construing the facts in the light most favorable to Complainant on summary decision, I declined to assume that the low funding for California organizations despite California’s large MSFW population was innocuous. However, Respondent has introduced no evidence, whether affirmative evidence or evidence supporting an inference, that Complainant did more than decline to take into account a discretionary factor. In allocating permanent housing grants, there is no requirement of geographic distribution. Id. Rather, the only requirement is that 70 percent of the funds go to permanent housing. Id.

At this stage, I find that the geographic distribution of funds was not arbitrary and capricious.

The methodology that Respondent used to award housing grants disadvantages California. California is a large state with multiple regions and a disproportionately high share of MSFWs. See HT 12, 27-28; AF at E.17. While organizations in other regions might cover multiple states, a California-based grantee might reach the same or a larger number of MSFWs by only covering part of California. See HT 28 (“Generally, we have seen estimates between a third to a half of the farmworkers, migrant seasonal farmworkers in the country reside here in the San Joaquin Valley and work here.”). Maximizing the number of states covered by the available funds does not account for the disproportionately high share of MSFWs in California. See id. Moreover, MSFWs in California reside in multiple regions of the state not necessarily all covered by any single organization. See id. at 29, 82, 85.

The way the Department prioritized the areas covered by housing grants treats the non-coverage of California or regions of California the same way as the non-coverage of states or regions with much smaller MSFW populations. See HT 68, 81-82 (“[W]e took into consideration the number of states, not the breakdown within those states.”); id. at 85. That quite obviously appears to be a bad policy decision, given that California’s total population is greater than that of
the twenty smallest states combined, and as noted its share of MSFW’s is even higher. These grants serve people, not land. Indeed, California got extra Career Service and Training grants, where other states got just one, presumably because of its greater need. But unfortunately, I cannot second-guess these policy choices.

4. Whether the panelists improperly deducted points for the case management and the outreach and enrollment criteria described in the FOA.

As described in the FOA, the panelists used the same case management and outreach and enrollment criteria to evaluate permanent housing grant applicants as they used for Career Service and Training grant applicants and temporary housing grant applicants. HT 72, 170, 172. Complainant argues that this was arbitrary and capricious.

As Respondent notes, Complainant has not shown that the deductions for the case management and outreach and enrollment criteria made a difference in Complainant’s non-selection, even when combined with the extra points that Complainant might have gotten from the double-counting method.

Like Complainant’s other concerns, there is some validity to its argument here, that the criteria in the FOA do not apply to permanent housing grants in the same way as to other NFJP grants. See, e.g., HT 219. But see, e.g., 20 C.F.R. § 685.420(g) (grantees must describe outreach efforts in their program plan). But this did not make the grant selection arbitrary and capricious. The appropriation bill funding the grants required the GO to provide at least 70 percent of the NFJP housing funds to permanent housing. Further Consolidated Appropriations Act, 2020, Pub. Law 116-94, 133 Stat. 2538 (Dec. 20, 2019). Even if the case management and outreach and enrollment criteria disadvantaged permanent housing grant applicants, all permanent housing grant applicants were similarly disadvantaged. As Respondent noted, other permanent housing grant applicants received the same deductions. See RX 12; HT 72-74. The fact that multiple permanent housing grant applicants had trouble meeting these criteria supports Complainant’s contention that these criteria are hard to apply to permanent housing. See HT 31-35. However, it also supports Respondent’s contention that the deductions for these criteria did not affect the selection decision.

8 Because 70 percent was a lower bound on the percentage of NFJP housing grant funding that had to go to permanent housing, a sufficiently large deduction for criteria inappropriately applied to permanent housing grantees could theoretically result in the non-selection of a grantee who would have otherwise been selected. If, but for an inappropriately-applied deduction, 100 percent of the housing grant money would have gone to permanent housing grantees, and only 70 percent in fact went to permanent housing grantees, the deduction would affect selections, despite the backstop created by statute. But even if I found that it was inappropriate to apply these criteria – which I do not – Complainant’s non-selection in this case is a result of its past performance score, not the application of these criteria. See AF at C.6.
Ibanez responded to Complainant’s concerns. See HT 173-75. NFJP permanent housing grants are intended to serve MSFW individuals and families. Id. Although permanent housing grantees do not limit their services to MSFW individuals and families, the outreach and enrollment process can, within the bounds of applicable legal constraints, connect MSFW individuals and families with NFJP-funded services. See HT 173-75, 219. Moreover, permanent housing providers are expected to meet these criteria, at least in part, through a “coordinated approach among different partners.” HT 174. Similarly, the grantee has leeway in planning its case management approach, an approach that will usually include partnerships. HT 205. However, the grantee must “communicate effectively” in describing how that approach meets the criteria. Id. Permanent housing services may be different than other services provided by NFJP grantees, HT 219, but a grantee can adapt its approach to those differences while still meeting the FOA criteria. HT 205.

Moreover, even if some of these criteria do not directly apply to permanent housing, see HT 218-19 (addressing conversations with the National Office about the applicability of case management for permanent housing applicants, given the Fair Housing Act and the process of developing permanent housing), Complainant could have explained more clearly how partnerships served functions that Complainant did not serve directly or why a criterion was inapplicable to Complainant’s services. Compare C.11-21 (panelists’ deductions) with E.17-.20; see also F.21-23. But see HT 31-32: AF at E.122-29. Complainant knew the criteria were in the FOA and that it needed to address them clearly, if only to say more explicitly why it should not receive a deduction for failing to explain how it met the criteria. See HT 218-19 (explaining when case management becomes relevant for permanent housing grantees); see also HT 205 (“Self-Help Enterprises did begin to describe its Case Management approach in their application.”). Unless Respondent ignored or completely mischaracterized information that was in the application – which I find that it did not – I will not second-guess Respondent’s determination that Complainant did not sufficiently explain the areas in which points were deducted.

The panelists’ deductions were not explained in depth. AF at C.11-.21. Rather, the panelists recited a criterion from the FOA and cited the portion of the Project Narrative that they determined failed to explain or fully explain that criterion. See id.9 This adoption of the precise FOA language is understandable, as ALJs have faulted ETA in the past for relying on any criterion that deviates from the announcement language. Northwest Community Action Programs of Wyoming, Inc. v. U.S. Dep’t of Labor, 2003-WIA-00005, slip op. at 7 (Jan. 20, 2004); Institute for Indian Development, Inc. v. U.S. Dep’t of Labor, 2012-WIA-00010, slip op. at 4 (Sept. 16, 2013). But see The Workplace, Inc., ARB No. 13-064, at *3. Still, relying too much on the FOA language without any further explanation could theoretically allow the panelists to decide on an impermissible basis yet purport to be relying on a FOA criteria. For this reason, it may be possible for a point deduction to be arbitrary and capricious if it is clear that an applicant addressed a criteria but is assessed not to have addressed it.

I find, however, that the panelists’ point deductions were not arbitrary and capricious here. There is no evidence that the deductions were pretextual or that the panelists ignored relevant information. The panelists could perhaps have found that the partnerships addressed in the narrative explained why Complainant did not fully address certain criteria. But it was up to

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9 One deduction does not include a citation to a page of the Project Narrative. See AF at C.12.
Complainant to communicate, at the level of specificity required in the FOA, how it (possibly in tandem with partners) was complying with the outreach and enrollment and case management criteria. AF at F.21-22.

5. **A note about the Final Determination**

   In the Order Granting in Part and Denying in Part Respondent’s Motion for Summary Decision, I addressed Complainant’s lack of knowledge about the past performance deductions at the time of its appeal. When filing its appeal, Complainant only knew about the panelists’ deductions, and did not know that its past performance score resulted in its non-selection. HT 14-15.

   I adopt my reasoning from the June 28, 2021 Order addressing why I have jurisdiction to hear Complainant’s objections to its past performance score even though they were not specifically raised at the time of appeal. See 20 C.F.R. § 683.800(c).

   I find that the insufficiency of the Notice of Determination is not, in this case, a ground to reverse the GO or to remand. Respondent introduced sufficient evidence that its rationales for its past performance deductions were not newly concocted but rather were the grounds for its actual decision-making. See RX 13 at 3-4; RX 14; see also Regents of the University of California, 140 S.Ct. at 1909. Thus, I decline to find that Respondent’s failure to provide an adequate Notice of Determination means that its decision itself was arbitrary and capricious.

   Still, Respondent’s Notice of Determination was misleading. In the future, Respondent should provide more accurate information to non-selected applicants. I note that unsuccessful appellants incur expenses on appeal. Better information can help a non-selected applicant determine whether an appeal is worth the cost.

**VI. Order**

The Grant Officer’s determination not to award funding to Complainant is AFFIRMED. Accordingly, the complaint is DENIED.

**SO ORDERED.**

EVAN H. NORDBY
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 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).

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The Notice of Appeal Rights has changed because the system for online filing has become mandatory for parties represented by counsel. Parties represented by counsel must file an appeal by accessing the eFile/eServe system (EFS) at [https://efile.dol.gov/](https://efile.dol.gov/)

**Filing Your Appeal Online**

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/](https://efile.dol.gov/support/).

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at [https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf](https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf) and/or the video tutorial at [https://efile.dol.gov/support/boards/new-appeal-arb](https://efile.dol.gov/support/boards/new-appeal-arb). Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account 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](https://efile.dol.gov/contact).
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You are still responsible for serving the notice of appeal on the other parties to the case and for attaching a certificate of service to your filing. If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing of your document on those registered parties. Non-registered parties must be served using other means. Include a certificate of service showing how you have completed service whether through the EFS system or otherwise.

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   U.S. Department of Labor  
   200 Constitution Avenue, N.W., Room S-5220,  
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After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered e-filers 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, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.