



In the Matter of

Date Issued :
MAY 12 1992

IOWA DEPARTMENT OF EMPLOYMENT
SERVICES

Case No. 91-ESA-2

Complainant

v.

U.S. DEPARTMENT OF LABOR
Respondent

BEFORE: STUART A. LEVIN
Administrative Law Judge

DECISION AND ORDER

This case arises under the 1982 Employment Service Grants-to-States for the operation of the Disabled Veterans Outreach program (hereinafter the Act). Pub. L. No. 96-466, Sec. 586(a)(2); 91 STAT 2171; 38 U.S.C. §2003A. During the fiscal year 1982, the Department of Labor granted the State of Iowa \$7,936,540.00 for employment services, of which 6.7% or \$521,431.00, was devoted to the implementation of a Veterans Outreach Program (DVOP). At issue, is a layoff of 14 veterans employed as DVOP Specialists from January 29, 1982, to February 26, 1982. The amount in dispute is \$16,301.00. The parties agree upon the essential facts and have filed cross motions for Summary Decision.

I.

The Disabled Veterans Outreach Program required each state to appoint one disabled Vietnam veteran as an outreach specialist for each 5300 veterans of the Vietnam era residing in the state. In the event no qualified disabled veteran of the Vietnam era was available, then preference was accorded to other qualified disabled veterans, and finally, in the absence of a disabled veteran, a third preference was accorded to any qualified veteran. The State of Iowa initially complied with outreach program requirements and appointed 25 disabled veterans.

Budget cuts at the federal level, in fiscal year 1982, necessitated revisions in the Employment Service grants-to-states. (See, Field Memorandum 35-82, dated January 8, 1982.). To implement the cuts, the Department of Labor advised Iowa that its FY '82 allocation would be 12% less than its original FY '82 operating plan. The Iowa Department of Employment Services in turn was compelled by the cuts to initiate a reduction in force (RIF) based on seniority and ability in accordance with a collective bargaining agreement between the State of Iowa and the employees of the Iowa Department of Employment Services. Since the disabled veterans outreach program specialists were employees covered by the collective bargaining

agreement, 14 DVOP Specialists were RIFed in 1982 in accordance with the reduction in force formula in the collective bargaining agreement. (See, Affidavit of Virgil Hoehne).

The RIFed veterans were then replaced for about 29 days by 13 non-disabled veterans and one non-veteran from within the state agency. On February 26, 1982, the RIFed veterans were rehired.

II.

The Department of Labor argues that the DVOP Specialists were not accorded the preferences required by Section 2003A(a)(2) of the Act, and that the RIF's were, therefore, improper. Auditors retained by the Department's Inspector General calculated that "the costs foregone by the disabled veterans during the time they were laid off were \$16,301." (Admin. File at 23.). The Grant Officer subsequently determined that \$16,301 in lost wages should either be paid to "the illegally RIFed Specialists" or an amount totaling \$16,301 would be treated as a debt due to U.S. Department of Labor.

The State of Iowa vigorously disputes the Grant Officer's conclusions. It contends that the disallowance of \$16,301 is inconsistent with the Act, contrary to state law and the collective bargaining agreement, ignores the recommendations of the auditors, eschews the determination of the Employment Training Administration, and defies the Comptroller General of the United States. For good measure, Iowa alleges violations of the Tenth and Eleventh Amendments of the Constitution of the United States.

III.

The subsection of the Statute upon which the Department of Labor relies reads in part:

Each such specialist shall be a veteran. Preference shall be given in the appointment of such specialists to disabled veterans of the Vietnam era. If the Secretary finds that a disabled veteran of the Vietnam era is not available for any such appointment, preference for such appointment shall be given to other disabled veterans. If the Secretary finds that no disabled veteran is available for such appointment, such appointment may be given to any veteran. 38 U.S.C. 2003A(a)(2)

A careful review of subsection 2003A(a)(2) suggests that Iowa's contention that the layoff did not technically violate the Act is not completely lacking in merit. The subsection addresses the appointment of DVOP Specialists. It is silent in respect to retention preferences during times of budget dislocations. For this reason, upon consideration of the language of the applicable statutory provision, the court in Paulson v. Goodwin, 702 F.2d 168, (8th Cir. 1983), held that, "The subsection does not address the circumstances under which a DVOP Specialist, once appointed, may be laid off." Paulson at 168. While the Paulson court noted that the veteran was replaced by another veteran of equal preference, its holding was predicated upon an absence of a retention preference in the Act, not the status of the replacement worker. Thus, Congress

afforded the target class of veterans preferential access to the employment opportunities created by the outreach program, but it did not expressly provide that class greater protection than other state employees when the outreach program funds were cut.

Now am I unmindful of the concerns expressed by the Department of Labor that the failure to expand the coverage of the (a)(2) preferences to include retention situations would "utterly thwart Congress' intentions." The Department anticipates the hypothetical situation in which states temporarily hire disabled Vietnam veterans or other disabled veterans to meet the statute's demands, and then, "arguable, the very next day lay them off and hire whomever they see fit." (See, Grant Officer's Memorandum in Support of Motion for Summary Decision, fn 9, pg. 12.). Yet, the statute's express restrictions on the appointment process would seem to place a damper on the state's unfettered discretion to hire whomever it pleased as outreach specialists. Nor is the State of Iowa entitled to lay off anyone it chooses. In this instance, it was bound by the RIF formulas set forth in the collective bargaining agreement.

The record here does not support the notion that the layoff thwarted either the intent of Congress or any established policy of the Department of Labor. Funding cuts at the federal level initiated the ripples of dislocation which passed through the state agencies. Indeed, Iowa rehired the RIFed veterans quickly upon passage of the budget crises. Thus, there is no evidence in this record that Iowa's actions thwarted the intent of Congress when it reduced its federally funded staff positions in response to the reduction in its federal funding allocation.

Furthermore, as mentioned above, Congress mandated no preference in retention in subsection (a)(2) of the Act, and the Department of Labor had not yet communicated to the states that it interpreted the statute as affording a retention preference when Iowa took the action here challenged. In fact, Labor's retention policy was not communicated to Iowa until October 1, 1982, a full 8 month's subsequent to the RIF and rehiring of DVOP Specialists. Consequently, it need not be decided whether the Department's Program Letter No. 2-83, issued in October of 1982, is consistent with the Eighth Circuit's more recent Paulson decision. Iowa was not informed of the Department's policy when it was confronted with the need to act, and at the time it acted, Iowa's procedures were not contrary to the statute as construed in Paulson.

In view of the foregoing discussion, I find and conclude that the layoff of the 14 DVOP Specialists from January 29, 1982 to February 26, 1982, did not violate the appointment preference provisions of the Act, and did not contravene any publicly communicated DVOP retention policy of the U.S. Labor Department then in effect.

IV.

Having RIFed the disabled veterans it seems that Iowa had a choice. It could have perhaps declined to replace the RIFed DVOP Specialists and fall below its "mandatory" level of 25 appointments. The Comptroller General of the United States observed that the FY '82 Employment Service grant did not earmark any part of the funds for the DVOP. Consequently, the failure to fill unoccupied DVOP Specialist positions would not, according to the Comptroller, justify the disallowance of otherwise appropriate expenditures on grant activities. (See, Grant

Officer's Motion for Summary Decision, Attachment 1; (69 Comp. Gen. 600, 1990).). According to the Comptroller, the positions could have simply been left vacant. Like South Dakota, in the Paulson case, however, Iowa elected temporarily to replace the RIFed veterans.

Now, Iowa has conceded that one of these replacements was not a veteran, and, as such, this individual was not eligible to serve as a DVOP Specialist. Subsection (a)(2) is unambiguous in this respect. It provides: "Each such specialist shall be a veteran." Although this non-veteran's placement may have been entirely consistent with the bumping rights specified in the collective bargaining agreement, the appointment was otherwise contrary to the express language of statute. The statute forbids non-veterans to bump into DVOP Specialist positions. Accordingly, the wages paid to the non-veteran who served as a DVOP Specialist was properly disallowed.¹

The remaining 13 replacements were veterans, and thus, unlike the non-veteran, were not inherently ineligible to serve as DVOP Specialists. The placement of these veterans was apparently consistent with the retention provisions of the collective bargaining agreement. Since the veterans temporarily replaced had no retention rights under Section 2003A(a)(2), (See, Paulson, supra), the Grant Officer's proposal that the "lost wages" to or the "costs foregone" by the RIFed veterans, amounting to \$16,301.00 be disallowed is inappropriate. Nor would it be consistent with Paulson to pay, as the Grant Officer proposed, any amount disallowed to the veterans who were temporarily laid off.

The Department has established that one non-veteran improperly served as a DVOP Specialist from January 29, 1982 to February 26, 1982. Wages paid to that individual during that 29 day period are disallowed, and may be recovered by ETA. The parties will be afforded 30 days from the date hereof to submit either a stipulation of the wages paid to the non-veteran or evidence of the wages paid to the non-veteran. An appropriate order will thereafter issue.

ORDER

IT IS ORDERED that the record in this matter be reopened for a period of 30 days from the date hereof to afford the parties an opportunity to submit such evidence as they deem relevant in revealing the wages paid to the non-veteran DVOP Specialists during the period January 29, 1982 through February 26, 1982.

STUART A. LEVIN
Administrative Law

Judge

SAL:jeh

¹ The Comptroller's opinion is not applicable to and does not address the expenditure of federal grant funds, whether or not earmarked for DVOP purposes, on ineligible recipients or employees.

