

U.S. Department of Labor

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In the Matter of

COUNTY OF LOS ANGELES,
SERVICE DELIVERY AREA
(herein "the County")
Complainant

CASE NO. 87-JTP-5

v.

U.S. DEPARTMENT OF LABOR
Respondent

ORDER OF DISMISSAL/DENIAL OF MOTIONS

The Grant Officer's (GO) March 27, 1987 Motion to Dismiss the appeal in the above captioned matter Case No. 87-JTP-5 is before this Office for decision.

Case No. 87-JTP-5 was initiated by a December 9, 1986 hearing request filed by the County of Los Angeles, a subrecipient, following the GO's November 7, 1986 Final Determination (FD) which imposed sanctions and corrective actions only against the State of California (State), the recipient, based on an audit of Contract No. 8300-2587 and costs incurred by the County, the subrecipient during the October 1, 1983 - March 31, 1984 period. The GO's contention is the November 7, 1986 FD, as to the County, did not involve the Secretary's determination not to award financial assistance to an applicant nor in it does the Secretary, as to the County, impose a corrective action or sanction so as to entitle the County under §166(a) of the Job Training Partnership Act to a hearing in this forum. 29 USC §1576(a).

Case No. 87-JTP-9, State of California, Complainant, v. U.S. Department of Labor, Respondent, is scheduled to be heard October 6, 1987 in Sacramento, California, based on the State's appeal of the November 7, 1986 FD. The July 8, 1987 Notice of Hearing in Case No. 87-JTP-9 hereby incorporated reflects advice to all parties/counsel in Case No. 87-JTP-5 that upon completion of the time period allowed for submissions/replies by the parties, a decision will be reached on this Dismissal Motion as well as the alternate County motion for joinder in 87-JTP-9 as a basis for its agreement to dismissal of its 87-JTP-5 appeal here. The County in responding to the dismissal motion stated it would not object to the dismissal of its 87-JTP-5 hearing request if it were joined as a party in 87-JTP-9 and allowed to raise the same issues in the 87-JTP-9 proceedings it raises in its 87-JTP-5 appeal/pre-hearing statement.

The County contends since the two cases involve the same parties, audit, and facts, and the disallowed costs and findings of the November 7, 1986 GO Final Determination were adverse to, and directly and necessarily affected the County which had not had an opportunity in an appropriate forum to dispute the FD, the hearing right it is entitled to under §629.57 20 C.F.R., although a subrecipient, should be joined with the State's 87-JTP-9 requested hearing, in one proceeding to conserve administrative time/costs.

At the time the May 8, 1987 Show Cause Order was issued^{1/} it appeared that as to the GO's November 7, 1986 FD's findings 1, 4, and 5, part of the bases for the State's hearing request in 87-JTP-9, the County's contentions of a direct affect on it by the hearing decision in 87-JTP-9 were well-taken.

However, further consideration has been given the County's contentions and position in light of the subsequently received State's May 28, 1987 Response, the GO's June 19, 1987 Show Cause Response, the County's July 2, 1987 Response as well as the GO's July 21, 1987 Supplemental Response. On further consideration of these and all submissions here, and analysis of the underlying procedural history of the State's audit of Contract No. 8300-2587, and the County's appeal of the State's findings, the ALJ's view is now as urged by the GO.

The GO's November 7, 1986 FD imposed no sanction nor corrective action, denied no financial assistance to the County so as to entitle the County to the formal hearing provided under §166(a) of the Act and its effectuating regulations at §629.57 20 C.F.R., which can afford no great appeal right than the statute provides. While the Act may not define a recipient, §166(a) of the statute and 20 C.F.R. §629.57 are very specific in stating a prerequisite to jurisdiction before the OALJ is that the complainant be as identified in §164(f) and 166(a) of the Act, and that all other disputes arising under the Act shall be adjudicated under the appropriate recipient or subrecipient grievance procedures or other applicable law, i.e., the complainant seeking this Office's jurisdiction over its hearing request must have suffered the Secretary's failure to award financial assistance or the Secretary's determination imposing corrective actions or sanctions. Here the County suffered neither as the following underlying facts and procedural history which resulted in both 87-JTP-5 and 87-JTP-9 reflect.

In its 87-JTP-9 appeal California is seeking to overturn the November 7, 1987 GO's FD which disallowed \$1,548,322 in alleged JTPA grant costs incurred by L.A. County, California's subrecipient. This FD was based, in part, upon an "Audit Report" and "Final Determination" of L.A. County's JTPA expenditures for the period October 1, 1983 through March 31, 1984. Both the Audit Report and the Final

^{1/} State's April 17, 1987 response to GO's Dismissal Motion not received and associated with this case at Order's May 8, 1987 issuance.

Audit Determination were prepared and issued at the behest of California.

In its Final Audit Determination, California found that L.A. County had incurred \$3,130,502 in disallowed JTPA costs. Specifically, California determined that L.A. County had incurred disallowed JTPA costs for the following reasons:

- (1) \$672,845 for its failure to maintain effort;
- (2) \$1,855,166 for its enrollment of ineligible participants;
- (3) \$138,639 due to its failure to fulfill placement and wage requirements; and
- (4) \$463,852 in undocumented supportive service costs.

Accordingly, pursuant to section 144(a) of the Act, 29 U.S.C. §1554(a) and California's Job Training Partnership Office Policy/Procedure Bulletin 84-8 L.A. County was afforded the opportunity to request a hearing with regard to California's audit determinations.

L.A. County requested and was provided with such an opportunity to be heard by a State hearing officer with regard to California's determination to disallow certain JTPA costs. However, prior to the receipt of any evidence, California and L.A. County entered into a Settlement Agreement. Under the terms of the Settlement Agreement L.A. County was not liable for the repayment of any of the costs disallowed by California. Instead, California agreed to accept "stand-in costs" (the substitution of other costs for disallowed JTPA costs) for L.A. County's alleged maintenance of effort violation (\$672,845) and its alleged failure to fulfill its placement and wage requirements (\$138,639). California further agreed to seek DOL approval to waive L.A. County's liability for the disallowed costs attributable to the alleged violation regarding ineligible participants (\$1,855,166). California also agreed to allow the costs associated with L.A. County's alleged failure to document support services costs (\$463,852). For its part L.A. County agreed not to further contest any finding with regard to which the DOL agreed with California's determination to accept either stand-in costs or to waive liability for the disallowed costs. L.A. County, however, reserved the right to reopen and contest before the State hearing officer all disallowed cost issues with regard to which the DOL disagreed with California's determination to either waive liability or to accept stand-in costs. Pursuant to the terms of California's and L.A. County's settlement California sought the DOL Grant Officer's approval.

In response to California's request, the DOL Grant Officer agreed to accept its determination to waive liability for \$1,855,166 in costs L.A. County expended in connection with ineligible participants and to allow the \$463,852 in costs associated with undocumented services.

However, the Grant Officer did not concur with California's determination to accept stand-in costs (\$672,845 contained in the FD's finding No. 1) for L.A. County's alleged failure to maintain effort or for its alleged failure to fulfill placement and wage requirements (\$100,541 contained in FD's finding No. 4). In addition, the Grant Officer disallowed \$774,936 in costs (contained in FD's finding No. 5) representing alleged overbilling by certain L.A. County service providers which had not been previously disallowed by California. The Grant Officer thus determined that California was liable for the repayment of \$1,548,322 in disallowable JTPA costs.

The State agrees (5/28/87) the OALJs has jurisdiction of the County's appeal and the County should be made a party to the State's 87-JTP-9 action, citing as support the fact the GO made two determinations in the FD the State had not previously made and instituted sanction repayment of funds resulting from the disallowed costs of the November 7, 1987 FD's findings. However, since the FD did not impose sanctions or seek repayment funds from the County, the State could not and did not so represent in its response. The County was not a party to the GO's audit review with the State, the basis of the November 7, 1986 FD. While under 29 U.S.C. §1574(e)(3) the GO had the authority to impose a sanction or corrective action directly against the County, in which event it would have a §1576(2) right to hearing, the GO did not do so here.

The issues in the State's 87-JTP-9 appeal arise out of the GO's determination stand-in costs were not an acceptable means of California repaying the federal government the disallowed County costs both the State and the GO agreed should be disallowed. As argued by the GO his finding of wilful disregard, one of the issues the County contends it never had an opportunity to present and defend on, does not affect the fact, or amount of the violation and the County has not shown any greater adverse affect on it by this finding than what resulted from California's determination the violation occurred. The GO's wilful disregard finding affects only the manner under 29 U.S.C. §1574(d),(e) in which the GO determined California must repay the costs both DOL and the State agreed should have been disallowed. This is an issue between the State and the GO and does not affect the County, or the fact and violation amount agreed upon. While the State may have to present evidence through County witnesses on this issue, the determination of this issue solely affects the question of how the State can effectuate repayment costs and the fact County witnesses will be involved is not a sufficient basis to join the county as a party.

The State and County's contention the GO's November 7, 1986 determination that \$774,936 in costs not previously disallowed on the State's audit, representing overbilling by certain County providers, is a new finding, the second new GO finding directly and adversely affecting the County which has had no opportunity to be heard, supporting their contention the County has a right to be heard either here in 87-JTP-5, or joined in 87-JTP-9, is not convincing. It is the State, not the County, which is being held liable in the November 7, 1986 determination for these disallowed costs.

The County argues if the GO wished the State and County to reach a final decision rather than the settlement they did, the GO should have so requested before issuing the FD. It is urged the GO's dismissal request is thus inappropriately timed and on this basis the GO should be precluded from denying the County's participation as a party. Such is not convincing as the State elected to pursue its appeal to the GO based on this audit's earlier procedural history and the County elected to reserve its right to contest California's findings against it in the State review process. 29 U.S.C. §1554.

It appears the GO had to work with the procedural history presented by the State, and elected by the County. There is no indication the State, or the County during the course of the informal administrative proceedings held to resolve matters in 1967 urged as the County now presents. This request if granted would bring before this forum all the specific issues the County's pre-hearing statement wishes to raise relative to the FD's findings 1, 4, 5, a significant number of which are not contested as between the GO and the State, factual issues meant to be resolved under the §1554 29 U.S.C. State - County resolution process. This factor, as well as the additional issue the GO wishes to raise against the County should the County be Ordered joined, reflect just how complex the 87-JTP-9 proceeding could become were the County's request granted.

If the County is found to have demonstrated a sufficient basis for its joinder as a party, and such is Ordered, the GO urges the County's liability for the \$1,855,166 in disallowed costs he determined the State was not liable for because the State met the Act's §164(e)(2), 29 U.S.C. 1574(e)(2) criteria, should be made an issue as against the joined County. Recovery of such costs was not sought from the County in the GO's November 7, 1986 determination because sanctions, repayment and corrective action were sought solely from the State. This request of the GO appears to be reasonable were joinder Ordered but it indicates how joinder would do anything but simplify the process if granted.

The County's argument that given fiscal reality its interests are clearly and directly involved in the State's appeal of the November 7, 1986 GO determination is too tenuous and premature to rule to join it as a party to the 87-JTP-9 proceeding.

The County further urges that under this forum's procedural regulations, at §18.10(b) 29 C.F.R. the County has the right to participate as a party. However under §18.1, 29 C.F.R. the statutory provision of §1576(a) controls and as indicated whether the final decision on the 87-JTP-9 issues could directly and adversely affect the County is too conjectural; joinder as a party will not contribute materially to the 87-JTP-9 disposition, and the County's interest will be adequately represented by the State. Joinder of the County as a party is thus not appropriate. The County's request is denied under §18.10(d) 29 C.F.R. However the County's request is treated as a petition for participation in Case No. 87-JTP-9 as amicus curiae and this petition is granted.

For all these reasons urged by the GO, but specifically because under §166(a) of the Act, §629.57 20 C.F.R., the County is not, on the procedural history which resulted in the GO's November 7, 1987 FD, entitled to a hearing before the OALJs, the GO's motion to dismiss the County's request for hearing is granted. This request, the basis of Case No. 87-JTP-5 is dismissed on the lack of this Office's jurisdiction under §166(a) of the Act, §629.57 20 C.F.R. Further, the County's alternate request to be joined as a party in Case No. 87-JTP-9 is denied.

Ellin M. O'Shea

ELLIN M O'SHEA
Administrative Law Judge

Dated: 10 AUG 1987
San Francisco, California

EMO:mw