

U.S. Department of Labor

Office of Administrative Law Judges
11 11 20th Street, N.W.
Washington, D C. 20036



Deliberative Priv

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In the Matter of
CAMPELINOS UNIDOS, INC.
.....

Case No. 82-CPA-22 ✓
83-JTP-3

ORDER

On November 30, 1983, a Prehearing Conference regarding the above-captioned cases was held before the undersigned. One of the subjects discussed at that Conference was the objection of the attorney for the Grant Officer to Complainant's request to depose certain witnesses and call them to testify at the hearing in these cases. 1/ The objection of the attorney for the Grant Officer is based on the "deliberative process" privilege. On November 30, 1983, I ruled, orally, that the Complainant would be able to depose and call these witnesses but that the questions would be limited in scope: to questions of facts, factors considered in reaching a decision and of undue influence, prejudice or bias. I now follow-up my ruling in writing with the reasons therefor as outlined below.

The Department of Labor's Solicitation for Grant Application (SGA) criteria for the Job Training Partnership Act (JTPA) grant selection, as published in 48 Fed. Reg. 23932 (1983), required the Department to set up competitive review panels of three members to rate individual grant applications. Complainant has asked to question these witnesses through depositions and at the hearing. The attorney for the Grant Officer raised objections at the Prehearing Conference to these requests based on the "deliberative process" privilege. More specifically, he objected that any questioning of these panel members would have a "chilling" effect and adversely affect the Department's selection process, although he was willing to permit questioning to show undue influence, prejudice or bias. The Grant Officer's attorney cited two cases which support his position: U.S. v. American Telephone and Telegraph, 524 F. Supp. 1331 (D. D.C. 1981), and Kaiser Aluminum and Chemical Corporation v. U.S., 157 F. Supp. 939 (Ct. Cl. 1981).

The court in U.S. v. American Telephone and Telegraph, *supra*, stated that in that particular case the reasons underlying various decisions of members of the Federal Communications Commission (FCC)

1/ . In a separate order, I denied the Grant Officer's Motion to Dismiss case number 82-CPA-22 and granted Complainant's Motion to Consolidate case numbers 82-CPA-22 and 83-JTP-3. Since these cases are now consolidated, Center for Employment and Training's intervention in 83-JTP-3 applies to 82-CPA-22 as well.

Deliberative Process

In Carl Zeiss
some documents held
in name & others
ordered produced

- 2 -

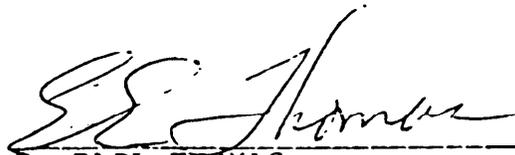
or their understanding of what those decisions meant are part of the agency's deliberate process and as such are clearly privileged. Id at 1387. Therefore, the Court held that questions which tended to probe the mental processes of individual members of the FCC would not be permitted. Id. The Court's rationale was that "disclosure of intra-agency deliberations and advice is injurious to the government's consultative function because it would tend to inhibit the frank and candid discussion that is necessary for an effective operation of government." Id. The Court also said that this "deliberative process" privilege is qualified, rather than absolute, and its validity in particular circumstances depends upon balancing the public interest in nondisclosure and the need for the information as evidence. Id at 1386 n 14. The Court stated that an exception to this privilege is made where there are allegations of misconduct or misbehavior and that evidence to that effect is not privileged. Id at 1389. In that case, the Court permitted American Telephone and Telegraph (AT&T) to question FCC staff members on whether they exerted improper or undue influence upon Commission members; that is, on whether their influence on the Commission exceeded bounds set by the rules or customary practices of that agency. Id. For a similar decision and rationale, see Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), aff'd on opinion below, 384 F.2d 979 (D.C. Cir. 1967), cert den., 384 U.S. 952 (1967).

The court in Kaiser Aluminum, supra, described the public policy behind this privilege as being one of open, frank discussion between subordinate and chief concerning administrative action. 157 F. Supp. at 946. In this case, the Court held that disclosure of an advisory opinion on an intraoffice policy was so contrary to the public interest that the United States would be permitted to claim the executive privilege of nondisclosure. Id. The Court reached this conclusion after considering the circumstances around the demand for the document in order to determine whether its production was injurious to the consultative functions of government. Id.

The Supreme Court has stated, in regards to a suit brought under the Freedom of Information Act, that, in the absence of a claim that disclosure would jeopardize state secrets, memoranda consisting of only compiled factual material or factual material contained in deliberate memoranda and severable from its context would be generally available for discovery by private parties in litigation with the government. Environmental Protection Agency v. Patsy T. Mink, 410 U.S. 73, 87, 88.

With these principles of law in mind, I ruled that while the questioning of competitive review panel members by NRO would be permitted, the scope of questioning would be limited to certain areas.

While not a commonly recognized privilege, the privilege of deliberative process has been followed by the courts and its claim by the Grant Officer is hereby followed by me within the limitations established by the courts. The basic rationale behind this privilege is to protect the mental or thought processes of agency members and to encourage open and frank discussion. But, as the court said in U.S. v. American Telephone and Telegraph, supra, the privilege is qualified, rather than absolute, and before may be invoked in a particular case, the competing concerns of the public interest in non-disclosure and the need for the information as evidence must be balanced. It is this balancing process and the limitations placed on the privilege by the courts that caused me to limit the scope of questioning of panel members in this case. This limitation in scope resulted after I balanced the Department of Labor's interest in protecting the deliberate process which resulted in the non-selection of CUI and the selection of CET and in continuing this process in the future by providing some protection to these panel members versus CUI's need to obtain evidence of this process, through the questioning of panel members, so as to enable it to present its case fully and accurately. Also, as I stated above, the courts have not extended this privilege to prevent questioning on factual matters or where there are allegations of undue influence, prejudice or bias. In view of the above, I limited the scope of deposing and questioning panel members to facts, factors that led to a decision, and undue influence, prejudice or bias. Any problems with this limitation shall be dealt with as they arise.



E. EARL THOMAS
Deputy Chief Judge

Dated: 13 DEC 1983
Washington, D.C.

EET:PC: jeh