

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

_____)	
In the Matter of)	
ILLINOIS MIGRANT COUNCIL, INC.,)	--
Complainant)	
v.)	Case No, 84-JTP-10
UNITED STATES DEPARTMENT OF LABOR,)	
Respondent)	
_____)	

FINAL DECISION AND ORDER

BACKGROUND

This case arises under the Job Training Partnership Act (JTPA), 29 U.S.C. §§ 1501-1781 (1982), and the regulations issued thereunder contained in Title 20 of the Code of Federal Regulations (1985). On February 8, 1983, the Department of Labor's Employment and Training Administration (ETA) solicited migrant and seasonal farmworker youth grant applications for Program Year 1983 by publishing a notice of Solicitation of Grant Applications.^{1/} This notice stated that Solicitation for Grant Application (SGA) packages would be mailed to all eligible applicants on or about February 9, 1983, and that the package would contain the guidelines and specifications to which eligible applicants must adhere in preparing an application.

^{1/} 48 Fed. Reg. 5,822 (1983). The notice stated that these grants were authorized under Title IV, Part A, Subparts 2 and 3 of the Comprehensive Employment and Training Act (CETA) at §§ 433(a)(4) and 423(b), 29 U.S.C. §§ 909(a)(4) and 901(b) (Supp. V 1981), and Section 181 of JTPA, 29 U.S.C. § 1591. CETA was repealed by JTPA, Pub. L. No. 97-300, § 184, 96 Stat. 1357 (1982). Under JTPA transition provisions in Section 181(a) and (d), these CETA programs were carried forward until new JTPA farmworker programs became operational under the statute.

The SGA package provided that appropriate youth **programs** should differ depending upon such factors as the specific characteristics of the youth, (age, family status, educational and language deficiencies) job market **characteristics**, diversity of geographical areas, and the type and extent of community **resources**.^{2/} The SGA permitted applicants to follow one or more of the three approaches described therein: Skills Training, Year-Round Programming for Migrant Youth, and Work Experience Programs for Seasonal Youth.^{3/}

Illinois Migrant Council, Inc. (IMC), was one of **thirty-nine** applicants to submit a funding proposal. **IMC's** proposal, containing a multi-state, year-round program model, and the other thirty-eight proposals were reviewed by a three-member SGA Proposal Review Panel using the five rating and scoring criteria contained in the **SGA**.^{4/} The Panel gave **IMC's** proposal an average rating of 59. AF, Tab C. ETA determined that only those organizations receiving a score of 63 or more would be eligible to be considered for a final rating and ultimate funding. AF, Tab B. Therefore, **IMC's** proposal was given no further consideration.

^{2/} Solicitation for Grant Application for Youth Programs for Youth Who Are Members of Migrant and Seasonal Farmworkers Families, February, 1983 (SGA), Administrative File (AF), Tab E at 2.

^{3/} SGA at 3-4.

^{4/} Id. at 8-9. These criteria consisted of: (1) quality of **application** - program approach; (2) administrative capability; (3) delivery system; (4) linkages and coordination; and (5) responsiveness to youth. Each criterion was evaluated based on factors listed therein and assigned a maximum point value.

On June 30, 1983, the Grant Officer informed IMC of its nonselection, and on July 27, 1983, the Special Counsel to the Assistant Secretary of Labor, responding to **IMC's** Petition for Reconsideration, sustained the initial decision. AF, Tab A. On August 5, 1983, IMC filed a request for a hearing with the Chief Administrative Law Judge with respect to its non-selection. Id.

The Administrative Law Judge (ALJ) found that the SGA Proposal Review Panel Instructions required that past performance was to be incorporated into the overall score of each applicant before a selection was made, rather than into the scores of only those applicants receiving the cut-off score of at least 63 under the combined five criteria, and that a high score on past performance might be a determinative factor in the selection process. Accordingly, on March 22, 1984, he ordered that the Grant Officer compute a past performance score for each applicant and then give each a final rating. Under this subsequent computation, IMC received a final total combined score of 61. Since only applicants who had a final rating of 62 received grants, the Grant Officer's Affidavit of April 25, 1984, stated that even with an evaluation of past performance, IMC would not have received a **grant.**^{5/}

^{5/} IMC's past performance is no longer an issue. ALJ Order Regarding Discovery, Pre-Trial Procedures And Notice Of Hearing, May 9, 1984, at 2; Opposition To Grant Officer's Motion For A Protective Order, June 12, 1984, at 2.

On May 21, 1985, IMC waived its right to a full hearing. Instead, the case was submitted on the record adduced and developed during discovery, including the depositions and scoring sheets of the three panelists.^{6/} On December 2, 1985, the ALJ issued his decision adverse to the Grant Officer.^{7/}

The ALJ ruled that neither the expiration of the grant period at issue nor the absence of a specific JTPA provision for migrant youth grants under the administration of the Department, as had previously existed under CETA, rendered this case moot. He held that JTPA did not limit the remedies available to a disappointed applicant. He also ruled that migrant youth grants could be funded under Section 402 of JTPA, 29 U.S.C. § 1672, although he found that such grants were not currently funded under this provision.^{8/} Further, according to the ALJ, since IMC undertakes both youth and adult training programs, it had a vested interest in the outcome of this case and any impact it might have on other grant applications.^{9/}

Turning to the merits of the case, the ALJ held that his standard of review was contained in 20 C.F.R. § 633.205(e), requiring affirmance of the Grant Officer's decision if "there is

^{6/} Hearing Transcript (Tr.), May 24, 1985, at 2-4.

^{7/} Decision and Order (D. and O.), Illinois Migrant Council, Inc., v. United States Department of Labor, Case No. 84-JTP-10, December 2, 1985.

^{8/} D. and O. at 3, 12. The ALJ cited the reference to farm-worker "dependents" in Section 402(c)(3) of JTPA, 29 U.S.C. § 1672(c)(3), in support of such direct funding. Id. at 3.

^{9/} Id. at 3.

a basis in the record to support the Department's decision."^{10/} Purporting to adhere to this standard, the ALJ concluded that the panel's evaluation of **IMC's** grant proposal under both the administrative capability and delivery system criteria lacked any rational basis and therefore its complete evaluation of the proposal lacked a rational basis.^{11/} Further, since the Grant Officer based his decision on the panel's evaluation, the ALJ found that the Grant Officer's decision not to award IMC a grant lacked any rational basis.^{12/} Based on his interpretation of the testimony of the panelists, the ALJ found that IMC would have been awarded an additional eight points for an amended panel score of 62 before the past performance evaluation, and that its final score would have been 64.^{13/}

The ALJ found that **IMC's** final score, as revised by the ALJ, would have placed it among the top ten ranked proposals receiving funding.^{14/} He ordered that for all future Department of Labor grants for which IMC applies, it is to be credited with past performance of a Program Year 1983 Migrant Youth

^{10/} Id. at 4. For a discussion of this standard in the context of a **challenge** to a responsibility review determination, see North Dakota Rural Development Corp. v. United States Department of Labor and Minnesota Migrant Council, Case No. 85-JTP-4, Secretary's Decision, March 25, 1986, slip op. at 5-12, appeal docketed, No. 86-1492 (8th Cir., April 24, 1986).

^{11/} D. and O. at 11

^{12/} Id.

^{13/} Id.

^{14/} Id.

Program grant equal to the anticipate-d performance rates set out in its funding request.^{15/}

The Grant Officer, pursuant to Section 106(b) of JTPA, 29 U.S.C. § 1576(b), filed various exceptions to the decision of the ALJ, and I asserted jurisdiction on January 21, 1986. Upon review of the full record, I have determined that it is unnecessary to consider the merits of this case because I find that it is moot.

DECISION

Under applicable procedural regulations governing remedies in appeals from grant denials for migrant and seasonal farmworker program applicants, set forth in 20 C.F.R. § 633.205(e),^{16/} this case is moot since no relief can be granted now that the grant period has ended. 20 C.F.R. § 633.205(e) provides, in pertinent part:

The available remedy under such an appeal will be the right to be designated in the future rather than a retroactive or immediately effective selection status. Therefore, in the event the ALJ rules that the organization should have been selected and the organization continues to meet the requirements of this Part, the Department will select and fund the organization within 90 days of the ALJ's decision unless the end of the 90-day period is within 6 months of the end of the funding

^{15/} Id. at 12, 13.

^{16/} See Section 181(d) of JTPA, 29 U.S.C. § 1591(d). By the time of the Grant Officer's Motion to Dismiss on the Ground of Mootness, July 20, 1984, the Department had issued 20 C.F.R. § 633.205(e). 48 Fed. Reg. 48,771 (Oct. 20, 1983). Although the ALJ cited this regulation for his standard of review (D. and O. at 4), he did not follow it on the mootness issue.

period. Any organization selected and/or funded prior to the ALJ's decision will be affected in a manner prescribed by the Department. All parties will agree to the provisions of this paragraph as a condition for funding.

Reading the first two quoted sentences together, the "available remedy" for a disappointed applicant is not a retroactive or an immediate designation, because that might disrupt or impair the receipt of services for farmworker program beneficiaries. The remedy, therefore, is limited to the right to "future" designation and funding (i.e. within ninety days of the ALJ's decision), during the contested "funding period," so as to minimize service disruptions or impairments and allow for an orderly transition of grantees.^{17/}

No relief is available under 20 C.F.R. § 633.205(e) once the grant period has ended. State of Maine v. United States Department of Labor, 770 F.2d 236, 239, 240 (1st Cir. 1985). In dismissing as moot on that basis the action of the disappointed applicant in State of Maine, the Court of Appeals for the First Circuit stated:

Maine Labor argues that, even if it cannot obtain relief under DOL's existing policies or regulations, we should create some form of relief--relief that would involve its receiving some kind of advantage or a direct award in a later grant period. But, we cannot do so. For one thing, we have found no authority showing that a court has the power to create this type of relief--relief that would take a later grant away from a later winner. For another thing, this is not a proper case

^{17/} Under the second quoted sentence, relief is also denied to an aggrieved applicant when the decision comes towards the end of the grant period.

for imaginatively fashioning such relief out of the Administrative Procedure Act, say, by finding DOL's refusal to grant relief "arbitrary" or "capricious," 5 U.S.C. § 706(2) (A), and then "compel[ling] agency action unlawfully withheld." 5 U.S.C. § 706(1). The simple reason is that DOL's "no relief" policy is not "arbitrary" or "capricious". Rather, DOL's policy against allowing such relief reflects a reasonable balancing of the interests involved: the interests of Maine Labor, of other competitors, and of the farmworker beneficiaries of the program. It is, of course, important for any agency to apply its regulations fairly, and to avoid mistakes; yet often regulations are complex; and the process of deciding whether an applicant has been wronged takes time. To follow a determination of wrong with a remedy applicable to the next [emphasis in original] grant period threatens to interfere unfairly with other applicants who have legitimately and properly received the award for the next period. . . . More importantly, such relief (as DOL points out) threatens to injure the interests of the farmworkers themselves by depriving them of the services of the best qualified applicants.

770 F.2d at 240 (emphasis supplied). Similarly, the ALJ's relief in this case is an ongoing advantage for future grant awards which threatens to injure the interests of the Department's farmworker program beneficiaries by depriving them of the services of the best qualified applicants.

Since the relief ordered by the ALJ is not based upon actual performance, it is inconsistent with the JTPA policy, set forth in Section 402(c)(1) of the Act, 29 U.S.C. § 1672(c)(1), and 20 C.F.R. § 633.205(e), of serving the Department's farmworker program beneficiaries through the best qualified applicants for each grant period. Specifically, the relief does not comport with the requirements enunciated in Section 402(c)(1)

for funding organizations with "a previously demonstrated capability to administer effectively a diversified employability development program for migrant and seasonal farmworkers" and the use of "procedures consistent with standard competitive Government procurement policies." These requirements contemplate actual past performance, which can be closely evaluated for purposes of future funding decisions, rather than the fictional performance levels created by the **ALJ's** order. This is made clear in 20 C.F.R. § 633.204(a), concerning responsibility reviews of potential farmworker program grantees; one of the tests therein is "[s]ubstantial failure to provide services to applicants as agreed to in a current or recent grant." Such a test obviously contemplates actual past performance.

ETA is not awarding migrant youth grants under Section 402 of JTPA. Indeed, throughout this case, ETA has asserted that such grants were unique to CETA and do not come within the purview of federally administered JTPA farmworker programs in Section 402. Hence, aside from considerations of the available remedy under the regulations at 20 C.F.R. § 633.205(e), this case is moot since there is no continuing controversy presenting an actual, live issue. United Indians of Nebraska v. Donovan, 702 F.2d 673 (8th Cir. 1983).

In United Indians of Nebraska, the court dismissed as moot a petition for review of a denial of designation of the plaintiff as the Native American grantee for certain counties

in Nebraska. The grant period had expired, as had CETA itself, by the time the case reached the Court of Appeals. After re-viewing those facts, the court concluded:

It is conceded that no retroactive relief can be given with respect to fiscal year 1981, and in light of the circumstances nothing this court could decide on the merits or that the ALJ decided in his decision of January, 1982 can or should provide any precedent for future action. Therefore, we conclude that this case must be, and it is, dismissed as moot.

702 F.2d at 674. See also Chicago Consortium, Inc. v. Brennan, 559 F.2d 138, 141 (7th Cir. 1979) (dismissing as "abstract, if not necessarily moot" claims alleging duty of Secretary of Labor to notify Consortium of funds cut off when statute authorizing program had been repealed); Hood River County v. United States Department of Labor, 532 F.2d 1236, 1238 (9th Cir. 1976) (dismissing as moot after funding year 'had ended direct action by public entity denied the right to comment on improperly awarded grant).

The present case cannot be preserved as an exception to the mootness doctrine as "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). Under this exception, there "must be a 'reasonable expectation* or a 'demonstrated probability' that the same controversy will recur involving the same complaining party," Murphy v. Hunt, 455 U.S. 478, 482 (1982), quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975). Since ETA is not awarding

migrant youth grants, there is no reasonable expectation or demonstrated probability that the same controversy will recur between ETA and IMC involving the same grant application review criteria and permissible program models.

Accordingly, the decision of the Administrative Law Judge is hereby vacated and this case is dismissed as moot.

SO ORDERED.



Secretary of Labor

JUL 17 1986

Dated:
Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: Illinois Migrant Council v. United States
Department of Labor

Case No. : 84-JTP-10

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following persons on July 17, 1984.

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