



In the Matter of:

**MIDWEST FARMWORKER
(STATES OF MINNESOTA, SOUTH
DAKOTA AND NORTH DAKOTA),**

COMPLAINANT,

v.

**UNITED STATES DEPARTMENT OF
LABOR,**

RESPONDENT.

ARB CASE NO. 98-144

ALJ CASE NOS. 97-JTP-20

97-JTP-21

97-JTP-22

DATE: July 23, 1998

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER

We have before us Respondent's "Request for Emergency Review of Denial of Motion for Protective Order and Grant of Motion to Compel Discovery" (Request for Emergency Review) and Complainant's initial response, a letter dated July 22, 1998. We treat the Respondent's request as a motion for relief from an order to comply with Complainant's discovery request and for expedited consideration. The motion is **DENIED** in part and **GRANTED** in part.

These cases arise under the Migrant and Seasonal Farmworkers Program of the Job Training Partnership Act, Title IV, Section 402, 29 U.S.C. §1672 (Supp. 1996). According to Respondent's motion for relief, Complainant Midwest Farmworker Training and Employment, Inc. (Midwest), applied for training grants authorized by the Act and administered by the Department of Labor, but its applications were denied. Exercising its right under 20 C.F.R. §633.205(e), Midwest sought review of that decision by the Department, and the matter at some point was forwarded to the Office of Administrative Law Judges. Also according to Respondent's motion, the administrative law judge (ALJ) assigned to Midwest's cases and the parties conducted a telephone conference call on July 16, 1998.

During that conference, Respondent alleges, it opposed requests by Midwest to depose certain individuals who allegedly were involved in the decision not to grant Midwest's applications and to provide Midwest with related documents. Respondent asserts that it based its opposition on the deliberative process and attorney-client privileges. However, according to Respondent, "the ALJ

stated that he did not recognize the deliberative process privilege” and “indicated that he would draw negative inferences, potentially resulting in a ruling on the merits in favor of the Complainant, if the Respondent did not comply with his order.” Further, Respondent states, the ALJ “effectively declined” to issue a written order. *See* Request for Emergency Review.

Whether the deliberative process or attorney client privileges apply to particular witnesses or documents is a mixed question of fact and law. For neither privilege is it enough simply to assert that disclosure may have “chilling effects” on agency personnel or attorneys and their clients. Neither in its Request for Emergency Review nor in attachments (the gist of which Respondent obviously considered material to its case, yet simply incorporated by reference) does Respondent identify the particulars of the grant application decisional process that make the deliberative process or attorney client privileges relevant and, if relevant, sufficient to justify non-disclosure. *See, e.g., In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 1998 WL 336518 (D.C. Cir. June 26, 1998); *Swidler & Berlin v. United States*, 118 S.Ct. 2081, 66 U.S.L.W. 4538 (June 25, 1998).

Moreover, we find Respondent’s allegations concerning the content of the July 16 telephone conference call insufficient basis for an appellate order. Respondent’s account of the colloquy does not even purport to be based on first hand knowledge, nor is its reliability certified in any way. *See, e.g.,* 28 U.S.C. §1746.

Although we have in fact considered Respondent’s motion on an interlocutory and expedited basis, we note that such interlocutory review was not necessary to assure appellate review of the merits of ALJ’s ruling on this issue. If the Respondent chooses not to comply with the ALJ’s order to produce and if the ALJ, in turn, draws negative inferences as a result, the ALJ’s final order certainly will explain his reasoning and thus present the issue for our review.

ACCORDINGLY, we **GRANT** Respondent’s motion for emergency consideration and **DENY** Respondent’s motion for reversal of the ALJ’s order.

SO ORDERED.

KARL J. SANDSTROM

Chair

PAUL GREENBERG

Member

CYNTHIA L. ATTWOOD

Acting Member