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In the Matter of

Date Issued: November 14, 2000

STATE OF FLORIDA
DEPARTMENT OF LABOR
AND EMPLOYMENT SECURITY
Complainant

Case No. 1999-JTP-0016

v.

U.S. DEPARTMENT OF LABOR
Respondent
.....

ORDER DENYING MOTION TO COMPEL

By Order issued October 25, 2000, the Department of Labor (DOL) was required to submit, *in camera*, a copy of its "Project Proposal 1997" in response to the Florida Department of Labor and Employment Security's (FDLES) contention that it was audited in bad faith, and DOL's assertion that the document is a privileged communication. FDLES contended that the DOL conducted an audit of its Job Training and Partnership Act performance based incentive program in bad faith, and the "Project Proposal 1977" will either demonstrate this or lead to the discovery of information demonstrating bad faith.¹ The October 25 Order considered the arguments advanced by the parties and reviewed the precedent upon which they relied. That discussion will not be repeated here. It shall suffice to note my conclusion that FDLES failed to adduce any actual evidence of impropriety or persuasive circumstantial evidence that it was targeted for audit in bad faith. *See*, Ord., 10/25/2000 at pg. 6. I deemed limited *in camera* inspection appropriate, however, under Jones v. FBI, 86 F.3d 1222 (D.C. Cir. 1996) in the interests of reassuring FDLES that the proposal to audit was not rendered in bad faith. Accordingly, DOL was required to produce a copy of the "Project Proposal 1997" for *in camera* review.

¹FDLES did not initially raise the "bad faith" argument, and the August 7, 2000, Order denying *in camera* review of the Project Proposal did not address it. FDLES alleged DOL's "bad faith" in subsequent filings, and its assertion led to further proceedings herein concluded. *See*, Order issued October 25, 2000.

In compliance with that order, DOL submitted the Project Proposal 1997 memorandum. I have carefully reviewed it. The Proposal is a four page memorandum dated "January 1997." The author is not identified. In her May 30, 2000 affidavit, Patricia A. Dalton, Acting Inspector General, in asserting the deliberative process and informant's privilege for this document, stated: "The memorandum describes the information about allegations received by OIG, actions undertaken by OIG to confirm or refute the allegations, and subjective impressions of the Florida program. The memo also proposes the manner and means by which OIG could conduct the Florida audit, the projected time and costs, and possible scope of findings and disallowed costs."

I have previously ruled that the IG's affidavit is sufficient to invoke the deliberative process privilege. I have now reviewed the Project Proposal *in camera* in light of FDLES' contention that it was targeted for an audit in bad faith. My review of the document confirms that the proposal to proceed with the audit was based entirely upon the factors specified in the Dalton affidavit. The Project Proposal discusses appropriate considerations untainted by any hint that the recommendation to proceed was motivated by bad faith or improprieties of any sort. Accordingly, FDLES' speculations are unfounded, and it has not otherwise demonstrated a compelling need for discovery of this privileged information. Its Motion to Compel will, therefore, be denied. An appropriate protective order will issue.

Finally, the parties are advised that because the Office of Administrative Law Judges has no mechanism to seal *in camera* material once a record leaves the possession of the presiding judge, the materials produced for *in camera* inspection will be returned to counsel for DOL, under separate cover, with a direction that the documents be preserved for future production in the event an appellate tribunal may wish to entertain a review of the discovery orders which have issued in this matter. Therefore:

ORDER

IT IS ORDERED that FDLES' Motion to Compel the production of the "Project Proposal 1997" be, and it hereby is, denied;

IT IS FURTHER ORDERED that DOL's Motion for a Protective Order be, and it hereby is, granted;

IT IS FURTHER ORDERED that all documents hereinbefore submitted for *in camera* inspection, including the Woodward Report, the supervisory notes, and the Project Proposal 1997, will be returned under separate cover to counsel for DOL; provided, however, that DOL shall keep and preserve such documents for future production in the event an appellate tribunal may wish to review the protective orders which have issued in this matter.

STUART A. LEVIN
Administrative Law Judge