U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW
Washington, D.C. 20001

Issue date: 28Jan2002

In the Matter of	:	
STATE OF FLORIDA, DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY Complainant	:	**Case No. 1999-JTP-16**
v.	:	
U.S. DEPARTMENT OF LABOR Respondent	:	

Before: Stuart A. Levin
Administrative Law Judge

ORDER DENYING MOTION FOR SUMMARY DECISION

Between March 1, 1995 and June 9, 1998, the Employment and Training Administration, U.S. Department of Labor, (DOL) granted the State of Florida $11,419,499 under Title III of the Job Training and Partnership Act (JTPA), 29 U.S.C. § 1501 et.seq., to fund a Performance Based Incentive Program (PBIF) established by the Florida legislature and administered by the Florida Department of Labor and Employment Security (FDLES) to provide job retraining opportunities to unemployed workers who were laid-off or terminated due to economic conditions and unlikely to return to their former jobs. During the period in question, JTPA money was used to pay community colleges and school districts throughout Florida for enrolling eligible students in vocational and technical courses, training them, and finding them jobs. On June 28, 1999, the Grant Officer, acting upon an audit report issued by DOL's Inspector General and the State's response to his Initial Determination, concluded that the entire amount funneled by FDLES through the PBIF was misapplied and subject to debt collection. The State requested a hearing.

Following an extended period of discovery, the Grant Officer, on February 9, 2001, filed a Motion for Summary Decision pursuant to 29 C.F.R. §§ 18.40 and 41. In it, the Grant Officer contended that FDLES used PBIF funds improperly to pay for activities, *inter alia*, which were available to the general student population, not just JTPA participants. Florida allegedly used the funds to improve programs available to all students and pay portions of instructional costs for eligible participants which were otherwise the obligation of the state. JTPA funds were earmarked for certain target group members, but, according to the Grant Officer, other students also derived benefit from PBIF expenditures in violation of the Act. Consequently, the Grant Officer perceives no genuine issue of material fact contradicting its contention that the PBIF was not a "bona fide program that satisfies the JTPA's requirements," but was used instead as a funding mechanism to subsidize the State's adult education costs. Florida disagrees.

Responding to the Grant Officer's motion, Florida asserts that PBIF program payments were made only on behalf of JTPS eligible Title III participants[1] as confirmed with the DOL database, and its payments constituted reimbursements for some of the costs associated with the education and training of the participants. Florida maintains the actual costs of the services provided to the participants, in all cases, exceeded the PBIF reimbursements. Utilizing a detailed cost and price analysis, the State formulated and adopted benchmark payment rates designed to ensure that reimbursements "never" exceeded the actual costs of training. It argues that its PBIF, while creating incentives for achieving various goals including enrollment, completion of training, and finding a job for participants, was actually a cost reimbursement program which allowed participating institutions to serve a target population of disadvantaged individuals not otherwise likely to receive training. Florida further denies that it used PBIF funds to supplant its obligation to pay for adult education services while emphasizing that vocational education is not an entitlement in the State. Finally, Florida maintains that its PBIF program was included in every JTPA state plan it submitted to DOL since 1994, and every plan was approved.

Because the Grant Officer's motion involved complex issues not readily resolved by the briefs filed by the parties, oral argument was scheduled and presented at a June 11, 2001, hearing. Thereafter, the parties submitted supplemental comments on September 14 and 20, 2001.

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[1]The Grant Officer also questioned $652,913 in "surplus" Title III funds which were re-routed to Title IIA participants (disadvantaged youth) on the ground that the funds failed to procure services "in addition to" those otherwise available.

Discussion

I.

Summary decision may be entered pursuant to 29 C.F.R. Section 18.40(d) under circumstances in which no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See,* Gillilan v. Tennessee Valley Authority, 91-ERA-31, at 3 (Sec'y, Aug. 28, 1995); Flor v. United States Dept. of Energy, 93-TSC-1, at 5 (Sec'y, Dec. 9, 1994). The party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. §§ 18.40(c). *See*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. Anderson, 477 U.S. at 251-52. In determining whether a genuine issue of material fact exists, however, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion, Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Held v. Held, 137 F.3d 998, 999 (7th Cir. 1998), in light of the content and substance of the response rather than the form of a submission. Winskunas v. Birnbaum, 23 F.3d 1264 (7th Cir. 1994). Thus, summary decision should be entered only when no genuine issue of material fact need be litigated. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 Sup. Ct. 486 (1962); Rogers v. Peabody Coal Co., 342 F.2d 749 (6th Cir. 1965).

The Grant Officer stipulates that the eligibility of the individuals who received training as participants in the PBIF program is not in issue. Nor is it disputed that eligible participants actually received competent education and training services in areas specifically authorized by Section 314(d)(1)(A)-(I) of the Act. The essence of the Grant Officer's motion for summary decision is predicated upon an interpretation of Section 141(b) of the Act which limits the use of JTPA funds to "...activities which are in addition to those which would otherwise be available in the area in the absence of such funds." *See*, Tr. 37.

Following an investigation which included, *inter alia*, interviews with 270 students and officials from 18 colleges and school districts, the Grant Officer concluded that Florida's PBIF program was not designed to assist individual JTPA participants in unique ways. Rather the Grant Officer's auditors discovered that JTPA participants enrolled in public school or community college programs were provided with instruction and assistance which was indistinguishable from the classroom training, job placement, and other services afforded to the general student population. As the Grant Officer reads Section 141(b) of the Act, it bars the

expenditure of JTPA funds for such training and assistance because it was not "in addition to activities" available to the classmates of the target population.

II.
A.
Section 141(b)

Since Congress mandated DOL to implement its statutory will under the JTPA, DOL must be accorded deference when it construes the enactment Congress charged it with administering. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 842 (1984); Regions Hosp. v. Shalala, 522 U.S. 448 (1998). Yet, the interpretation of a statutory provision by an auditor or a Grant Officer in any particular case may depart from the agency's interpretation, and to the extent that it does, interpretative deference to the litigant's construction may be unwarranted. In this instance, having accorded the Grant Officer's interpretation every consideration, I conclude that the construction of Section 141(b) advanced in this proceeding is a bit too narrow to maximize the potential of dislocated workers to return to the productive workforce. A key purpose of the JTPA is to fund programs which train and assist participants to overcome employment barriers and find jobs. The Grant Officer's interpretation of Section 141(b) in this instance, as demonstrated below, loses sight of this fundamental statutory mission and seems inconsistent with DOL's own understanding of the statutory provision at issue here.

At the outset, it should be noted that the parties were invited to comment upon the legislative history of Section 141(b), and neither found any specific guidance which addressed this provision. The Grant Officer and Florida do agree that the Act was never intended to supplant or subsidize the service, facilities, and training activities routinely provided by the State in the absence of JTPA funding. Presumably, in response to the funding abuses Congress detected in the implementation of the CETA program, JTPA's progenitor, Section 141(b) deals with CETA's deficiencies by expressly proscribing the use of JTPA resources on overlapping activities or "duplicate funding." *See also,* Section 107(b). What actually constitutes "duplicate funding" or "activities in addition to those which would otherwise be available," however, is not specifically addressed in the Act.

Before turning to guidance provided by the agency, we must review the Grant Officer's interpretation of Section 141(b) which ultimately triggered the bulk of the audit disallowances. As explored in great detail at the hearing, and later in post-hearing comments, the Grant Officer disallowed the expenditure of JTPA funds used to enroll a JTPA eligible participant in any program of adult training offered to a

general student population by a public school or community college. Florida community colleges, for example, variously offered a variety of vocational training opportunities designed to satisfy market demands for workers in fields ranging from practical nurses to computer technicians, and JTPA participants were offered the opportunity to matriculate in these tried and proven programs. Yet, the Grant Officer would allow no such training at JTPA expense.

The Grant Officer reasons that training programs "available" to a general student population in classrooms using desks and other physical facilities not designated exclusively for use by JTPA enrollees, must, perforce, be "available" to dislocated workers. As a result, all JTPA funds used to retrain dislocated workers at a school with established curriculum tracks for jobs in high demand vocations were disallowed by the Grant Officer. Thus, a JTPA participant could not receive JTPA funding for training as a computer technician, for example, at any institution which offered a computer technician training program as part of its regular curriculum. Such training at JTPA expense would only be permissible, as the Grant Officer understands Section 141(b) of the Act, if the institution created a separate computer technician curriculum and offered it in separate classrooms with desks and chairs specifically earmarked for the JTPA eligible student, and then barred other students from taking the course or using the facilities. Tr. 25-26, 28, 31-32. Section 141(b) requires no such result.

At this stage of the proceedings I decline to explore the economic inefficiencies and extraordinary limitations the Grant Officer's approach would impose on the educational opportunities available to those in need of JTPA assistance. It should suffice here to observe that the Grant Officer's construction focuses upon the general availability of a training activity while ignoring its specific and realistic availability to individuals Congress intended to assist. If a dislocated worker lacks the financial resources to take advantage of opportunities otherwise available to other students, as a practical matter, the "activity" is not available to her in the absence of JTPA funding. Consequently, by focusing abstractly upon the "availability" of the "activity," in general, and not the needs of the target population, I believe the Grant Officer has misconstrued the meaning and intent of Section 141(b) and the Act in general. Equally important, it appears that the statutory interpretation urged by the Grant Officer in this proceeding bars JTPA funding in ways contemplated neither by the statute nor the agency.

B.
Regulatory Guidance

Recognizing a complex and delicate balance between Federal, State, and local governments, the JTPA and its implementing regulations provide detailed guidelines for the expenditure of JTPA funds by grantees and subgrantees. 29 U.S.C. § 1518; 20 C.F.R. §§ 627.37-629.39; *see generally*, Mississippi Dept of Economic and Community Development v. United States Dept of Labor, 90 F.3d 110 (5th Cir. 1996). Intent upon training disadvantaged and dislocated workers without duplicating the activities otherwise available to JTPA eligible individuals, the statute and the implementing regulations specifically require coordination between the JTPA and other available financial assistance grants and programs. Thus, Section 627.220(a) of the regulations provides that "SDA's and Title III SSG's shall establish coordination procedures and contractual safeguards to ensure that JTPA funds are used in addition to funds otherwise available in the area and are coordinated with these funding sources." Subsection 627. 220(c) further mandates information sharing between the SDA and the educational institution to "prevent duplication of funding and [to streamline] the tracking of the participant's financial needs." 20 C.F.R. § 627.220(c). Assessment of the individual's financial circumstances and the coordination of other available sources of assistance are required; however, the agency construes the resource duplication bar in Section 141(b) as nevertheless permitting JTPA funding under circumstances in which alternative funding, such as student loans, would be "available to" the general population. *See*, 20 C.F.R. § 627.220((b)(4) *See*, Commissioner, Employment Security Dept. v. US. Dept. of Labor, 92-JTP-22-7 (1997)(citing, Commissioner, Employment Security of the State of Washington v. US. Dept. of Labor, 90-JTP-29, 91-JTP-11, and 92-JTP-34 (Sec'y Sept. 13, 1995). In this way, the agency has interpreted "availability," not in any absolute sense, but rather as a practical and flexible test which focuses not only on educational funding sources generally, but on the dislocated, disadvantaged worker's actual and reasonable access to the funding.

Indeed, in 1994, DOL specifically addressed the inherent ambiguity of the coordination requirements in light of Sections 107(b) and 141(b) of the Act. In its comments to the final rulemaking, DOL stated that "the issue of whether JTPA funds should pay for tuition or supportive services in coordination with other payment programs should be determined according to the availability of each funding source for either training costs or supportive services, with the goal of making the program affordable and enabling the participant to successfully complete it." Fed. Reg. 59-170, 45815 (Sept. 2, 1994). As the "official comments" to the 1994 Final Rules

further explain; "The purpose of coordination requirements is to preclude duplicate or overlapping payments among Federal, State, and local programs to participants and the training institutions and to ensure the best mix of programs and funds is available to the JTPA participant." The term "best mix" in this context suggests that a combination of resources, including JTPA funds, can and should be mobilized to assist the JTPA participant to take part in job training activities which she could not otherwise pursue without JTPA help. In this way, computer technician or other training programs available at a community college would not necessarily remain beyond the reach of an out-of-work seamstress from the apparel industry, for example, who could neither afford the tuition nor obtain a non-JTPA subsidy.[2]

As the agency's rulemaking comments indicate, expenditures under the JTPA are closely regulated and discreetly coordinated between Federal, State, and local governments. Considering this regulatory framework and the agency's interpretation of the concept of "availability" within the meaning of Sections 141(b) and 107(b) as discussed in the "official comments," the notion that an activity or funding source is "available" to a participant is somewhat more flexible and fact- dependent than the Grant Officer here suggests.[3] While the general "availability" of an "activity," such as a training course, on the supply side, is a factor which must be considered under Section 141(b), so too, consistent with purposes of the Act and the agency's

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[2] The auditors concluded and the Grant Officer initially contended that Title XVI, Chapter 239, Section 239.117(1995) of the Florida statutes provides that tuition paid by a Florida resident funds only 25% of the instructional costs of an Associates Degree and 10% of the costs of Certificate programs. The rest is paid by the state from general revenues. Indeed, at one point, the Grant Officer seemed to suggest that adult vocational training was an entitlement the State afforded all its citizens. Thus, JTPA was, according to the Grant Officer, funding tuitions the State had an obligation to pay.

Florida responded that Grant Officer's understanding of its law is incorrect. It maintained that Section 239.117 is not an entitlement program guaranteeing postsecondary education to all residents, and JPTA eligible individuals thus received training and services that would not otherwise have been available to them absent the PBIF program. Florida asserted that the Grant Officer simply misconstrued Section 239.117, as applying to all students. To the contrary, Florida contended that Section 239.117 applies only to the PBIF program. *See*, Tr. 65-67. At the hearing and in post-hearing comments, the Grant Officer seems vaguely to concede that Section 239.177 may not be quite as generous as first assumed, but it matters not, because, according to the Grant Officer, JTPA participant's did not receive "additional" services as otherwise required by Section 141(b). (G.O.. Post-Hearing Comments at p.6).

[3] At the hearing, the Grant Officer was invited to comment on DOL's interpretation of Section 141 (b) as it applied to PBIF programs in other states. Tr. 11-14. The record, however, remains unhelpful in this respect.

comments, must we consider, on the demand side, a laid-off worker's realistic and reasonable opportunity to pursue the activity absent JTPA assistance. Indeed, the JTPA recognizes that dislocated workers may require special assistance precisely because they may be unable to take advantage of educational opportunities available to others. Consequently, it would seem that both the supply side and the demand side must be evaluated in assessing, under Section 141(b), the "availability" of an activity to the JTPA participant.

The training courses offered by Florida institutions are not in dispute, but the ability of members of the demand side submarket, consisting of the JTPA eligible population, to access them is a relevant fact-dependent issue which can not be adjudicated by Summary Decision. Accordingly, it appears that the Grant Officer's motion raises genuine issues of material fact for hearing. Summary Decision is, therefore, inappropriate. 29 C.F.R § 18.41.

ORDER

IT IS ORDERED that the Grant Officer's Motion for Summary Decision be, and it hereby is, denied.

Stuart A. Levin
Administrative Law Judge