

U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036



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In the Matter of :
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NORTHWEST RURAL OPPORTUNITIES, :
INC. :
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Case No. 84-JTP-3

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BEFORE: E. EARL THOMAS
Deputy Chief Judge

DECISION AND ORDER

This proceeding arises under the Job Training Partnership Act (JTPA), 29 U.S.C. §§1501 et seq., and the Rules and Regulations issued thereunder, found at Title 20 of the Code of Federal Regulations.

Statement of the Case

Northwest Rural Opportunities, Inc. (NRO), the Complainant, initiated this proceeding by filing a request for hearing with the Office of Administrative Law Judges on October 25, 1983. Complainant made this request in order to appeal the Grant Officer's final determination not to award NRO a Section 402 JTPA grant for the state of Washington for fiscal year 1984. On November 30, 1983, California Human Development Corporation, the Section 402 grant recipient for Washington state, was permitted to intervene in this case.

A hearing on this matter was held on December 12, 13, 15 and 16, 1983, at which time all parties were afforded full opportunity to present evidence and argument.

The findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes and case law. 1/

Issue

Whether there is a basis in the record to support the Grant Officer's decision not to select NRO as a Section 402 JTPA grantee due to his finding that NRO was non-responsible.

Findings of Fact

1. NRO is a non-profit organization which provides services to migrant and seasonal farmworkers in the state of Washington.

2. NRO was awarded a Section 303 grant under the Comprehensive Employment and Training Act (CETA) during the period January 1, 1978 to September 30, 1979 (DOL #2) and during October 1, 1979 to February 28, 1982 (DOL #4). The Section 303 grants were later extended to September 30, 1983. (NRO #15)

3. On September 29, 1982, agent David Paul of the Seattle, Washington office of the Office of Inspector General of the United States Department of Labor forwarded to the Chief of the Division of Farm and Rural Employment Programs of the Employment and Training Administration an Investigative Memorandum on Ricardo Garcia, Director of NRO. (DOL #2) In this memorandum, Paul stated that NRO used Department of Labor (DOL) grant funds to renovate a building in Sunnyside, Washington in direct violation of a special condition in its grant agreement which prohibited the use of federal funds for that purpose; that NRO and the Foundation for Chicano Education, which owned the building that was leased to and renovated by NRO, are related parties with an interlocking directorate; that NRO used unreported program income in excess of \$50,000.00 to pay for the renovation of the building; and that NRO failed to report \$120,000.00 of program income earned in 1977 and 1978 to DOL. Paul also stated in his Memorandum that the Foundation for Chicano Education reimbursed NRO \$75,000.00 as full payment for the renovations.

5. On February 2, 1983, the Grant Officer revoked NRO's letter of Credit in its three grants with DOL. (NRO #13 and #14) The reason given was that information from auditors indicated a possible misuse of grant funds. (NRO #14)

6. On February 4, 1983, the Grant Officer signed Section 303 CETA modifications of NRO's grants extending them to September 30, 1983 and obligated the full Fiscal Year 1983 allocation. (NRO #15)

7. On March 11, 1983, the Grant Officer of the Division of Financial Policy, Audit and Closeout issued a Final Determination which, among other things, dismissed all administrative findings of the audit covering five grants during the audit period of January 1, 1977 to June 30, 1979 and disallowed certain costs relating to a building in Sunnyside because he found that NRO violated a special grant condition by spending grant funds to renovate a building without prior approval.

8. On May 13, 1983, indictments in United States District Court were returned against Ricardo Garcia and Antonio Cardenas of NRO regarding the purchase of a building in Pasco, Washington.

9. On May 27, 1983, the Solicitation for Grant Application (SGA) for Fiscal Year 1984 Section 402 JTPA grants was published in the Federal Register. 48 FR 23932 et seq. The SGA set out the procedures to be followed by DOL and potential grantees for these grant funds. Under the SGA, in order to receive funding a grantee must meet the precondition for grant application requirements, pass the competitive review process and pass a responsibility review.

10. On June 7, 1983, agent David Paul issued another Investigative Memorandum on Ricardo Garcia. (DOL #4) Mr. Paul stated that the OIG investigation established that Ricardo Garcia, the Executive Director of NRO, and Antonio Cardenas, former Director of Administration of NRO, entered into a conspiracy to misapply approximately \$32,000 in CETA funds to purchase a building in Pasco, Washington without the required prior approval of DOL. He noted that the grant in question (which covered October 1, 1979 to February 28, 1982) contained a special condition which required NRO to follow the Property Handbook for Employment and Training Administration Project Grantees, No. 303, in acquiring property. (This Handbook requires prior approval of the Grant Officer before real property may be purchased.) The memorandum outlined the events which resulted in the purchase of the building on December 28, 1981.

11. On July 15, 1983, a memorandum was sent to David Williams, Special Counsel to the Assistant Secretary of Labor, to which was attached an Audit Report of Special Examination of NRO by Washington state which outlined its findings on NRO's internal accounting control system. The report stated that conditions it found "result

in more than a relatively low risk that errors or irregularities in amounts that would be material in relation to the financial statements and reports may occur and not be detected within a timely period."

12. Also on July 15, 1983, a memorandum from David Williams was sent to Edward Tomchick, the Grant Officer, regarding the review of organizations submitting Pre-Applications in response to the SGA. (DOL #1, AF Tab B) According to this memorandum, each such organization was checked for fraud/abuse, determinations of debt and debt status as required by the SGA. For NRO, the attachment to the memorandum noted that \$1,996,898 in debt status was on appeal. The memorandum also noted that OIG status was not included because it had not been received. On July 21, 1983, Mr. Williams followed up this memorandum with another one concerning the OIG response to the pre-application process. Mr. Williams stated that OIG asked that ETA be advised of the indictments and the Washington state actions. Finally, Mr. Williams noted that based on this, his office did not recommend any funding agreements with NRO.

13. On July 29, 1983, United States District Court Judge Robert J. McNichols issued an order which dismissed the Indictments against Mr. Garcia and Mr. Cardenas.

14. On August 3, 1983, Daniel Cox, NRO's Government Authorized Representative (GAR), completed the "FY 84 Farmworker Responsibility Review" on NRO. (NRO #3) This document, in the form of a checklist, included all the information on the SGA Responsibility Review section. On the cover letter that accompanied this Review when it was sent to Edward Tomchick, Grant Officer, Mr. Cox recommended conditional funding of NRO, as did A.E. Berndt, the Chief of the Division of Farmworker and Rural Employment Programs (DFREP) on August 5, 1983. (DOL #1, AF Tab B) Ron Luden (Clay Adams signing for) recommended conditional funding on August 3, 1983.

15. In a letter dated August 5, 1983, Ricardo Garcia informed Mr. Williams of the dismissal of the indictments and asked to meet with him regarding the purchase of the building in Pasco, Washington. (NRO #22)

16. On August 8, 1983, Paul Maynard, Acting Director of the

17. On August 17, 1983, a memorandum was submitted to Mr. Williams, Mr. **Mayrand** and Mr. **Tomchick** to which was attached a press release from the Assistant Attorney General of the state of Washington wherein the Attorney General recommended that three state agencies terminate funding with NRO because of "continued, extensive management and accounting difficulties." (DOL #14) The press release also noted that the three state agencies had terminated contract funding of NRO. Mr. **Mayrand** had been previously notified of these actions by Washington state in a memorandum from Mr. Berndt on July 13, 1983. (NRO #19)

18. Mr. **Tomchick** testified at the hearing that a meeting was held on August 12, 1983 to discuss competitive review panel scores and the results of the responsibility review. (TR 151) He further testified that a decision on NRO was not reached that day pending a meeting with a representative of the Solicitor of Labor and in order to await further information. (TR 156)

19. Mr. **Tomchick** also testified that NRO won the competitive review panel competition for Washington state by a "pretty good margin" (19 points). (TR 189)

20. On August 18, 1983, Joyce Kaiser, a member of Mr. **Tomchick's** staff, sent a memorandum to Mr. **Tomchick** and Mr. Williams regarding the Fiscal Year 1984 Section 402 competitive process in which she recommended that NRO not be designated because of misapplication of funds. (DOL #1, AF Tab B)

21. On August 29, 1983, A.E. Berndt sent NRO a letter concerning the report of Robert Greene of DFREP on NRO's Office of Rural and Farmworker Housing Programs (ORFH). This letter states that Mr. Greene reported that NRO's "fiscal procedures to protect public funds and the commitment of staff to sound business practices are commendable."

22. On September 9, 1983, Robert Jones, the DOL Administrator of the Office of Management Assistance, sent a memorandum to William **DuRoss**, Associate Solicitor for Employment and Training, which outlines the reasons for the non-selection of NRO. As reason therefor, Mr. Jones stated that the non-selection rests on NRO's past performance in the "wanton misapplication of federal funds. The memorandum then details the renovation of the Sunnyside building and the purchase of the Pasco building. Finally, Mr. Jones stated that NRO's current accounting system was not relevant to the issue.

23. Mr. **Tomchick** testified at the hearing that another meeting was held on September 12, 1983, at which time the decision not to fund NRO was made. (TR 154) He further testified that the final decision to select or not was his (TR 180), which decision he made based on the SGA and the proposed regulations (published July 20, 1983). (TR 180) Mr. **Tomchick** also testified that his reasons for

non-selection of NRO on the ground of non-responsibility were due to its misuse of federal funds to buy a building and to renovate a building, problems the state of Washington had found and the resignations of some key staff persons. (TR 148)

24. A memorandum dated September 19, 1983 went to Mr. Tomchick from Mr. Williams on the pre-procurement award clearance on NRO. (DOL #1, AF Tab B) While this memorandum is dated after the decision to non-select NRO was made, Mr. Tomchick testified that he relied, in part, on an undated, draft version of this memorandum. See NRO #4 Both memoranda outline the problems DOL had with NRO, including the renovation of the Sunnyside building; the failure to report program income; the purchase of a second building; the actions of Washington state to terminate funding with NRO; the recent resignations of key officials of NRO; the Final Determination of March 11, 1983 which disallowed \$1,996,898 in costs; and NRO's removal from the Letter of Credit payment method. (DOL #1, AF Tab B and NRO #4) Finally, both memoranda recommended that NRO not be refunded.

25. By letter dated September 20, 1983, Mr. Tomchick notified NRO of its non-selection for Section 402 funding. (DOL #7)

26. By letter dated October 13, 1983, Joseph T. Paslawski, Deputy to the Special Counsel, notified NRO that he sustained the Grant Officer's decision to non-select NRO after his review of that decision in accordance with NRO's petition for reconsideration (DOL #1, AF Tab A)

27. On October 25, 1983, NRO filed its request for hearing with this Office. (DOL #1, AF Tab A)

Conclusions of Law

At the prehearing conference held on November 30, 1983, it was agreed that the initial decision in this case would be limited to the question of the responsibility of NRO. The issue here is limited then to whether the Grant Officer was correct in finding that NRO was non-responsible.

The standard of review by which this issue will be determined is that set out in the regulations issued pursuant to JTPA and published in the Federal Register on October 20, 1983 and made effective on October 1, 1983. 2/ This standard is that there may

2/ While these regulations became effective after the decision of non-responsibility was reached by the Grant Officer, the request for hearing was not filed until after they became effective. Therefore, these regulations, at least as they relate to administrative review of the Grant Officer's decision, do apply to this case.

be an administrative review with respect to "whether there is a basis in the record to support the Department's decision." 20 C.F.R. 633.205 (e) as published in 48 FR 48774. I find this standard to be akin to the arbitrary and capricious standard which is usually applied in government procurement cases. In order to overturn the Grant Officer's decision, NRO must demonstrate that his decision lacked any rational basis. See Wroblaski v. Hampton, 528 F.2d 852 (7th Cir. 1976). Such a standard of review is necessary because of the considerable amount of discretion that must be given where the awarding of grants of federal funds is concerned. See Farmworkers Corporation of New Jersey, 82-CET-62 (December 31, 1981).

Under the JTPA regulations, the burden of persuasion is on NRO since it is the party which is seeking to overturn the Grant Officer's decision. 20 C.F.R. §636.10(g).

Pursuant to these standards, I make the following conclusions of law in regards to whether there is a basis in the record to support the Grant Officer's decision finding NRO non-responsible.

I

Section 402 of JTPA directs the Secretary of Labor to establish administrative procedures and machinery for the selection, administration, monitoring and evaluation of migrant and seasonal employment and training programs under the Act. 29 U.S.C. §1672(b).

Section 402 further allows the Secretary to award grants or contracts to public agencies and private nonprofit organizations so that they may provide services to migrant and seasonal farmworkers. 29 U.S.C. §1672(c)(1). Such organizations are to be ones whom the Secretary has determined have "an understanding of the problems of migrant and seasonal farmworkers, a familiarity with the area to be served, and a previously demonstrated capability to administer effectively a diversified employability development program" for these workers. Id. It was pursuant to these provisions that the Solicitation for Grant Application (SGA) was developed and published in the Federal Register on May 27, 1983. The SGA basically establishes three requirements that must be met before an organization may be awarded funding pursuant to Section 402. The first requirement is that an applicant meet the Precondition for Grant Application. 48 FR 23933. Secondly, a potential grantee's application will be reviewed by a competitive review panel in order to determine if the applicant meets the criteria of Section 402(c)(1). 48 FR 23936. Finally, an applicant must pass a Responsibility Review before it can be finally selected as a potential grantee. 48 FR 23933. It is the Responsibility Review provision that is at issue in this case.

The Responsibility Review provision requires DOL to conduct a review of available records in order to determine if a potential

grantee has responsibly administered federal funds. The review is intended to establish overall responsibility. The provision then lists fourteen criteria that are to be taken into consideration. These criteria are referred to as the "following information."

Pursuant to the Responsibility Review provision, DOL then developed a "FY 84 Farmworker Responsibility Review" which contains the fourteen criteria in the form of a checklist to be answered on a yes or no basis. This checklist is to be completed by the government authorized representative (GAR) on the basis of either information provided by the Office of Special Counsel or by the GAR.

(NRO #2) Upon completion by the GAR and after his/her recommendation regarding funding, the checklist is then sent to the Program Office via a "Routing and Approval Form" where the Field Supervisor, the Chief of DFREP, and the Administrator note their recommendations on funding. Both are then forwarded to the Grant Officer who makes the final decision regarding an organization's responsibility and the selection of a potential grantee. The selected potential grantees are then invited to negotiate the final terms of a grant with DOL. 48 FR 23936.

In this particular case, the Responsibility Review checklist was completed by Daniel Cox, NRO's government authorized representative. (NRO #3) Mr. Cox did not make any purely negative ratings on NRO's review. He did, however, list some question marks, with explanations, and some items were completed as "unable to determine." Cox's first question was whether NRO had unappealed debts (section (i) of the Responsibility Review section of the SGA); more specifically, he said there was a dispute as to whether \$763.00 had been paid. NRO presented evidence at the hearing that this debt, in the amount of \$739, had been paid. (NRO #26) Cox's second question concerned whether there was established fraud or criminal activity within NRO (section (iii)); for this, he wrote that NRO's executive director had been indicted for misapplication of funds. Mr. Cox, however, later added that the indictment was dismissed and attached the order saying so. Mr. Cox listed "unable to determine" for the grant closeout section (section (vii)) and whether NRO had properly reported disposed property (section (ix)). Finally, Mr. Cox questioned whether NRO has serious management deficiencies which were specified in final findings and determination (section (ii)); for this he noted that NRO's current financial management capabilities are under review. Despite these questions, Cox recommended that NRO be conditionally funded. (DOL #1, AF Tab B) Ron Luden, the Field Supervisor, and A.E. Berdnt, the Division Chief agreed with Cox's recommendation.

Paul Mayrand, who is the Acting Director of the Office of Specially Targeted Programs, made the final recommendation regarding the responsibility of NRO to the Grant Officer, Edward Tomchick. He recommended, however, that NRO was non-responsible and not be given funding. (DOL #1, AF Tab B) As reason therefor, he cited

"misapplication of funds." Id. During his testimony at the hearing, Mr. **Mayrand** further explained his recommendation. He testified that he disagreed with the recommendations of conditional funding because of the information on misapplication of funds which he deemed to be sufficient cause to not recommend funding. (TR 249) That information included the reported income problem; the renovation of the building without authorization; and the OIG investigative memorandum on the Pasco building. Id. Mr. **Mayrand** testified that in making his decision he was guided by the SGA and that he considered the fourteen criteria and his judgment was formulated based on those considerations. (TR 301, 302) He also testified that he reviewed the checklist on NRO. (TR 361) Finally, Mr. **Mayrand** testified that he could consider the misapplication of funds for the purchase of the Pasco building although it may not have fit neatly into one of the fourteen criteria because it is more than adequate cause based upon not only the responsibility review but on the preamble and other considerations as well. (TR 305)

Edward Tomchick, the Grant Officer, testified that the final decision to select or not was his (TR 180) and that he made the final decision that NRO was non-responsible and relied on the program office's information (TR 189) and on the undated draft memorandum of David Williams in doing so (NRO #4). (TR 211) He further testified that he reviewed the routing sheet prior to making his decision (TR 239), although he could not recall if he saw the completed checklist on NRO. (TR 194) He also testified that he delegated to one of his staff the duty of ensuring that the Responsibility Review criteria were followed. (TR 191) Mr. **Tomchick** gave as reasons for his decision the problems of the unauthorized purchase and renovation of buildings; the problems Washington state found; and the resignations of NRO staff which he discussed with Paul **Mayrand**. (TR 148)

Finally, in regards to the reasons for the decision that NRO was non-responsible, I note that the memorandum of September 9, 1983 from Robert Jones to William Duross states that the decision not to select NRO rests on its "past performance in the wanton misapplication of federal funds" and then outlines NRO's renovation of the Sunnyside building and purchase of the Pasco building both without prior approval.

From all the evidence, it is clear that the true reason for the the finding of non-responsibility of NRO rested on DOL **officials'** beliefs that NRO had misapplied federal funds in two instances and not on any of the questions raised by Daniel Cox on the FY 84 Farm-worker Responsibility Review Checklist. While Mr. Cox did note the indictment against NRO's Executive Director, that the indictment was dismissed is also noted. Although Mr. **Mayrand** testified that he felt NRO had violated some of the fourteen criteria listed in the SGA and on the checklist, such as section (ii), administrative deficiencies, and (viii), failure to submit required reports (on the

earned income), these failures were not his major concern. Also, Mr. Cox listed the indictment under section (iii), established fraud or criminal activity, whereas Mr. **Mayrand** admitted that there is no proven or documented fraud against NRO. I can only conclude from all the evidence and testimony presented that the Grant Officer's decision finding NRO non-responsible was actually based on his determination that NRO had misapplied federal funds in two instances **and** not on any of the criteria specified on the checklist or the SGA. And while, arguably, misapplication of funds could have been fitted into the fourteen criteria, it was not. The question, then, is whether the Grant Officer was limited to the findings made relative to these fourteen criteria or whether he could look beyond these criteria in deciding that NRO was non-responsible. This question, in turn, breaks down into an interpretation of the SGA: whether the fourteen criteria were designed to be an inclusive list under which an applicant could be found non-responsible only if it failed one or more of those criteria specified by the Grant Officer.

The SGA Responsibility Review section states that the review is to be of "available records" and is intended to "establish overall responsibility." 48 FR 23933. It goes on to state that the "following information will be taken into consideration" and then lists fourteen factors. 48 FR 23933, 29934. The proposed JTPA regulations on the responsibility review, published on July 20, 1983, use the same language. 48 FR 33182, 33210. On the other hand, in the final regulations, the language regarding the responsibility review has been changed. It states, first, that with the exception of two paragraphs, the "failure to meet any one of the tests would not establish that the organization is irresponsible unless the failure is substantial or persistent" (emphasis added) and then states that the "responsibility tests are as follows" and proceeds to list the same fourteen factors (with minor changes). I find the change in language to be significant. The phrase "responsibility tests" as compared with the "following information" is more definite and conclusive and is indicative of an intent to show that the fourteen criteria are exhaustive and that a failure to pass one or more of these particular tests is required before an organization may be found non-responsible. The language used in the SGA, and the proposed regulations, however, is not so clear-cut. The list of fourteen factors there merely provides applicants with guidelines on the types of information that DOL would consider in doing the responsibility review. In fact, Paul **Mayrand** testified at the hearing that "the fourteen (criteria) are not all inclusive," "the intent or the purpose of the responsibility review was to try to be as inclusive as we could in alerting or instructing interested organizations what the responsibility review is all about, and what the department, in fact, would use to make judgments concerning their responsibility for federal funds." (TR 305, 306) Mr. **Mayrand** added that the list "was never intended as an exhaustive inventory of all of those considerations" and "would not restrict the Government from

considering any other facts that would be brought to its attention."
(TR 306)

I conclude that the fourteen factors published in the SGA were indeed not an inclusive list in view of my reading of the SGA Responsibility Review section, and in my comparison of the language of the final regulations, and of Mr. Mayrand's testimony. I find that under the SGA, DOL was able to consider other information in determining whether an organization was non-responsible as long as an organization's overall responsibility was determined. 3/

I find that the Grant Officer was permitted to consider information relating to misapplication of funds even though that information was not tied to one of the fourteen factors since that information did go towards establishing NRO's overall responsibility in administering federal funds.

Such a finding does not violate NRO's due process rights. In arguing that it does, NRO, in its brief, cites several cases. The cases cited, however, generally concern the situation where an agency is attempting to deny benefits to persons who have a property (or liberty) interest in those benefits under the Fourteenth Amendment to the U.S. Constitution. The same situation is not present here. The Supreme Court in the landmark case of Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), which concerned a university teacher's constitutional right to a statement of reasons and a hearing on the university's decision not to rehire him for another year, stated that in order to determine whether due process rights apply in the first place, we must look first to the nature of the interest at stake and then to see if that interest is within the Fourteenth Amendment's protection of liberty and property. 408 U.S. 564, 571 (1972). Here, NRO clearly does not have a liberty interest in being awarded Section 402 grant funds. Nor does NRO have a property interest in such funds. For the Supreme Court also stated in Roth, supra at 577, that in order to have a property interest in a benefit, a person must have not just a unilateral expectation but have instead a legitimate claim of entitlement to that benefit. In this case, NRO does not have a legitimate claim of entitlement to grant funds - despite its record of good past performance in the operation of other grants. Its favorable past performance could create only a mere expectancy of being awarded grant funds.

3/ Although I do not decide this issue, I note for the record that I would be inclined to find that the responsibility tests provided in the final regulations are inclusive and that from now on DOL must find that an applicant failed one or more of those specific tests in order to be found non-responsible.

This situation is different from an entitlement to welfare benefits, for example. In Baker-Chaput v. Cammett, 406 F. Supp. 1134, 1138 (D.N.J. 1976), the Court held that an applicant for welfare benefits had a protectible property interest in those benefits since she had made a prima facie showing of eligibility. Here, NRO has not made a prima facie showing of eligibility since to do so it would have to pass the responsibility review. Furthermore, it was only because the applicant did have a property interest in benefits that the Court in Baker-Chaput held that her due process rights included the right to have her eligibility determined through the establishment of written, objective and ascertainable standards. Id. at 1140. In the case at hand, there were written, objective and ascertainable standards to guide the Grant Officer in making his selection of potential grantees. That those standards were merely illustrative was not a violation of any due process rights of NRO, particularly in view of NRO's lack of property interest in those grant funds, and as long as the Grant Officer was not arbitrary and capricious in making his selections.

II

The next issue concerns the type or source of information that DOL could consider in regards to NRO's alleged misapplication of funds. The SGA states that DOL may conduct a review of the available records. 48 FT 23933. The records reviewed in this case included a press release and audit report by the state of Washington, two investigative memoranda prepared by Special Agent David Paul of the DOL Office of Inspector General (OIG), audit reports and the March 11, 1983 Final Determination. Mr. Mayrand testified, however, that disallowed costs and administrative findings on appeal could not be considered under the SGA. (TR 278-280)

NRO argued in its brief that the Grant Officer cannot rely on unresolved audit findings even if they are subsequently included in an OIG report. (NRO's brief, page 22) I agree with NRO that unresolved audit findings, particularly if a final determination has not been reached and in the event of an appeal to this Office, may not be considered. DOL was, however, free to consider information supplied in investigative memoranda prepared by the OIG. As I stated supra, the SGA permitted a review of all available records and it cannot be argued that such memoranda do not qualify as available records. Furthermore, OIG investigative memoranda are different from OIG audit reports. David Paul, OIG Special Agent in charge of the Seattle, Washington office, testified that the OIG consists of two divisions: investigative, which handles criminal and employee integrity cases, and audits. (TR 83) Mr. Paul further testified that the usual procedure for the investigative division is that he begins an investigation upon receiving an "incident report" from auditors and that once his investigation is completed he presents his case to the U.S. Attorney for possible criminal prosecution and

if the U.S. Attorney declines to prosecute an investigative memorandum is submitted to the agency for administrative action. (TR 58) The investigation is independent of the audit. (TR 321) The purpose behind the investigative arm is to investigate criminal or fraudulent activities. See Inspector General Act of 1978, 5 U.S.C. app. I. Any administrative action that DOL may take pursuant to an investigative memorandum is separate from action taken in response to an audit report. I conclude, then, that while DOL may not have been able to review ongoing audit reports as available records, it could still consider investigative memoranda even though some of the same information or allegations may have been contained in both.

This finding leads to the question of to what extent should DOL have relied on David Paul's investigative memoranda. NRO argues that these memoranda should not have been relied upon since NRO was not given an opportunity to respond to the allegations contained therein. More specifically, NRO cites 29 U.S.C. §816, part of CETA, which requires the Secretary to investigate allegations received in an audit report, on-site review or otherwise, make a final determination regarding the truth of the allegation and determine if it is true after notice and opportunity for hearing. NRO argues that since DOL did not investigate the allegations nor give NRO an opportunity to respond, any decision based on these allegations is violative of the statute and fundamental due process.

The fallacy in NRO's argument is that, first of all, this case falls under JTPA, not CETA. But even if CETA did apply, 29 U.S.C. §816 and the regulation issued pursuant thereto found at 20 C.F.R. 5676.86 (e) apply only to information received against a recipient or subrecipient. NRO was a recipient under CETA at the time the OIG memoranda were received. Thus, if the Grant Officer had wanted to take any action against NRO due to the allegations contained in the memoranda, he/she would have had to follow the requirements of 29 U.S.C. §816 and 20 C.F.R. 5676.86. Grant Officer Janet Sten in fact decided not to take any action against NRO in regards to the first OIG report. ^{4/} (NRO # 10) Whether Ms. Sten should have followed through on the allegations contained in the memoranda anyway is not an issue in this case. Here, we are strictly concerned with the selection process under JTPA - not with investigations or termination proceedings under CETA. For the reason that we are concerned here only with the JTPA selection process, it is also inopposite that the Grant Officer has not investigated under the similar provisions contained in JTPA. See 20 C.F.R. §636.6(d),

^{4/} I must emphasize that at the time Ms. Sten made this decision, only the first OIG report was available, which she said was not sufficient information to invoke emergency termination and that there was not enough time for "normal" termination procedures. But termination is a different situation from the case at hand.

although I note that here as well the provisions are limited to reports concerning grantees or subrecipients.

Under the Responsibility Review, as published in the SGA and even in the final regulations, the Grant Officer was not required to investigate every allegation and confront the applicant before determining the responsibility of an applicant. Admittedly, the SGA Responsibility Review does seem to require the Grant Officer to rely on "proven" charges before he finds an organization non-responsible, as indicated by the fact that final agency action is required before unpaid debts can be used against an organization, deficiencies have to be identified in final findings and determinations and so on. But it also allows him to rely on available records, of which the OIG investigative memoranda were a part. In this respect, I note that the OIG memoranda were not mere allegations. They both involved investigations that had been conducted by the OIG and both contained supporting documentation. 5/ I conclude, then, that it was proper for the Grant Officer to rely-on these reports in determining the responsibility of NRO. And that such reliance did not violate either JTPA or the implementing regulations.

At the hearing NRO had the opportunity to show that the investigative memoranda were not worthy of reliance and that it was error for the Grant Officer to so rely. I am not convinced that these memoranda were sufficiently vague and questionable so that the Grant Officer should have conducted further investigation and contacted NRO before relying on them.

In this regard, I note again that the standard of review in this case is not de novo but is something more akin to the arbitrary and capricious standard. Therefore, it is not necessary for me to decide whether NRO in fact did not report program income; did renovate the Sunnyside building in violation of a special condition in the grant and the regulations; and did purchase the Pasco building without prior approval. I only have to find that there was sufficient, reliable information for the Grant Officer to believe that NRO did these things and that it was reasonable for the Grant Officer to rely on that information.

It is true that NRO raised some questions at the hearing as to the truth of the three major points relied on in finding NRO non-

5/ Perhaps if the OIG reports had just contained allegations, without any investigation or documentation, they could not have been properly relied upon. But here OIG did do an investigation and in addition to which, DOL had Mr. Garcia's statement of January 12, 1983, the validity of which it had no reason to question.

responsible. Again without deciding the truth or falsity of the allegations, I note that in regards to the renovation of the **Sunny-**side building, even if NRO did in fact have approval to expend \$15,000 for renovations (NRO #1) NRO spent more than that amount, although it is not clear to me from my reading of Modification Number 1 whether NRO did have permission to spend that money for renovations. Reliance by DOL on the non-reporting of program income is questionable in view of the dismissal of administrative findings, including unreported program income. However, NRO did not deny that it purchased the Pasco building without prior DOL approval. In fact Ricardo Garcia admitted as much during his testimony (TR 452) and in his statement of January 12, 1983. (DOL #3) While the exact circumstances of that purchase may later be found to justify granting retroactive approval of that purchase, it is not particularly relevant to the case at hand. In fact, the Grant Officer could have found that the circumstances surrounding the purchase of the Pasco building were sufficient, standing alone, to find NRO nonresponsible-particularly in view of NRO's knowledge of the questions raised by its renovation of the Sunnyside building, also because of the lack of prior approval. 6/ Based on all the evidence, I find that it was reasonable for the Grant Officer to determine that NRO had misapplied federal funds due to these instances and not an abuse of discretion or an arbitrary or capricious act.

III

NRO's final argument is that the Grant Officer violated the statutory mandate of 29 U.S.C. §1672(c)(1) by failing to consider NRO's program performance, its understanding of the problems of migrant and seasonal farmworkers and its familiarity with the area to be served. It is true that Section 402 of JTPA requires DOL to award a grant or contract for service to certain organizations that meet these three criteria. 29 U.S.C. §§1672 (c)(1). It is also true that the responsibility review did not address all of these criteria. The competitive review panel process, did, however, address these criteria. Therefore, it was not a violation of the statute that the responsibility review did not. 29 U.S.C. §1672 (b) and (c) give the Secretary authority to establish the machinery to select programs. The machinery established by the Secretary involved a three-step process: (1) the precondition for grant application, (2) the responsibility review, and (3) the competitive review panel.

6/ I disagree with NRO's argument, made both at the hearing and in its brief, that DOL officials believed NRO purchased both buildings in question despite the language used in the Robert Jones memorandum (DOL # 10) and in the OIG investigative memoranda. It is clear to me that what was meant was that NRO spent DOL funds on two separate occasions regarding two different buildings without prior approval in violation of the regulations and Property Handbook No. 303.

Each was a separate step. Even though NRO won the panel competition it still had to be found responsible in order to be selected as a potential grantee. And since the factors outlined in 29 U.S.C. §1672 (c)(1) were considered under the competitive review process they did not have to be considered again under the responsibility review. At issue before the Grant Officer was only whether NRO was responsible. Therefore, the Grant Officer in making that determination only had to consider information relevant to that part.

Finally, I find that it was not error for the Grant Officer to not select NRO instead of considering conditional funding. He could reasonably have found that the allegations against NRO were so serious that non-selection was the only appropriate action.

IV

In conclusion, I find that there was "a basis in the record to support" the Grant Officer's decision that NRO was non-responsible and should not be awarded grant funds under Section 402 of JTPA. The Grant Officer was correct in relying on the investigative memorandum prepared by the DOL Office of Inspector General and on the other information in making his decision. It was simply not feasible for the Grant Officer to rely only upon information upon which final action had been taken, i.e. after a decision on all allegations had been made by an administrative law judge and all other appeal rights had been exhausted. The selection of potential grantees cannot be delayed that long. And it is simply not practical because then an agency may be in the position of where it can never select grantees or where it is relying on events that occurred several years before. As Daniel Cox testified, ". . .we do not have a very recent audit on any grantee, and I think we would be remiss of our duties if we didn't include in this concerns which may be current, but are not covered by an audit." (TR 574) In order to responsibly award grant funds, then, the Grant Officer must be allowed to consider information contained in reports like the OIG investigative memorandum when those reports are issued after an investigation has been conducted and are supported by documentation. Otherwise, the Grant Officer would be derelict of his duties.

ORDER

The decision of the Grant Officer in not selecting NRO for Fiscal Year 1984 migrant and seasonal farmworkers grant for the state of Washington is hereby AFFIRMED.



E. EARL THOMAS
Deputy Chief Judge

Dated: 26 JAN 1984
Washington, D.C.
EET:PC:jeh

SERVICE SHEET

Case No: 84-JTP-3

Case Name: Northwest Rural Opportunities, Inc.

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