U.S. Department of Labor

Office of Administrative Law **Judges**
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DATE ISSUED: October 19, **1998**

CASE NOS.: 97-JTP-00023

In the Matter of

JOB SERVICE OF NORTH DAKOTA
Complainant

v.

U.S. DEPARTMENT OF LABOR
Respondent

Appearances:

Jennifer L. Gladden, Pro Se
For the Complainant

Stephen R. Jones, Esq.
Washington, D.C.
For the Respondent

Before: PAUL H. TEITLER
Administrative Law Judge

DECISION AND ORDER

Background

This case arises under the Job Training Partnership Act, Title IV Section 402, 29 U.S.C. §1672 et ***seq*** (hereinafter **"JTPA")** and the regulations contained at 20 C.F.R. $632 ***et seq.*** On June 18, 1997 Respondent, United States Department of Labor **(DOL),** notified Complainant, Job Service North Dakota **(JSND),** that Motivation Education & Training, Inc. (MET) had been selected as the Section 402 Grantee for North Dakota. On July 1, 1997, pursuant to 29 C.F.R 633.205(e), JSND sought administrative review of the decision of the Grant Officer, **James DeLuca** to disapprove JSND's application for a grant to provide job placement services, vocational/educational training and employment assistance service to migrant farmworkers in the State of North Dakota, pursuant to 20 C.F.R. $636.10.

The DOL alleged that Midwest Farmworkers Education and Training **(MFET),** the previous Grantee had not performed satisfactorily under the terms of the existing grants for the program years 1995-l 996 and invited competition for the program years 1997-1998. On February 11, 1997 the DOL issued an "Application of Waiver Provision, and Solicitation for Grant Application **(SGA)"** (62 FR 6272-76) (SGA) for the program years 1997 and 1998.

After the review of the competing applications, which included Job Service of North Dakota's application, **MET** was awarded the JTPA grant. JSND thereafter filed a timely appeal.

Section 402(a) of the JTPA states:

> The Congress finds and declares that -
> (1) Chronic seasonal unemployment and underemployment in the agricultural industry aggravated by continual advancements in technology and mechanization resulting in displacement constitute a substantial portion of the Nation's rural employment problem and substantially affect the entire national economy, and
> (2) because of the special nature of farmworkers employment and training problems, such programs shall be centrally administered at the national level.

29 U.S.C.A. $1672. As stated above, Congress determined that this program should be administered by the Federal government versus administration by the individual states. Section 402 requires that the Secretary of Labor

> provide services to meet the employment and training needs of migrant and seasonal farmworkers through such public agencies and private nonprofit organizations as the Secretary determines to have an understanding of the problems of migrant and seasonal farmworkers, a familiarity with the area to be served and a previously demonstrated capacity to administer effectively a diversified employability development program for migrant and seasonal farmworkers.

29 U. S.C.A. §1672(c)(1). Competition for grants is conducted every two years and the Secretary is required to use procedures that are **consistent with standard competitive Government procurement policies.** 29 U.S.C.A. § 1672(c).

> To implement this program, the Secretary of Labor promulgated the regulations located at 20 C.F.R. Part 633. The procedures for awarding funding grants under Section 402 of the JTPA are found at 20 C.F.R. §§633.201 through 205. Under these regulations, the Department of Labor is required to publish a notice and solicitation

> for grant applications (SGA) in the Federal Register 20 C.F.R $633.202(a). Eligible applicants who intend to apply for the grant must file a Preapplication for Federal Assistance with the Department of Labor by a date specified in the SGA. 20 C.F.R. §633.202(b). Under Section 633.202(d) which implements Executive Order 12372 with regard to this program, applicants are required to provide copies of the applications to the state for which they are applying for comment if that state has established a consultation process expressly covering this program. The application is to be submitted to the state by the deadline for submissions to the Department of Labor. 20 C.F.R §633.202(d).

Once the Department of Labor receives the applications, they are reviewed to make sure that they comply technically with all the requirements. The applications are then forwarded to a panel for review and a list of the names of the applicants is fonvarded to the office that performs the responsibility reviews. The responsibility review is independent of the competitive process and consists of a review of all available records to determine whether the applicant has established overall responsibility to administer federal funds. 20 C.F.R. $633.204.

The panel reviews the applications under the review standards established at 20 C.F.R. $633.203 and noted in the SGA. These include

> (a) An understanding of the problems of migrant and seasonal farmworkers;
> (b) A familiarity with the area to be served;
> (c) A previously demonstrated capability to administer effectively a diversified employability development program for migrant and seasonal farmworkers;
> (d) General administrative and financial management capability;
> (e) Prior performance with respect to financial management, audit and program outcomes.

20 C.F.R 5633.203. The panel then makes recommendations to the Grant Officer as to which applicant should be awarded the grant. Once the Grant Officer reviews the recommendations of the panel and makes an independent determination that the recommendations are correct, the selected applicant is notified and invited to negotiate the final terms and conditions of the grant. 20 C.F.R. $633.205(a). Applicants who are not selected are also notified in writing at this time. 20 C.F.R. § 633.205(c). Applicants whose applications are denied are given the opportunity to request an administrative review as provided for in 20 C.F.R. Part 636, 20 C.F.R. $633.205(e).

JSND Arguments

Ms. Gladden requested permission to have a decision based upon the record and the arguments of the parties. Ms. Gladden argues:

I. A. The application of MET should have been rejected as non-responsive to the Solicitation for Grant Application **(SGA).** The ground was that MET did not comply with **FR Doc 97-3447** in that the MET grant application exceeded 50 pages of single spaced type, and JSND complied with the above **FR Doc 97-3447.**

B. That the transcript of MFET hearing contained a statement on Page 24 which stated: **"Let me add to that. They can also be a state agency. We don't want to leave them out."** Ms. Gladden argues that state agencies do not receive equal consideration for Section 402 grants.

C. The ratings are unreliable and biased to MET. Ms. Gladden states relative to Mr. Charles Kane on Page 488 of the MFET v. DOL transcript **"Charles Kane had made statements to the fact--to the effect that no grantee has ever been selected that he did not agree should be selected".** (Emphasis added). Ms. Gladden also argues that on Page 214 that there was testimony from Fraiian Sendejo that MET was told in advance that they had the grant. Further, JSND scored 11 points and MET scored 12 points although JSND had demonstrated **"The applicant has established linkages with a strong network of employment and training service providers."** (Emphasis added).

D. Weaknesses listed for Job Service North Dakota are based upon conjecture and speculation and are not substantiated. The statement limited experience with serving the client population. The 402 program would lose its distinction by being folded into the ongoing State Job Service Public Employment Service Program was based upon conjecture, speculation and not on fact.

II. A. The submission date was extended without explanation and details of receipt for the MET application. Ms. Gladden states: **'Along with the other suspicious circumstances of this case, the possibility exists that the MET application was not received timely and the extension granted to allow MET application to meet the submission criteria."**

> B. Ms. Gladden also argues that: **"Although requested, no debriefing** has **been received by JSND."** That the fact that DOL did not respond to the Agency's request the DOL disregarded their own procedure. This further evidences the denial of basic fair treatment to Job Service North Dakota.

I conclude that my previous Decision and Order and Ms. Gladden's arguments have demonstrated that the selection process was not fair to Job Service of North Dakota. I now incorporate below my previous Decision and Order:

Findings of Fact and Conclusions of Law'

Procedural History

Once SGA was issued and the applicants were notified that the grants were subject to competition, the **Standards of Ethical Conduct, Executive Order 1274 and 5 C.F.R. 2635** applied.

These regulations provide that:

> To insure that every citizen can have complete confidence in the integrity of the Federal Government, each Federal employee shall respect and adhere to the fundamental principles of ethical service as implemented in regulations. ..
>
> (d) An employee shall not, except pursuant to such reasonable exceptions as provided by regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.
>
> (h) Employees shall act impartially and not give preferential treatment to any private organization or individual.
>
> (n) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order.

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[1] Citations to the record will be abbreviated as follows: MFET EX -- Complainant's Exhibit; DOL EX -- Respondent's Exhibit; TX -- Hearing Transcript.

Mr. Kane in his testimony (TX 690) admitted that he knew Mr. Frank Acosta from MET (the successful Grantee after MFET). He also admitted:

> Q. Did he ever send you any packages of food stuff from Texas?
> A. Yes
> Q. How many times?
> A. Some hot sauce and some oranges--grapefruits.
> Q. And you received those at the Department, at your office in the Department of Labor?
> A. No at the home.

Mr. Kane alleged that he sent a check for $25.00 for the oranges. He said that the hot sauce was bought in Mexico and he did not know its value. He then said that he wanted to say that the hot sauce was worth about $10.00. He was asked if he received anything else. He then said that Mr. Acosta (an officer of the successful grantee) makes menudo and he sent some of it to him. (TX 69 l-693)

Relative to Mr. Kane , his supervisor Anna Goddard, testified:

> Q. Okay. Now assuming that Mr. Kane had solicited from a prospective grantee some food stuffs, how would you feel about that?
> A. I would disapprove of it.
> Q. And what action would you take?
> A. I would again tell him not to do that and to reimburse the grantee and not have grantees send anything to his home.
> Q. Well, with the instant case here the Petitioner has demonstrated that — and Mr. Kane testified that he did receive cooked goods from a grantee and some oranges from a grantee.
> A. I had never heard that.
> Q. Okay. The question is did he develop this relationship with the grantee before the grant was given and did that relationship influence the grant. That is the question we have here.
> A. My guess is -- and you'd have to ask Mr. Kane. But if he had been doing that I bet he's been getting them for years.

Ms. Goddard testified (TX 1027) that the DOL was at a meeting with some grantees, executive directors of these Section 402 organizations. There was two contractor staff, there was DOL staff, and we were discussing Board Training, these 402 non-profit Board members and their responsibilities regarding oversight of their 402 program, et cetera and several of the participants of the 402 grantees — Mr. Kane — his idea his notion of the training was to have 402 staff take the training. It was a train-the-trainer type format. Take the training and go back and train the Board members. And a couple of the grantees objected to this design and said hey, it

would be much better to send the Board members themselves rather than the 402 staff, that it would be like the fox in a chicken coop. You know, the grantee staff are learning — are going to go back and tram the grantees — I mean train the Board members on how they're to conduct oversight of the 402 staff. And I agreed with this, that I thought that the Board members — or it should be at least up to the Board who to send. Maybe they would send a mix of 402 staff and whatever.

Mr. Kane disagreed with that and said — and he got into a discussion with another grantee who had quite a number of farm workers on his Board, and Mr. Kane said "How can farm workers understand how to run a million dollar organization," that they would just rubber stamp what the Executive Director said. And then he went on to say that he felt farm workers — farm worker **Board** members — would not understand the training and further would not be able to go back and train other Board members on the training since it was a train the trainer session.

A DOL staffer Alica Femandez who was at the meeting was a former farm worker, and she was offended by the remarks, since she had been on several Boards before she got her GED and she certainly understood them. Obviously, Mr. Kane's demonstration of prejudice caused problems and he was told by Ms. Goddard not to talk about it further. She was reliably informed that Mr. Kane had continued to make the same disparaging allegations. After discussion with her boss, Mr. Kane was reassigned.

During his testimony Mr. Kane read a statement:

> I was removed from my position as division chief of the Division of Migrant and Seasonal Farm Worker Programs because of unsubstantiated allegations about comments I made in a work shop planning session meeting on November 1, 1997 in Quarterline, Ohio. The allegations implied that I was a racist who supported the program I headed was highly questionable, and that my convictions were disgusting. The person who made these allegations asks that I be immediately removed from my position. The Department complied with that request and removed me for the position the same day. **In a memorandum to me about my removal, my office director's supervisor said that she had lost faith and confidence in my ability to effectively carry out my duties as a consequence of my "actions" at the Idaho.** (Emphasis added).

MF'ET states that approximately one week after Mr. Kane testified on July 27, 1998 the MET Executive Director sent a letter to the Administrative Law Judge in this proceeding for the purpose of defending Mr. Kane's relationship and conduct. MET did not enter an appearance and was not a party. MFET also creditably stated, "The very fact that this communication was sent demonstrates that it was in fact solicited by Mr. Kane following his testimony." In addition, the communication makes reference to a very expensive dinner at which Mr. Kane was a participant.

Indeed, given the alleged location of this dinner, El Paso. Texas, and the number of participants, it clearly had to be a very lavish affair. Evidently Mr. Kane did not share in the cost of this dinner immediately but rather it appears that he may have paid for the dinner later.

I find the testimony of Ms. Libby Bribiesca Gonzales credible that she had been offered a job by MET employee Frailan Sendejo prior to the awarding of the grant to MET. I also find credible her statement that MET was told in advance of the award that they had the grant by someone in the Department of Labor. (TX 2 1 O-2 14)

MFET has proven that MET had charges, namely **Fraud and Misuse of Federal Funds,** and other charges pending against the manager of its Eagle Pass office in the spring of 1997, and was not competed for its existing grants, and was allowed to compete for the MFET grants in Minnesota and North Dakota. Mr. Jones argues that the "Sammy Ibarra" matter was an isolated incident. I respectively disagree.

Contrary to Mr. Jones' statements relative to Mr. Kane, I specifically find that he was in violation of U.S. Department of Labor ethical standards. His conduct at Quarterline, Ohio indicated that his thinking relative to farmworkers abilities was, at a minimum, prejudicial. The facts, including the multiple items he received from MET and the trip to the MET Texas dinner, indicate that his relationship with MET was too close, and was ethically not correct. It is obvious that a possible grantee could be influenced by his feelings about farmworkers and his acceptance of gifts. Therefore, the process that involved Mr. Kane was tainted supra. MFET credibly argues that MET should be terminated as a Section 402 grantee because of the fraud perpetrated by Sammy Ibarra, the former Director of MET's Eagle Pass, Texas office. Mr. Kane was highly critical of Mr. Reyna's management of his employees; however, embezzlement of funds from the JPTA grant was an "isolated incident rather than evidence that the MET organization was 'not-responsible'." Considering Mr. Kane's friendship with Mr. Acosta and the gifts he received, and the fact that there is no evidence that the embezzled funds were returned, this matter has serious ethical overtones. A prudent Grant Officer, with the knowledge of Mr. Kane's activities and Mr. Acosta's gifts, should terminate MET's grants. MET was required to establish administrative and financial management capability; the gift giving and embezzlement should also lead a prudent person to question their continuation with the Grant Program.

DOL's decision not to waive competition for MFET was reasonable. However, the record has demonstrated that although MFET an others were invited to compete for the grants, Mr. Kane was receiving gifts, and that MET had a serious problem with JTPA funds. I also find that the reduction of the point value for the "familiarity with service area" criterion had a negative effect on both MFET's and JSND's competition for the Grant. The alleged typographical error did in fact compromise the grantee selection process. Ms. Goddard's testimony relative to this was not creditable. I do not credit Mr. Reyna's statements that Ms. Pindle and Mr. DeLuca acted with prejudice. However, I credit Mr. Reyna's statement that Mr. Kane had a lot to do with it. I do not believe that Mr. DeLuca knew of Mr. Kane's requesting and receiving gifts from Mr. Acosta, nor do I believe that MET would have received grants if he was appraised of this

situation. I also note that Mr. DeLuca learned of the MET's embezzlement at trial. Mr. DeLuca was being given information by Mr. Kane who had not disclosed his relationship with a competing grantee. JSND and MFET were at a serious disadvantage relative to MET.

I find that the selection of MET as 402 grantee for North Dakota was made in violation of ethical, statutory and regulatory requirements. Once the U.S. Department of Labor issued Solicitation for Grant applications pursuant to 62 FR 6272-76 for the program years 1997 and 1998 pursuant to the JTPA Section 402 and the implementing regulations promulgated by DOL at 20 C.F.R 633.200 *et seq.,* it had an obligation to give each applicant an unbiased opportunity to compete. JSND and MFET did not get such an opportunity. The successful competitor, MET, engaged in gift giving to Mr. Kane. I find Ms. Gladden's argument relative to Mr. Kane's participation in the selection process creditable. **Charles Kane had made statements to the fact--to the effect that no grantee has ever been selected that he did not agree should be selected", supra.** It is obvious that Mr. Kane had great input into the selection process, at the same time he was receiving gifts at home from MET. This was improper. This fact together with the embezzlement rendered MET unfit to receive the grants for North Dakota.

Mr. Rubin's testimony that the panel formed an unbiased opinion based upon the criteria before it was creditable. However, after review of Mr. Kane's contact with the process, and Ms Gladden's arguments, I cannot conclude that JSND and MFET were not prejudiced by the "alleged typographical error" which reduced the familiarity criteria from 25 to 15 points. I do not find Ms. Goddard's testimony creditable; further, she did not know that Mr. Kane was receiving gifts at home from MET. Unfortunately, this Decision may have disturbed the selection of Proteus as the JTPA Section 402 grantee for South Dakota. There is no evidence that Proteus engaged in any improper conduct. There is no evidence of any misconduct on the part of Mr. DeLuca, Ms. Pindle or Ms. Goddard. However, they did not have knowledge of material facts that affected the grant process.

Accordingly I find that JSND and MFET were not given a fair opportunity to compete for the JTPA section 402 grants for North Dakota.

ORDER

IT IS ORDERED that the U.S. Department of Labor, as soon as possible, re-compete the 1997- 1998 JTPA Section 402 grants for North Dakota.

PAUL H. TEITLER
Administrative Law Judge

SERVICE SHEET

Case: Job Service North Dakota v. U.S. Department of Labor

Case No.: 97-JTP-00023

Title of Document: **DECISION AND ORDER**

I certify that a copy of the above document was sent to the following:

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Dated: October 19, 1998

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