

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR  
WASHINGTON, D.C.

3/25/86

NORTH DAKOTA RURAL DEVELOPMENT  
CORPORATION,  
Complainant

v.

UNITED STATES DEPARTMENT OF  
LABOR,  
Respondent

and

MINNESOTA MIGRANT COUNCIL,  
Intervenor.

Case No. 85-JTP-4

FINAL DECISION AND ORDER

This case arises under the Job Training Partnership Act (JTPA), 29 U.S.C. §§ 1501-1781 (1982), and the regulations issued thereunder contained in Title 20 of the Code of Federal Regulations (1985). The Grant Officer, pursuant to Section 166(b) of JTPA, 29 U.S.C. § 1576(b), filed exceptions to the decision of the Administrative Law Judge (ALJ)<sup>1/</sup> and the Secretary asserted jurisdiction in this case on September 26, 1985. The ALJ found the Grant Officer was arbitrary and capricious in determining, pursuant to the regulations at 20 C.F.R. § 633.204(a) (1983), that the North Dakota Rural Development Corporation (NDRDC) was not responsible to be a grantee of Federal funds for a JTPA Section 402, Migrant and Seasonal Farmworkers Programs (MSFW) grant. 29 U.S.C. § 1672.

<sup>1/</sup> Decision and Order (D. and O.), North Dakota Rural Development Corporation v. United States Department of Labor and Minnesota Migrant Council, Case No. 85-JTP-4, August 27, 1985.

The Grant Officer had designated the Intervenor herein, Minnesota Migrant Council (**MMC**), as the North Dakota **MSFW** grantee for the Program Year (PY) **1985**, after he determined NDRDC to be **nonrespon-**sible. The **ALJ's** decision, following a lengthy hearing requested by NDRDC, reversed the determination of nonresponsibility and remanded the case to the Grant Officer to reconsider **his designa-**tion of the grantee for the PY **1985**.<sup>2/</sup>

The responsibility review of grant applicants conducted by the Grant Officer is independent of the competitive program review of the respective applications. Applicants which fail the responsibility review **will not** be selected as potential grantees regardless of their standing in the competitive **process**.<sup>3/</sup> NDRDC's request for a hearing concerned its nonselection as **grantee**,<sup>4/</sup> however, the parties agreed that the issue to be decided by the ALJ was the validity of the Grant Officer's determination that NDRDC was nonresponsible under the responsibility review regulations at 20 C.F.R. § 633.204(a).<sup>5/</sup> The ALJ concluded that there was no basis in the record to support the Grant Officer's determination of **NDRDC's** nonresponsibility to administer Federal **funds**.<sup>6/</sup>

<sup>2/</sup> D. and O. at 19.

<sup>3/</sup> 20 C.F.R. § 633.204(b) (1985).

<sup>4/</sup> Administrative File (AF), at 5-12, admitted in evidence as DX-1, Hearing Transcript (TR) at 69.

<sup>5/</sup> D. and O. at 3; TR at 59-60.

<sup>6/</sup> D. and O. at 19.

Upon review of the full record, including the hearing transcript and exhibits and the extensive briefing submitted by counsel for the parties, I find that **there** is support in the record for the determination of nonresponsibility made by the Grant Officer. Accordingly, the decision of the ALJ must be reversed.

#### BACKGROUND

NDRDC is a private, non-profit organization which has been providing services to migrant and seasonal farmworkers. It has been a grantee of Federal funds from the United States Department of Labor, under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§ 801-999 (Supp. V 1981), and JTPA; the **United** States Department of Agriculture (Farmers Home Administration); **the** United States Department of Health and Human Services (Community Services Administration); and the United States Department of Energy. It has operated its own programs and entered into subgrants with other private, non-profit organizations to support programs for migrant and seasonal farmworkers.

On October 19, 1984, the Department of Labor (Department) published a Solicitation for Grant Applications (SGA) for the Migrant and Seasonal Farmworkers Program, Section 402, JTPA, for Program Year 1985.<sup>7/</sup> NDRDC submitted an application for

7/ 49 Fed. Reg. 41,118 (1984).

this grant, as did four other **organizations**<sup>8/</sup> **competing for** the program to be operated in the state of North Dakota. All five applications were considered to be responsive to the program requirements and a panel rated each application on a scale from 0-100. NDRDC received the highest score among the five **applicants**.<sup>9/</sup> The competitive standings were advisory to the Grant Officer, and they were not binding on his **selection**.<sup>10/</sup> As required by Section 633.205(b) the Grant Officer's **determina-**tion that NDRDC was not responsible to administer Federal funds pursuant to his responsibility review was "independent of the competitive process" and, precluded further consideration of NDRDC to be a potential grantee, "irrespective of [its] standing in the competition."

#### DISCUSSION

NDRDC has challenged the appeal of the **ALJ's** decision as interlocutory because it did not decide **NDRDC's** complaint of nonselection and remanded the selection issue to the Grant Officer. However it is clear from both the hearing record and the **ALJ's** decision that the sole issue before the ALJ was the Grant Officer's determination that NDRDC was not

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<sup>8/</sup> Applications were also received from Minnesota Migrant **Council** (MMC), Center for Employment and Training-California (CET), Quad County Community **Action** Agency, and Proteus California.

<sup>9/</sup> The point scores awarded by the panel were: NDRDC, 84; MMC, 77; CET, 76; Quad County, 74; and Proteus, 63.

<sup>10/</sup> 49 Fed. Reg. 41,118 (1984).

responsible.<sup>11/</sup> As such, the decision was dispositive of the controversy herein and not interlocutory.<sup>12/</sup> The Grant Officer and the Intervenor were correct to appeal under JTPA Section 166(b).

The ALJ properly stated the standard of review required to be applied to the Grant Officer's determination:

Any applicant whose grant application is denied ... may request an administrative review as provided in Part 636, with respect to whether there is a basis<sup>13/</sup> in the record to support the Department's decision.<sup>13/</sup>

The ALJ also properly recognized that this standard is similar to that used in government procurement cases and that the challenges to the Grant Officer's determination "must demonstrate that [the] decision lacked any rational basis."<sup>14/</sup> This is a difficult standard and properly so, because there must be considerable discretion exercised in determining the award of Department funds among multiple grant applicants. When there is a basis in the record for a Grant Officer's responsibility review determination, neither an ALJ nor the Secretary may reverse the determination merely because he might weigh the same information and call the balance differently. The Supreme Court addressed this standard in Bowman Transportation, Inc.

<sup>11/</sup> TR at 32, 60, 2064-2071; D. and O. at 3.

<sup>12/</sup> See Black's Law Dictionary 988 (5th ed. 1979).

<sup>13/</sup> 20 C.F.R. § 633.205(e); D. and O. at 3.

<sup>14/</sup> D. and O. at 3.

v. Arkansas - Best Freight System, Inc., 419 U.S. 281, 285-286

(1974): "Under the 'arbitrary and capricious' standard the scope of review is a narrow one . . . . 'The court is not empowered to substitute its judgment for that of the agency.' [citation omitted] . . . [W]e will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." [citation omitted] The ALJ erred in his application of this standard to the record in this case.

At the outset, the ALJ misconstrued the application of the responsibility review regulations in Section 633.204(a). Subsection (a) identifies 14 "responsibility tests" against which the Grant Officer evaluates each application. The ALJ determined that the 14 enumerated tests are "exclusive" and that the Grant Officer's review "shall be based solely on the applicant's performance relative to these 14 specific tests."<sup>15/</sup>

The responsibility review provision states:

(a) Prior to final selection as a potential grantee the Department will conduct a review of the available records to determine whether or not the organization has failed any responsibility test. This review is intended to establish overall responsibility to administer Federal funds. With the exceptions of paragraphs (a)(1) and (a)(3) of this section, the failure to meet any one of the tests would not establish that the organization is irresponsible unless the failure is substantial or **persistent**. The responsibility tests are as follows:<sup>16/</sup>

At this point the respective tests are set out in the regulation.

<sup>15/</sup> D. and O. at 5.

<sup>16/</sup> 20 C.F.R. § 633.204(a).

To support his construction that the tests are exclusive, the ALJ compared the responsibility review in the Department's Solicitation for Grant Applications for Fiscal Year 1984<sup>17/</sup> to that of the final regulation just quoted which was in effect when the solicitation for applications for PY 1985 was issued on October 19, 1984.<sup>18/</sup> The introduction of the 14 tests in the 1984 SGA was quite similar, although not identical, to subsection(a) as finally adopted, one difference being the phrasing of the last line: "[t]he following information will be taken into consideration in making the final selection of an applicant as a potential grantee."

The ALJ ~~deemed~~ that change in language "significant" reflecting an intent to make the 14 tests "exhaustive".<sup>19/</sup> However, the ALJ misread the intent of the change. Section 663.204(a) as finally adopted was preceded directly not by the 1984 SGA language, but rather by Proposed Rules published for comment in 48 Federal Register 33,210, July 20, 1983. The introduction to subpart (a) in the Proposed Rules read:

(a) Prior to final selection as a potential grantee the Department will conduct a review of the available records to determine whether or not the organization has responsibly administered Federal funds. This review is intended

<sup>17/</sup> 48 Fed.Reg. 23,933 (1983).

<sup>18/</sup> 49 Fed.Reg. 41,118 (1984).

<sup>19/</sup> D. and O. at 6 quoting Northwest Rural Opportunities, Inc., 84-JTP-3, Decision and Order at 10, (1984).

to establish overall responsibility. The following information will be taken into consideration in making the final decision:

Both the 1984 SGA and the proposed rule contained the language "[t]he following information will be taken into consideration" which the ALJ found "significant."

However, the **ALJ's** theory underlying the rationale for the modification is not supported by the preamble of the final **Rules and Regulations.**<sup>20/</sup> The preamble states:

Responsibility Review

Numerous comments were received on the "Responsibility Review" contained at § 633.204. Objections were raised to both the opening description regarding application of the responsibility review and several of the individual responsibility factors. The commentators did not object to the concept of a responsibility review, but expressed concerns that it may be applied in such a manner as to deny selection as a potential grantee for inconsequential problems. Since the intent of this section is to establish overall responsibility for federal funds, the language has been altered to make it clear that the standard will be whether there is a **substantial** or persistent record of failures. A change has been made to the individual factors to clarify the existence of and use of performance standards.

The 14 tests then follow.

The change in the language does not support an interpretation of exclusivity of tests, but rather that the determination of irresponsibility will be made for substantial reasons.

While the areas identified in the tests must be considered in the Grant Officer's review, both the proposed and the final

<sup>20/</sup> 48 Fed.Reg. 48,748 (1983).



regulations begin by stating that "the Department will conduct a review of the available records." This opens the Grant **Officer's** inquiry to the whole of the administrative file to determine whether the organization failed any of the specific tests in the regulations, and if there was a failure, whether it was substantial or persistent. Since the explicit purpose of the review is to determine an organization's "overall responsibility to administer Federal funds," to disregard information contained in the files which relates to the tests and which can be analyzed as to its probity and seriousness would undermine the stated intent of the regulation.

It is the Grant Officer's responsibility to evaluate the information he is considering and to discount any information that is clearly contrary to his own knowledge and experience. Certain elements are requisite for immediate disqualification, such as the agency's inability to recover duly demanded debts, or the applicant's failure to comply with a repayment plan, as in test (a)(1); and established fraud or criminal activity, as in test (a)(3). Other tests, determining "serious administrative deficiencies" or "substantial failure to provide services," permit the Grant Officer to exercise his discretion as to what is "serious" and what is "substantial failure." The tests indicate the specific areas that command the attention of the determining official. However, as long as the organization's overall responsibility is being determined,

the Grant Officer is to consider other information that is in the official files of the Department.

Section 402(c)(1) of **JTPA**, itself, indicates the intended breadth of a Grant Officer's inquiry into a potential grantee's responsibility to administer MSFW funds: "[i]n awarding any grant or contract for services under this section, the Secretary shall use procedures consistent with standard competitive Government procurement policies." 29 U.S.C. § 1672(c)(1). At the time of **JTPA's** passage, October 13, 1982, competitive Government procurement policies were at Title 41, Code of Federal Regulations, Public Contracts, Property Management, Chapter 1 -- **Federal Procurement Regulations (1982)**, Subpart 1-1.12 -- Responsible Prospective Contractors. Section 1-1.1202 under General Policy stated in pertinent part:

(d) A determination of nonresponsibility shall be made by the contracting officer if, after compliance with §§ 1-1.1205 [Procedures] and 1-1.1206 [Subcontractor responsibility], the information obtained does not indicate clearly that the prospective contractor is responsible. Recent unsatisfactory performance regarding either quality or timeliness of delivery, whether or not default proceedings were instituted, is an example of a problem which the contracting officer must consider and resolve as to its impact on the current procurement prior to making an affirmative determination of responsibility. Where a contracting officer has doubts regarding the productive capacity or financial strength of a prospective contractor which can not be resolved affirmatively, the contracting officer shall determine that the prospective contractor is nonresponsible. (emphasis supplied).

It is evident from this provision and those that follow that a contracting officer, or as appropriate, a Grant Officer, was to consider any problem regarding a contractor known to him, even if there had not been a formal proceeding instituted with regard to that problem. Thus, the "Procedures for determining responsibility of prospective contractors" provided in § 1-1.1205-1 (b) that:

Maximum practicable use shall be made of currently valid information which is on file within the agency. Each agency shall, at such level and in such manner as it deems appropriate, maintain records and experience data which shall be made readily available for use by contracting officers in the placement of new procurement.

Section 1-1.1205-3' stated that:

Information regarding the responsibility of prospective contractors may be obtained from the following sources:

\* \* \*

(c) Other information existing within the agency, including records on file and knowledge of personnel within the purchasing office making the procurement, other purchasing offices, related activities, audit activities, and offices concerned with contract financing;

\* \* \*

(e) Other sources. These should include . . . Government departments and agencies.

The scope of the information to be obtained by a contracting officer to aid him in his responsibility review determinations was as broad as possible, and not restricted to just that

information that could neatly fit into a test response. Using "procedures consistent with standard competitive Government procurement policies," **29 U.S.C § 1672(c)(1)**, such as those recounted **above**,<sup>21/</sup> was clearly contemplated for MSFW grants under JTPA. It is proper, therefore, for the Grant Officer to search all of the records available to him and to consider all of the information as to its reliability and weight in making a determination on the responsibility of an applicant.

I now turn to the responsibility review in this case and the Grant Officer's conduct of the review, including the **14** tests under Section **633.204 (a)**. The Grant Officer reached a negative assessment of **NDRDC's performance** relating to six of the tests -- **(2), (4), (5), (6), (9)** and **(10)** which I will review in sequence.

Responsibility test (a) **(2)** is "**[s]erious** administrative deficiencies identified in final findings and determinations. -- such as failure to maintain a financial management system as required by Federal regulations." The Grant Officer testified that he was particularly concerned with NDRDC, because he was aware of prior administrative difficulties with the

<sup>21/</sup> On April 1, 1984, the Federal Procurement Regulations were replaced by the Federal Acquisition Regulations, codified at Title **48**, C.F.R. Subpart 9.1 (1985). The **recodified** procurement policies do not contain the detail of the earlier regulations, but there is nothing inconsistent with, or contradictory to, the earlier version. See e.g., 48 C.F.R. §§ 9.103(b), 9.104-1(d), 9.105-1 (a)(c) (1985).

**organization.** He **spoke to the** previous Grant Officer, who had recommended conditional funding of NDRDC's PY 1984 grant-<sup>22/</sup> **and he reviewed the** correspondence in the Administrative File.<sup>23/</sup>

The Grant Officer was additionally guided by the Employment and Training Administration's policy statement, Employment and Training Order No. 4-84.<sup>24/</sup> Specifically the policy directs Grant Officers to "[e]nsure that past and current performance assessments, including audits, are considered in refunding." (DX-16 at 4). This policy statement, drafted after the effective date of the responsibility review regulations, does not restrict the Grant Officer to considering only final findings and determinations (F&D), but rather, uses the broad term, "audits." Using other than final documents requires that a reviewing official be cognizant of subsequent issuances that might significantly alter the information contained in and relied upon in an earlier determination. Failure to take such alterations into account or to reconsider a determination if later revisions significantly alter the relied upon source might constitute a breach of the Grant Officer's discretion. But this is not what occurred in this case.

<sup>22/</sup> Testimony of Robert D. Parker, Grant Officer, Transcript (TR) at 883.

<sup>23/</sup> Id. at 912-917.

<sup>24/</sup> Exhibit DX-16, Management of Procurements Administered by the ETA National and Regional Offices, June 4, 1984.

Here, NDRDC had been the subject of two audits which were of concern to the Grant Officer in his responsibility review. The first, by Rodriguez, Roach & Assoc., reviewed **NDRDC's** federally funded activities from November 1, 1979, through September 30, 1981.<sup>25/</sup> Its findings were subsequently incorporated in a final F&D on March 1, 1983.<sup>26/</sup>

The second audit, by Petersen, Sorensen and Brough,<sup>27/</sup> was a financial and compliance review for the period from October 1, 1981, through December 31, 1983. The study also reviewed **NDRDC's** internal accounting controls from January 1, 1984, through May 31, 1984. The initial report was released on July 13, 1984, to the agency and **NDRDC.**<sup>28/</sup> NDRDC responded to the report on December 7, 1984.<sup>29/</sup> On March 15, 1985, as documented by a memorandum to the files, the Grant Officer determined that **NDRDC** was not responsible to administer Federal **funds.**<sup>30/</sup> The Grant Officer testified that he had a copy of the final audit report at the time he made his **determination.**<sup>31/</sup> Although strenuously challenged by **NDRDC's**

<sup>25/</sup> Exhibit CX-42.

<sup>26/</sup> AF at 153-164.

<sup>27/</sup> Final Audit Report, **AF** at 33-125.

<sup>28/</sup> Transmittal letter of Petersen, Sorensen & Brough, dated July 13, 1984, **AF** at 40.

<sup>29/</sup> **AF** at 90.

<sup>30/</sup> **AF** at 23-24.

<sup>31/</sup> Parker, TR at 936.

counsel, the Grant Officer persisted in his testimony that he had the benefit of the final Petersen audit report which included the comments of NDRDC to the criticisms. The findings of initial and final audit, however, were virtually identical.

Whether he had the final report or not, the Grant Officer had information concerning the manner in which NDRDC operated its previous CETA programs which he could assess. Some of the most serious allegations of administrative deficiencies were not convincingly repudiated by NDRDC's December 7, 1984, response to the initial audit, which was in the Grant Officer's file as part of the final audit package.<sup>32/</sup>

The ALJ's constricted view of test (a)(2) was that only information based on final findings and determinations could be used in determining whether NDRDC was experiencing serious administrative deficiencies. A final F&D is a distillation of the findings and conclusions and comments derived from a final audit determination. The ALJ's reading of test (a)(2) would bar the Grant Officer from using the underlying audit, responses, etc., which ordinarily provide a much fuller picture than the final F&Ds. To prohibit use of those "available records," § 633.204(a), taunts common sense and the purpose of this regulation which is to assure that grant recipients are indeed "responsible" to be entrusted with Federal funds to effectuate JTPA's purpose in the MSFW programs. If the Grant Officer may

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<sup>32/</sup> AF at 66-81Q.

not consider all "available records" in his consideration of the respective tests, then the term is a nullity. I reject that construction and find that the Grant Officer properly considered all available records in his determination of NDRDC's responsibility review. Thus it is incumbent upon me to review the incidents considered to determine if they demonstrate a rational basis in the record to find NDRDC nonresponsible.

NDRDC's relationship to Fiesta Enterprises.

NDRDC's board of directors formed a new, non-profit entity, Fiesta Enterprises, Inc., (Fiesta) and then entered into a series of business arrangements with Fiesta. These activities were violative of the conflict of interest regulations governing Federal grantees.<sup>33/</sup> The record contains two

33/ 20 C.F.R. § 676.62(a) and (b) (1985) provides:

§ 676.62 Conflict of interest.

(a) No member of any council under the Act shall cast a vote on any matter which has a direct bearing on services to be provided by that member or any organization which such member directly represents or on any matter which would financially benefit such member or any organization such member represents (section 121(h)(2)). However, members of the PIC may vote on the title VII Annual Plan subpart even if that subpart provides funds to the PIC.

(b) Each recipient and subrecipient shall avoid organizational conflict of interest, and their personnel shall avoid personal conflict of interest and appearance of conflict of interest in awarding financial assistance, and in the conduct of procurement activities involving funds under the Act, in accordance with the code of conduct requirements for financial assistance programs set forth in 41 CFR 29-70.216-4 (section 123(g)).



instances that presented significant breaches of a proper relationship between NDRDC and Fiesta.

The first concerned a classroom training contract let by NDRDC to Fiesta, whereby six participants were to be trained in carpentry skills while refurbishing a number of house trailers in which Fiesta had a **financial** interest. NDRDC paid for the participants' allowances, training materials, a site supervisor, and paid Fiesta for instructional **fees.**<sup>34/</sup> The contract between Fiesta and NDRDC was sole source, but without prior approval from the Department as required by 41 C.F.R. § 29-70.216-9(d)(2) (1982). Statements from the instructor elicited that contrary to the regulatory \*definition of classroom training,<sup>35/</sup> there was very little classroom **training.**<sup>36/</sup> Further, Fiesta failed to train the contracted number of participants; several of those enrolled failed to complete the program; and none of the enrollees was placed in unsubsidized employment as a result of the program. Moreover, Fiesta had a financial interest in the trailers being refurbished and the Executive Director

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<sup>34/</sup> AF at 71.

<sup>35/</sup> See 20 C.F.R. § 676.25-1 (1985):

(a) This program activity is any training of the type normally conducted in an institutional setting, including vocational education, and it is designed to provide individuals with the technical **skills and** information required to perform a specific job or group of jobs.

<sup>36/</sup> AF at 74.

of NDRDC at the time of this contract was a board member of **Fiesta.**<sup>37/</sup>

The second incident concerned a computer and software package purchased by Fiesta at a cost of approximately \$15,000. Fiesta leased the computer and software package to NDRDC under terms whereby in only 18 months, NDRDC paid Fiesta almost \$19,000.<sup>38/</sup> Although the hourly usage rate of \$12 appeared reasonable, no documentation apart from a summary of hours of use was available to support the presumed heavy use by NDRDC. Coincidentally, the Board minutes of Fiesta indicate concern that the low usage on the computer was not generating sufficient income to meet the loan payments Fiesta was required to make on its purchase of the computer: "[t]he Economic Development Coordinator for NDRDC (Executive Director at Fiesta) '... assured members he would make sure that in the future rent would cover loan payments.'" (AF at 76, excerpting the December 4, 1981, minutes of the Fiesta Board of Directors meeting). This arrangement violated the allowable costs associated with lease payments between related parties which are limited to 6-2/3% of the acquisition cost per annum.<sup>39/</sup> NDRDC's disregard of the applicable government regulations resulted in an overpayment of

<sup>37/</sup> AF at 70.

<sup>38/</sup> AF at 82.

<sup>39/</sup> OMB Circular A-122, Attachment B, ¶¶ 9(d) and 42(c) (1980).

almost \$17,000 in the 18 month period. Although, following the Department's challenge of this arrangement, Fiesta transferred title in the computer to NDRDC,, the overpayment was not compensated by the belated transfer, and the relationship between the organizations and their failure to establish necessary separation was demonstrably indicative of questionable administrative practices.

Unauthorized Enrollment Practices by NDRDC.

Apart from its relationship with Fiesta, NDRDC also engaged in a dubious administrative activity when it posthumously registered a deceased farmworker in the CETA program in order to use federal funds to ship the remains from North Dakota to Texas. A farmworker who previously had been enrolled in **NDRDC's** MSFW program was automatically terminated from the program rolls, as were all other participants, at the beginning of the new program year on July 1, 1984. The farmworker died in late July. A surviving son "was extended signature authority" by the widow to reenroll the deceased man in the **program.**<sup>40/</sup> The reenrollment was devised with the knowledge and cooperation of NDRDC<sup>41/</sup> to use Federal funds to ship the remains to Texas. Since the enrollee was dead at the time of his purported reenrollment, there can be no serious suggestion that he was eligible to

<sup>40/</sup> AF at 134-135.

<sup>41/</sup> The intake form was signed by an NDRDC "Interviewer" and approval indicated. AF at 136.

'obtain or retain employment, **to participate** in other program activities leading to their eventual placement in unsubsidized ... employment,"<sup>42/</sup> which is the purpose of the Migrant and Seasonal Farmworkers Program.

**NDRDC's role** in this matter is fully revealed in the Administrative File, which the Grant Officer testified was his working file at the time of his determination of **NDRDC's nonresponsibility**. While the ALJ characterized this instance as "a compassionate and charitable act,"<sup>43/</sup> it does not overcome **NDRDC's** blatant disregard for the purpose of the statute and the **organization's** failure to recognize and meet its responsibility to dispense JTPA funds only as authorized.

In sum, these several instances make clear that there is rational support in the record for the Grant Officer's determination on test (a) (2)'. .

The Grant Officer determined that NDRDC failed test (a)(4): "[w]illful obstruction of the audit process. "The record indicates<sup>44/</sup> the difficulty that the Department's Office of Inspector General (OIG) experienced in attempting to arrange a time to review documents relating to a Community Services Administration (United States Department of Health and Human Services) grant which was being reviewed under the comprehensive audit being conducted by Petersen, Sorensen and Brough.

<sup>42/</sup> JTPA, § 402(c)(3), 29 U.S.C. § 1672(c)(3) (1982).

<sup>43/</sup> D. and O. at 8.

<sup>44/</sup> AF at 38.

The delay, as adduced by a memorandum in the **OIG** materials,<sup>45/</sup> however, does not have the appearance of willful obstruction so much as a sense of dilatoriness and a failure by **NDRDC** to make completion of the review a priority. While there was delay, it was not lengthy and the **OIG** determined to issue its final report without reviewing the materials which **NDRDC** had identified in defense of its position. Since, as the Grant Officer testified, he had timely access to a pre-released copy of the final audit report, the consequences of the delays were not substantial. Thus, it appears that the record does not support a finding of failure on test (a)(4).

The Grant Officer also concluded that **NDRDC** failed test (a) (5): "[s]ubstantial failure to provide services to applicants as agreed to in a current or recent grant or to meet performance standard requirements as provided at § 633.321 of this subpart." This test was used as an example by the ALJ to show the unfair bias of the Department's officials toward **NDRDC**. At issue was **NDRDC's** performance in providing employment related services to its participants. Performance was measured by a number of statistical reviews and then compared to planned outcomes. A number of the performance indices were deemed to be below an acceptable standard by the Grant Officer.<sup>46/</sup> The

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<sup>45/</sup> AF at 38-39.

<sup>46/</sup> A full recitation of the disputed interpretation of the performance statistics can be found in the parties' briefs and in the D. and O. at 8-10.

ALJ determined that the Department's interpretation of the performance statistics was skewed to show NDRDC in the worst possible light.<sup>47/</sup>

The Grant Officer testified that NDRDC might have passed the performance test "mathematically" (TR at 1089) but maintained that the passing or failing of this test was not the sole basis on which he made his determination of nonresponsibility (TR at 1089). Other applicants that had demonstrably less favorable outcomes against plan than did NDRDC were not disqualified based on their poor performance. The Grant Officer explained that this was warranted by the conditions within which other applicants had operated their MSFW programs. Because NDRDC had been conditionally funded by the Department for PY 1984<sup>48/</sup> and in the context of the other administrative deficiencies that the Grant Officer found in NDRDC's operation, the Grant Officer did not choose to give NDRDC the benefit of the situation as he did other applicants. A review of the record concerning the performance statistics and the explanation concerning the performance tests does not demonstrate a rational basis for the Grant Officer's finding of failure of this test. The Grant Officer's testimony at 1089-1090, indicates that the performance test would have been passed had that determination been made in isolation.

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<sup>47/</sup> D. and O. at 8-9.

<sup>48/</sup> AF at 32.

The Grant Officer also determined that NDRDC failed test (a) (6): "[f]ailure to correct deficiencies brought to the grantees' attention in writing as a result of monitoring activities, reviews, assessments, etc." The Grant Officer's consideration of final findings and determinations from the Rodriguez audit report<sup>49/</sup> which listed certain administrative deficiencies as well as various monitoring reports and the report of the Petersen audit appear to be the bases of the determination that NDRDC failed this test. There is a pattern of recurring identification of administrative needs for improvement. The problems listed in the Rodriguez audit F&Ds included: "Financial management system controls need to be followed." "Intake procedures need to be strengthened." "Property management system needs to be improved".<sup>50/</sup> In the subsequent Petersen audit, the problems identified are very much the same: inadequate management of sub-grants;<sup>51/</sup> need for improved eligibility determination system;<sup>52/</sup> recommendation that NDRDC establish procedures to account for non-expendable personal property, obtain proper approval of capital expenditures and maintenance of approved plans of disposition.<sup>53/</sup> These findings do not demonstrate that the noted

<sup>49/</sup> AF at 153-160.

<sup>50/</sup> AF at 157.

<sup>51/</sup> AF at 68.

<sup>52/</sup> Id. at 81-Q.

<sup>53/</sup> Id. at 81-J.

problem areas had been addressed and corrected, as required by the test. There is, therefore, a basis in this record for the Grant Officer's determination of failure on test (a)(6).

The Grant Officer determined that NDRDC failed test (a)(9): "[f]ailure to properly report and dispose of government property as instructed by DOL." The final Rodriguez audit (AF at 157) and the Petersen audit (AF at 81-J) both indicated weakness in **NDRDC's property management**. One instance cited in the Petersen audit was the acquisition using Federal funds of a **pick up truck** by one of **NDRDC's** subgrantees, Utah Rural Development Corporation (**URDC**). The truck had been disposed of but neither **NDRDC** nor **URDC** had documents to support the transactions as required by OMB Circular A-122. In a colloquy with the ALJ, the Grant Officer seemed to acquiesce that this instance by itself might not be sufficient grounds to determine an applicant as nonresponsible. However, the Grant Officer properly considered this additional instance of failure by **NDRDC** to adhere to explicit applicable regulations for situations involving Federal funds and NDRDC property.

Finally, the Grant Officer found that **NDRDC** failed test (a)(10): "[f]ailure to have maintained cost controls resulting in excess cash on hand." NDRDC accrued an excess cash balance apparently in anticipation of close out costs that would come due after the termination of the CETA program.



Since CETA program costs could not be satisfied by funds from the successor JTPA program, the appropriateness of setting aside some amount of **CETA** funds is not **contested**.<sup>54/</sup> However, the record shows that NDRDC used more than \$18,000 of that amount as loans to non-Federal entities, and advanced funds without authorization to subgrantees. At the time of the audit report, the repayment of that money to NDRDC appeared **unlikely**.<sup>55/</sup> Although technically the problem is the excess cash that NDRDC drew down from its grant, the unauthorized use to which they put those funds is additionally questionable. The significant amount of excess cash that NDRDC accumulated and the questionable use of these funds was a legitimate concern for the Grant Officer, and another instance of questionable judgment and practice properly examined in his responsibility review.

The **ALJ's** decision was blunt concerning his disregard for the testimony of the Government Authorized Representative (GAR) which he considered not credible. However, the Grant Officer testified that he placed "very little" reliance on subordinates in conducting the responsibility **review**.<sup>56/</sup> Throughout his testimony, the Grant Officer emphasized that he took the information from his file, (although the original documents could

<sup>54/</sup> Grant Officer's Reply Brief, October 7, 1985, at 39.

<sup>55/</sup> Parker, TR at 1599; AF at **81F**, 81G.

<sup>56/</sup> TR at 916.

have originated in the program office), weighed it, and drew his own conclusions. The Administrative File provided the Grant Officer with a great deal of information about the Complainant apart from the Responsibility Review Checklist prepared by the GAR. The transcript is replete with statements by the Grant Officer in reply to questions by counsel and the ALJ that he recognized his responsibility to make the responsibility determination and he did it considering all of the information available to him.<sup>57/</sup> The key to the determination of nonresponsibility was the determination of the Grant Officer, and his testimony substantiates that he reached his decision from the available\* records.

The ALJ purported to estop the Department from using any of the Rodriguez audit final determinations based on a statement which the ALJ quoted as follows:

If, after this date, you demonstrate to the Office of Special Targeted Programs that appropriate corrective action has been taken . . . the fact of earlier deficiencies, now corrected, will not be considered adversely in future ~~decisions~~ regarding your relationship with ETA.<sup>58/</sup>

The full two sentences read:

If, after this date, you demonstrate to the Office of Special Targeted Programs that appropriate corrective action has been taken, that

<sup>57/</sup> TR at 960, 965, 966-968, 974, 1001, 1040, 1504-5, 1509, 1544-5, 1547-8.

<sup>58/</sup> D. and O. at 16, citing AF at 157.

office will so **notify** us in writing. Your organization's name will be then be removed from our list and the fact of earlier deficiencies, now corrected, will not be considered adversely in future decisions regarding your relationship with ETA. **(emphasis supplied).**<sup>59/</sup>

The reference to the "list," omitted from the **ALJ's** quotation, is significant. The Department maintained a "list of organizations which still have uncorrected administrative problems" and NDRDC was being placed on that list concurrent with the final audit **determination.**<sup>60/</sup> The context of the statements concerning no future adverse considerations related to removal from the list if deficiencies were corrected. Such a commitment should not preclude a future Grant Officer from taking notice that NDRDC had been plagued by certain administrative deficiencies in the past, proposed a plan to correct **them,**<sup>61/</sup> and might be experiencing similar difficulties at a later time. In any case, the deficiencies uncovered in the Petersen audit are substantial and as such are disqualifying without having to be persistent, as well.

#### CONCLUSIONS

A Grant Officer must use available records in his determination of the responsibility of potential grantees. The information must also be valid. The fourteen tests in Section 633,204(a) **are**

<sup>59/</sup>AF at 157.

<sup>60/</sup> Id.

<sup>61/</sup> CX-11.

inclusive and must be taken into consideration. In addition, the tests are indicative of the areas in which a Grant Officer must **look** to determine which operational areas are **critical**. They are not, however, exclusive. If other serious, substantial or persistent failures of a grantee come to the Grant Officer's knowledge, he cannot disregard them in making his determination of responsibility to administer Federal funds. The responsibility review is designed to protect Federal programs, and ultimately the targeted beneficiaries, from indifferent and irresponsible administration. The national priority to conserve our fiscal resources demands no less.

A potential grantee is protected from an arbitrary and capricious decision by a Grant Officer by putting the reasons for disqualification to a "substantial or persistent" standard. Further, the requirement that a disqualifying failure must be substantial or persistent protects a potential grantee from being debarred because of a single, inconsequential occurrence. It cannot be claimed on the record here that **NDRDC's** involvement with Fiesta was inconsequential. The favorable classroom training contract and the lucrative computer leasing contract expended thousands of dollars with little tangible gain for the participants in the MSFW programs.

The posthumous enrollment of a former participant in an attempt to have Federal funds used where either private funds or **NDRDC's** non Federal funds should have been used goes beyond

improper eligibility or enrollment processes and begins to edge upon fraud. The **ALJ's** hierarchical rating of some of **the** tests, even with the tacit agreement of the Grant Officer, is inappropriate and is not provided for under the regulations. Indeed, the regulation requires disqualification if any one of the tests was either substantially or persistently failed.

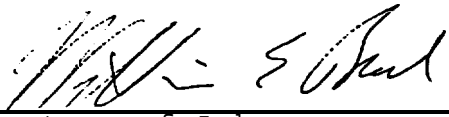
The Grant Officer testified that he comprehended a pattern of wrongful actions by NDRDC when it was operating its **MSFW** programs. Competent auditors reviewed **NDRDC's** program compliance against accepted accounting norms. Practices and procedures were revealed which the Grant Officer found were questionable in themselves and convincing in their combination that NDRDC should not be entrusted with the administration of Federal funds. The attack on his determination was not that his facts were wrong, but rather, the form in which he received them was improper.

There was no evidence that NDRDC did not pay \$19,000 for the undocumented use of a \$15,000 computer package; there was no evidence that the trailer refurbishing project was conducted in a classroom setting, and that the instruction was provided at a satisfactory level; or that it was proper to enroll a deceased farmworker in the MSFW program. What was shown was administrative sloppiness in the Department's timely processing of documents, and witnesses who had not prepared fully to respond to reasonably anticipated questions at the

hearing. while a casual review of the transcript may explain the **ALJ's** negative view of the Department's support staff, the record strongly supports the Grant Officer's determination that NDRDC was not responsible to be considered as a potential grantee.

ORDER

Accordingly the decision of the ALJ is reversed. The Grant Officer's determination of **NDRDC's** nonresponsibility. as a potential grantee of Migrant and Seasonal Farmworker Programs is AFFIRMED.

  
\_\_\_\_\_  
Secretary of Labor

Dated: 3-25-86  
Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: North Dakota Rural Development Corp.  
Case No. : 85-JTP-4  
Document : Final Decision and Order

A copy of the above-mentioned document was sent to the following  
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