U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON. D.C.

DATE: AUG 16 1994
CASE NO. 92-JTP-21

IN THE MATTER OF

FLORIDA DEPARTMENT OF LABOR
AND EMPLOYMENT SECURITY,
COMPLAINANT,

v.

UNITED STATES DEPARTMENT OF LABOR,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Job Training Partnership Act (JTPA or the Act), 29 U.S.C. §§ 1501-1791 (1988), and the regulations issued thereunder at 20 C.F.R. Parts 626-638 (1993) and at 29 C.F.R. Part 18 (1993).

BACKGROUND

The Grant Officer issued an Initial Determination on February 3, 1992, disallowing $1,382,695 in claimed costs by the State of Florida (State) pursuant to an audit of its JTPA program. Administrative File (A.F.) at 24-31. Of that amount, $1,261,010 pertained to JTPA funds used to purchase a number of computers, software/courseware and maintenance by a JTPA subgrantee, the North Central Florida Regional Planning Council, which were to be used to provide basic skills remediation and pre-employment skills training to eligible JTPA participants. The Grant Officer initially determined that less than 11 percent of the users were actually enrolled JTPA participants and

disallowed a proportional amount of the total attributable costs of $1,416,229, that is, $1,261,010. A.F. at 26.

On April 3, 1992, the Grant Officer issued a Final Determination wherein he allowed for a combined usage of the equipment by JTPA eligible (but not enrolled) persons as well as enrolled JTPA participants, of 28.9 percent. Using this higher proportion of "eligible" users, the Grant Officer modified the sum disallowed in the pertinent finding to $1,007,063. [1/]

The State timely requested a hearing disputing the Grant Officer's Final Determination before the Office of Administrative Law Judges (OALJ). The Grant Officer filed a motion to withdraw his Final Determination without prejudice on April 26, 1993. The motion was granted on May 26, 1993. The Florida Department of Labor and Employment Security (FDOLES), the State's administrative agency for its JTPA grant, appealed the ALJ's order to the Secretary. The Secretary asserted jurisdiction on July 19, 1993.

On December 7, 1993, the parties filed a Joint Motion to Stay Proceedings pursuant to their agreement to submit the dispute for resolution through the Alternative Dispute Resolution (ADR) procedures. An Order Granting Stay was issued on December 16, 1993, and the parties timely filed waivers of the statutory time limitation concerning the Secretary's issuance of a Final Decision pursuant to Section 166(c) of the JTPA. On

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[1/] The total amount disallowed by the Grant Officer is $1,095,389 of which $1,040,733 is subject to debt collection.

March 30, 1994, the parties filed a Joint Motion to Continue the Stay of the Proceedings pending their further attempt to resolve this case under ADR. That motion was granted on April 12, 1994. Counsel for the Grant Officer advised the Secretary on July 12, 1994, that the parties had been unsuccessful in their efforts to resolve this matter through ADR.

DISCUSSION

The regulations at 20 C.F.R. § 636.8 set forth the administrative procedures governing the resolution of disputes between the Department and a JTPA grantee. The regulations provide that the Grant Officer's Initial Determination indicate the matters in controversy, including the allowability of questioned costs based upon the requirements of the Act, regulations and other agreements under the Act. After an informal attempt to resolve the matters in controversy, the Grant Officer must issue a Final Determination indicating which matters still remain in dispute, listing any modifications to the findings and conclusions set forth in the Initiai Determination, and establish a debt, if appropriate. The Final Determination constitutes the final agency action unless a hearing is requested by the affected grantee pursuant to 20 C.F.R. § 636.10, as the state did here, [2/] in which case the agency's final action is held in abeyance until a final decision by the Secretary. A Grant Officer's Final Determination is not a final agency action

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[2/] A.F. at 4-6.

once it is challenged until after a hearing and the consequent decisions issued. 20 C.F.R. § 636.11.

The regulations do not provide for the Grant Officer to challenge his own Final Determination before the OALJ since the usual adverse effect of the determination requires the grantee to return disallowed JTPA grant funds. The regulation at 20 C.F.R. § 636.10(a)(2) restricts the OALJ's adjudicatory review to those issues specifically challenged by the grantee, but it does not act as a check on any subsequent action by the Grant Officer with regard to his reconsideration of the challenged determination.

The State excepted to the ALJ's granting the Grant Officer's Motion to Withdraw the Final Determination Without Prejudice once the case was before the OALJ for review. The regulations and the Act are silent with regard to the Grant Officer's authority to reconsider the final determination once it has been made but before it is the agency's final action. There is no question that an agency has an inherent right to reconsider its own decisions since the power to consider the matter in the first place is consistent with the power to reconsider that judgment. Truiillo v. General Electric, 621 F.2d 1084, 1086 (10th Cir. 1980). Since there was no final agency action here, there is no ground on which to deny the Grant Officer the opportunity to reconsider the bases for the Final Determination.

The Grant Officer's request for an opportunity to reconsider the Final Determination does not appear to be a matter of convenience or quirk, or even a subsequent change of policy, but

rather "a serious concern regarding the propriety and legality of that part of his Final Determination which allowed costs on the basis that certain users of the computers were eligible to participate in JTPA programs, although not formally enrolled." Grant Officer's Brief at 13. Cf. Chapman v. El Paso, 204 F.2d 46, 53 (D.C. Cir. 1953).

There are competing interests in this case regarding when decisions by public agencies are final. Although the State wants to limit its financial responsibility for the return of disallowed costs to a sum no more than the amount arrived at by the Grant Officer in the Final Determination, there is a competing public interest in having the Grant Officer reach a proper result. Trujillo, supra; California Human Development Corp. v. U.S. Dep't of Labor, Case No. 92-JTP-9, slip op., Sec. Final Dec. and Order, Aug. 31, 1993; [3/] Ohio Bureau of Employment Security v. U.S. Dep't of Labor, Case No. 89-JTP-19, slip op., Sec. Final Dec. and Order, Sep. 21, 1990. JTPA's legislative history is replete with Congressional concerns regarding the Department of Labor's management of' previous program expenditures, and the Grant Officer's belated resolve to do it right the second time is appropriate.

[3/] Although the presiding ALJ in California Human Development Corp. cites the ALJ's decision in this case as supporting precedent in granting the Department's motion for a dismissal without prejudice, because I am affirming the ALJ's action in this case, the circularity of citations is less egregious.

The Grant Officer's reason as stated in his motion before the ALJ for reconsidering the Final Determination is:

> that discussions with several agencies within the Department of Labor revealed that the Final Determination did not accurately reflect the policy of the Department with respect to the expenditure of JTPA funds. It is the Department's policy that, in a program for JTPA participants, funds must be spent exclusively for the benefit of individuals who are determined to be eligible for and formally enrolled in the JTPA program prior to the receipt of any program services. [4/]

One cannot challenge the correctness of the Department's policy regarding the appropriate expenditure of JTPA funds under the principles of prudent Federal grant management, as well as its consistency with the clear Congressional mandate to ensure that such expenditures benefit only those persons enrolled in the program. Less explicable is the dilatoriness of the Grant Officer in engaging in policy discussions with "the several agencies within the Department" concerning what was apparently a novel approach in determining the level of FDOLES's subgrantee's misexpenditure of JTPA funds.

Although there was only a two month lapse between the issuances of the Grant Officer's Initial and Final Determinations, there was almost a year delay from the issuance of the Final Determination until the Grant Officer's motion to withdraw the Final Determination, during which time the State requested a hearing before the OALJ. The Grant Officer did not

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[4/] Grant Officer's Motion to Withdraw Final Determination Without Prejudice, undated, Certificate of Service indicating March 26, 1993, mailing, received by OALJ on March 30, 1993.

address the reason for the delay in his motion before the ALJ. The unexplained reason for the delay notwithstanding, the Grant Officer is within his rights to reconsider his previous determination as to the allowability of the State's JTPA expenditures and the ALJ appropriately granted his motion to do so.

The State challenges the ALJ's authority to grant the Grant Officer's motion to withdraw his Final Determination. The regulations governing the procedures to be followed before the OALJ are set forth at 29 C.F.R. Part 18, which provide, at Section 18.1(a) "[t]he Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules ...." The rules of practice before the OALJ do not address the voluntary dismissal of actions, but Fed. R. Civ. P. 41(a)(2) provides that a court can, by order, dismiss an action upon such terms and conditions as the court deems proper, and unless otherwise specified in the order, the dismissal is without prejudice.

To dismiss an action with prejudice is a severe sanction, barring the moving party from recovery forever, and is condoned only when the responding party would face dire consequences or substantial legal prejudice because of the dismissal. The prospect of a second lawsuit or even the moving party's gain of some tactical advantage do not rise to the threshold of legal prejudice. In re: Paoli Railroad Yard PCB Litigation, 916 F.2d 829 (3rd Cir. 1990), cert. denied 111 S. Ct. 1584 (1991)

(voluntary dismissal shall be permitted unless the defendant wili suffer prejudice greater than mere prospect of a second action); Conafav v. Wveth Laboratories, 841 F.2d 417 (D.C. Cir. 1988) (without a showing of clear prejudice to defendant, dismissal without prejudice should be granted); Durham v. East Coast Railwav Co., 385 F.2d 366, 368-69 (5th Cir. 1967) (appellant did not establish plain legal prejudice merely by asserting that it had begun trial preparations); Stokesv. Pacific Gas & Electric Co./Bechtel Dower Corp., Case No. 84-ZRA-6, slip op. at 2-3, Sec. Finai Order, July 26, 1988; see 5 J. Moore, J. Lucas & J. Wicker, Moore's Federal Practice ¶ 41.05[1],at 41-51 to -70 (Second Edition, 1993). When a cause of action is dismissed without prejudice pursuant to Rule 41(a)(2), the parties are in the same position as they would have been had no suit ever been brought. See Nolder v. Raymond Kaiser Enaineers, Inc., Case No. 84-ERA-S, slip op. at 14, Sec. Final Dec. and Order, June 28, 1985, citing Humphreys v. U.S., 272 F.2d 411 (9th Cir. 1959).

What makes this case unusual, but not unique, is that the party seeking the dismissal, the Grant Officer, is not the party that initiated the action, FDOLES, as Complainant. However, by virtue of the Act and the regulations, the Grant Officer can impose a monetary sanction against a grantee after solely an administrative action, namely the Final Determination, by disaiiowing certain costs charged by the grantee to its JTPA grant. If the grantee fails to seek review of that determination before the OALJ, a debt is established which is to be repaid by

the grantee. The basis of the sanction, which is the return of disallowed costs, is the Grant Officer's Final Determination, and therefore the Grant Officer's motion to withdraw the Final Determination is tantamount to the withdrawal of a plaintiff's complaint for money damages, and thus the Grant Officer's motion falls within the spirit of the rule, if not the terminology.

The State argues at some length that the Grant Officer's issuance of the Final Determination entails the principle of res judicata and that the Grant Officer should therefore be precluded from reconsidering that decision. [5/] These arguments are not persuasive. The key elements for a holding of res judicata arise when there was a reasonable opportunity for the parties to litigate a claim before a court of competent jurisdiction over the parties and the cause of action, and the court decided the controversy. Then the interests of society and the parties are best served by precluding the relitigation of the claims and issues actually litigated. Kasper Wire Works v. Leco Ensineering, 575 F.2d 530, 536, 537-38 (5th Cir. 1978).

The predicate for res iudicata, that of judicial finality, is missing here. There was an administrative procedure whereby the Grant Officer reviewed the recommendations of the auditors and agency staff, as well as the explanations and documentation proffered by the grantee, during an informal resolution process prior to the issuance of the Final Determination. During that process, the Grant Officer agreed to use the basis of JTPA-

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[5/] FDOLES Initial Brief at 10-13; FDOLES Reply Brief at 4-11.

eligible usage as contrasted to JTPA-participant usage in determining allowable costs tc be charged against the State's JTPA grant. But merely because the State's position was accepted by the Grant Officer and used in his Final Determination in no way changes the character of the procedure from administrative to judicial, and that is fatal to any claim of res iudicata to prevent the Grant Officer from reconsidering the issued Final Determination.

The State misapprehends the effect of the 21-day filing requirement set forth in the regulations at 20 C.F.R. § 636.10(a) imposed on JTPA recipients and subrecipients. The time limitation is jurisdictional as it pertains to the right of complainants to request a hearing.

The State's complaint that the ALJ failed to respond to its arguments before him misses the point of the decision. The ALJ addressed FDOLES's arguments implicitly and rejected them. The ALJ established the statutory basis and legislative history of JTPA requiring the Department to establish more rigorous standards concerning the misuse of JTPA funds as his rationale to permit the Grant Officer to correct an erroneous basis for allowing costs that should have been disallowed. Further, he properly used the analogy of the Supreme Court's decision in Brock v. Pierce County, 476 U.S. 253 (1986), a CETA case, with regard to the regulatory requirement in JTPA that the Secretary issue a final determination within 180 days after the receipt of a final approved audit report when he found that the Secretary

does not lose jurisdiction over the case if the 180 day limit is exceeded.

ORDER

The ALJ's Order granting the Grant Officer's Motionto withdraw the Final Determination dated April 3, 1992, is AFFIRMED.

Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: Florida Department of Labor and Employment Security v. United States Department of Labor

Case No. : 92-JTP-21

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following persons on AUG 16 1994

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