DIGEST

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-130515 DATE: JUL 17 1974

MATTER OF: Waiver of Office of Economic Opportunity grant conditions.

DIGEST:

1. Special grant condition prohibiting conduct of investigations and unilateral evaluations by State economic opportunity office grantee does not violate Governor's statutory review rights, and "implicit waiver" of such special condition is precluded by Office of Economic Opportunity regulations as well as general considerations.

2. Prospective and general waiver of Office of Economic Opportunity regulation requiring non-Federal contributions for grants to State economic opportunity offices is not objectionable on general principles, but appears to violate 30-day advance publication requirement under section 623 of Economic Opportunity Act.

This decision to the Director of the Office of Economic Opportunity (OEO) results from our review of certain questions concerning waivers of OEO grant conditions in response to a congressional request. We were requested to review the validity of (1) the waiver of a special condition contained in a grant to the California State Economic Opportunity Office which prohibited the grantee from conducting investigations and unilateral evaluations, and (2) waiver of a requirement for non-Federal contributions in connection with grants to State economic opportunity offices.

Repeated attempts have been made to obtain the official positions and views of OEO on the specific questions presented in the congressional request. However, we have been unable to obtain a substantive response from OEO and are therefore required to present our conclusions without benefit of the agency's views. For the reasons stated hereinafter, we must conclude on the basis of the information presently available to us that both waivers by OEO were unauthorized and invalid.

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B-130515

Waiver of the special condition in the California State Economic Opportunity Office grant.

The California State Economic Opportunity Office (CSEOO) has received OEO grants pursuant to section 231 of the Economic Opportunity Act of 1964, as amended, 42 U.S.C. 2824, which authorizes grants to State agencies for the provision of technical assistance, coordination, and other advice and assistance in connection with community action programs under title II of the act. On June 14, 1973, our Office issued a report (B-130515) on the activities of CSEOO under its grant for program year (fiscal year) 1972. Chapter 2 of our report noted that the 1972 grant prohibited CSEOO from conducting investigations and unilateral evaluations of community action agencies. The special condition provided in part:

> "California SEOO may investigate problems within CAAs where such investigation bears directly upon the SEOO's responsibility to advise the governor in accordance with Section 242 of the EOA. However, such investigation efforts will be supported only by funds set aside for the purchase of said services from the Department of Human Resources Development. These investigators will function in close cooperation and coordination with the appropriate WR/OEO staff and the OEO Office of Inspection * * *."

The special condition went on to list specific procedures to be followed in order to insure cooperation and coordination. However, our report concluded that CSEOO had conducted a number of investigations and unilateral evaluations in violation of the special condition. OEO's response to the draft version of our report, transmitted by the then Acting Director by letter dated May 23, 1973, stated in part with reference to this matter:

> "The special conditions of the 1971-72 grant which prohibited investigations and unilateral evaluations were not met. It must be understood, however, that the work program could easily have been construed as contrary to the review rights secured all Governors through the Economic Opportunity Act. Normally, evaluations are an appropriate and expected function to be performed by a State Economic Opportunity Office. The conditions promulgated in that work program have been deleted from subsequent CSEOO work programs. The evaluations and investigations were performed with full knowledge on the part of OEO. Hence, it may be said that these restrictions were implicitly waived by the Agency."

several questions have been raised concerning the theories advanced in the quoted statement.

First, our views are requested on the statement that the special condition "could easily have been construed as contrary to" the Governor's statutory review rights. Such review rights arise under section 242 of the Economic Opportunity Act, as amended, 42 U.S.C. 2834, which provides in part quoting from the Code:

> "In carrying out the provisions of this subchapter, no contract, agreement, grant, loan, or other assistance shall be made with, or provided to, any State or local public agency or any private institution or organization for the purpose of carrying out any program, project, or other activity within a State unless a plan setting forth such proposed contract, agreement, grant, loan, or other assistance has been submitted to the Governor of the State, and such plan has not been disapproved by the Governor within thirty days of such submission, or, if so disapproved, has been reconsidered by the Director and found by him to be fully consistent with the provisions and in furtherance of the purposes of this subchapter. * * *."

We are not aware of any evidence that the "waiver" here involved was in fact based upon a formal or informal determination that the special condition did constitute a violation of the Governor's review rights; nor that such a determination has ever actually been made. Rather the statement in response to our draft report appears merely to advance a theory in support of the waiver.

If the special condition were considered to violate the review rights provided in section 242 of the act, it would, of course, be ineffective irrespective of the validity of the waiver as such. However, we fail to perceive a violation of section 242. The special condition expressly authorizes CSEOO to initiate through the Department of Human Resources Development investigations bearing directly upon its responsibilities to advise the Governor. Moreover, CSEOO may conduct evaluations subject to its cooperation and coordination with OEO officials. It seems to us that the special condition represents a reasonable approach to permitting fulfillment of CSEOO's responsibilities without resort to specific methods which had created problems in the past.

Secondly, the question has been raised whether the special role of the Congress in seeking imposition of the special condition renders

the Congress in effect a "third party beneficiary" to the grant agreement whose rights as such were violated by waiver of the special condition. In this regard, the following background is presented:

> "* * * these special grant conditions were imposed on C.S.E.O.O. as a result of extensive Congressional inquiry into the State agency, including a July 20, 1971, hearing held by a Special Subcommittee of the House Committee on Education and Labor. During the course of those hearings, commitments were made to the Congress that special grant conditions would be imposed designed to ensure that the unilateral, highly irregular investigations and evaluations by C.S.E.O.O. would be halted. O.E.O. officials (including the then Director, Frank Carlucci, future Director Phillip Sanchez, and the then Regional O.E.O. Director, H. Rodger Betts), repeatedly committed O.E.O. to reforming the State agency and assured the Subcommittee that the grantee would function correctly in the future. The findings of the June 14 G.A.O. report make it clear that C.S.E.O.O. has repeatedly been in violation of the grant conditions imposed pursuant to the Congressional hearing."

We are aware of no precedent to support the foregoing contention. A most relevant and cogent statement on this point--to which we have nothing to add--is contained in the recent opinion by Judge Gerhard Gesell in an action challenging the removal of the original Watergate Special Prosecutor, Nader v. Bork, 366 F. Supp. 104, 109 (D.D.C. 1973):

> "Plaintiffs have emphasized that * * * the Acting Attorney General was prevented from firing Mr. Cox by the explicit and detailed commitments given to the Senate, at the time of Mr. Richardson's confirmation, when the precise terms of the regulation designed to assure Mr. Cox's independence were hammered out. Whatever may be the moral or political implications of the President's decision to disregard those commitments, they do not alter the fact that the commitments had no legal effect. * * *."

In our view, the crucial considerations relating to the OEO action here involved relate to that agency's basic lack of authority to waive a special grant condition by implication. It appears that such implicit waivers are specifically and flatly prohibited by OEO Instruction 6710-1

(December 29, 1971, as amended), entitled "General Conditions Governing OEO Grants," which states in part:

> "Program funds expended under authority of this funding action are subject to the provisions of the Economic Opportunity Act as amended, the general conditions listed below, any attached special grant conditions, and OEO directives. The grantee is expected to inform OEO promptly if it fails to receive, or has reason to believe it has failed to receive, all OEO applicable directives or any attachments to the Statement of OEO Grant. Many of those provisions do not represent invariable policies of the Office of Economic Opportunity and exceptions should be requested in cases in which compliance with one or more of them would cause unnecessary difficulties in carrying out the approved program. Requirements found in grant conditions or OEO directives may be waived only by a written notification signed by an authorized OEO official. Any such waiver must be explicit: no waiver may be inferred from the fact that the funding action is responsive to a grant funding request which may have contained material inconsistent with one or more of these conditions." (Emphasis supplied.)

The quoted language seems clearly to foreclose the implicit waiver theory. Moreover, it is clear that OEO Instruction 6710-1 is a statutory regulatica which is itself binding upon OEO. See our decision to the Acting Director of OEO dated July 20, 1973, B-130515, discussed infra. Even in the absence of an express prohibition against implicit waivers, and assuming arguendo that special grant conditions may be waived or modified in some cases, it is doubtful as a general matter that waivers may properly be effected after the fact merely on the basis of agency knowledge of violations and inaction. Such a result is, in our view, nothing more than an abdication of agency responsibility having no binding effect.

Accordingly, we conclude that the special condition here involved was binding upon OEO and CSEOO under the grant for program year 1972 notwithstanding the purported waiver thereof.

Waiver of the requirement for non-Federal contributions by grantee State economic opportunity offices.

OEO Instruction 7501-1 (March 25, 1970), entitled "Role of State Economic Opportunity Offices," 45 CFR §1075.1-1 (1973), required in paragraph 9(b) a minimum 20 percent non-Federal contribution for grants

under section 231 of the act to State Economic Opportunity Offices (SEOOs). However, during fiscal year 1973 the non-Federal contribution requirement was apparently waived in a telegram sent to OEO regional directors. Several questions are also presented concerning the validity of this waiver. As a result of OEO's failure to respond to our request for its views and comments, our information concerning this waiver may not be complete; nor are we aware of the present status of the non-Federal contribution requirement. Accordingly, the following discussion is based upon what information we do have.

In our above-cited decision to the Acting Director of OEO of July 20, B-130515, we observed that OEO Instruction 7501-1 is a statutory regulation having the force and effect of law. Accordingly we concluded, on the basis of numerous decisions of our Office, that the non-Federal contribution requirement set forth in this instruction could not be waived on a retroactive and ad hoc basis. Our July 20 decision concerned partial waiver of the non-Federal contribution requirement as applied to CSEOO's 1972 grant. As we pointed out therein, the principle against retroactive and ad hoc waiver of statutory regulations derives from the need to preserve the uniformity which such regulations are designed to provide and from the fact that individual waiver would be manifestly unfair to parties who have complied with applicable requirements. Moreover, we noted that once the furnishing of a non-Federal contribution has been undertaken by acceptance of the grant which incorporates this requirement, it becomes in effect an obligation owing to the United States which cannot be waived or given away.

It is our understanding that the waiver presently in issue applied to all future SEOO grants. The considerations recited in our July 20 decision, therefore, do not apply in this context and we would have no general objection to such waiver on a uniform and prospective basis, provided the basis is clearly set forth in the regulations so that all similarly situated are treated alike. Cf. 37 Comp. Gen. 820 (1958).

We also noted in our July 20 decision that section 231 of the Economic Opportunity Act, which authorizes grants to SEOOs, does not impose a requirement for non-Federal contributions. Nevertheless, it is stated that the non-Federal contribution requirement had been applied administratively for many years; and that the Congress was aware of this but raised no objection. Therefore, the question has been raised whether the Congress has in effect acquiesced in this requirement so that it cannot be altered without congressional approval. There exists, of course, a well-established principle that an administrative practice reflecting a certain interpretation of a statute will

be given great weight in ascertaining the true meaning of the statute, particularly where the legislature is aware of the administrative practice and has not objected thereto. See, e.g., 2A Sutherland, Statutory Construction §49.04-.05, 49.07-.08 (4th ed. 1973). Support also exists in certain cases for the rule that an administrative regulation may not be changed after reenactment of a statute. See 1 Davis, Administrative Law Treatise §5.10 (1958).

The foregoing principles are significant primarily with respect to questions of statutory construction, serving as aids to be used in approaching ambiguities in the language of a statute. The present matter, however, does not involve a question of statutory construction. It is clear that section 231 of the Economic Opportunity Act does not require non-Federal contributions in connection with SEOO grants, but leaves this matter to the judgment of the agency. Therefore, the waiver here involved is not, in our view, dependent upon legislative action.

The final and most serious issue concerning the validity of this waiver arises under section 623 of the Economic Opportunity Act, as amended, 42 U.S.C. 2971b (Supp. II, 1972), which provides quoting from the Code:

> "All rules, regulations, guidelines, instructions, and application forms published or promulgated pursuant to this chapter shall be published in the Federal Register at least thirty days prior to their effective date."

Section 623 has been considered in two judicial decisions of which we are aware. In Local 2677, AFGE v. Phillips, 358 F. Supp. 60 (D.D.C. 1973), the court concluded in part that certain directives issued by OEO in connection with the proposed "phasing out" of community action agencies but not published in the Federal Register were ineffective in view of section 623. The court observed in this regard, 358 F. Supp. at 81-82:

> "* * * It is conceded by the defendant that the January 29, 1973, and March 15, 1973, directives on the termination of section 221 funding, supra, have never been published in the Federal Register, although the defendant claims that the latter has been prepared for publication. The Court holds that until section 2971b has been complied with, the directives of the defendant are illegal as issued beyond the defendant's statutory authority.

"The defendant argues that section 2971b does not mean that OEO regulations must be published for 30 days before they may take effect if all those affected by those regulations have notice of those regulations or if the regulations were issued in emergency situations or if the documents have been prepared for publication but are unpublished. The statute, however, does not provide for any of those contingencies. It says that all regulations 'shall' be published 30 days prior to their effective date. No clearer expression could have been used by the Congress to indicate that OEO regulations would not be effective until 30 days after their publication."

The court went on to conclude that certain other regulations which had been published in the Federal Register but purported to be retroactive were also ineffective under section 623 until 30 days following the date of publication. In support of these conclusions, the court cited two decisions reaching similar results under a provision of the selective service law virtually identical to section 623: Piercy v. Tarr, 343 F. Supp. 1120, 1127-28 (N.D. Cal. 1972), and Gardiner v. Tarr, 341 F. Supp. 422, 433-35 (D.D.C. 1972).

In Local 2816, Office of Economic Opportunity Employees Union, AFGE v. Phillips, 360 F. Supp. 1092 (N.D. Ill. 1973), the court denied relief in a similar challenge to the phasing out of community action programs on the basis that the plaintiffs lacked standing. The Local 2816 court also considered the issue of lack of publication under section 623. While not expressing a definitive conclusion on this issue, the court noted defendants' argument that in the case of the Administrative Procedure Act, 5 U.S.C. 553, publication requirements need not be followed where "good cause" exists for exceptions. However, the court responded that section 623 must be construed by itself and that, in any event, there was no evidence of "good cause" for an exception in that particular case. 360 F. Supp. at 1100.

As stated in the Local 2677 opinion and intimated in Local 2816, the advance publication requirement of section 623 seems comprehensive, and refers to no exceptions. Recognizing, of course, the highly unusual and emergency circumstances which applied generally to OEO's operations during much of fiscal year 1973, we cannot conclude that such circumstances would justify an exception from section 623 in the present case since the statute does not appear to contemplate exceptions and, in any event, we have no evidence that waiver of the non-Federal contribution requirement was in fact based upon emergency circumstances.

The only other possible basis which we can anticipate for not applying section 623 in the instant matter is that the waiver was not accomplished by a rule, regulation, guideline, or instruction within the meaning of that section. This waiver might in a formal sense be distinguished from the instruments described in section 623. However, we believe that the statute must be applied on the basis of substance rather than form. Conceivably certain waivers, modifications or elaborations concerning the application of statutory regulations within the general framework thereof are not subject to section 623. Nevertheless, the instant waiver apparently operated in effect as a general amendment to, and repeal of, a substantive requirement imposed by a statutory regulation. This factor, while avoiding the problem of retroactive and ad hoc waivers discussed supra, leads us to conclude that such action established a new substantive policy and as such must be considered to fall within the application of section 623. Cf., Piercy v. Tarr, supra, 343 F. Supp. 1127-28.

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