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**Judges' Deskbook for the  
Comprehensive Employment and Training Act (CETA),  
Job Training Partnership Act (JTPA), and  
Workforce Investment Act of 1998 (WIA)**

These enactments cover varying periods of time and are related in purpose. Generally, these statutes are designed to provide procedures through which federal grant monies may be expended to assist in training and employing people. Upon issuance of a decision and order by the administrative law judge, the aggrieved party has the right to appeal within 20 days to the Administrative Review Board ("ARB" or "Board"). 20 C.F.R. § 667.830(b) (regulations implementing the WIA). The style of the case is \_\_\_\_\_, *Complainant v. U.S. Dep't. of Labor, Respondent*.

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## **I. Statutory and regulatory authority**

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### **A. Comprehensive Employment and Training Act**

Enacted in 1973 and codified at 29 U.S.C. § 801 *et seq.* (repealed in 1982, to be replaced by JTPA).

### **B. Job Training Partnership Act**

- 1. Enacted in 1982 and codified at 29 U.S.C. § 1501 *et seq.* (repealed in 1998, to be replaced by WIA)
- 2. 29 C.F.R. Part 34 (non-discrimination regulations); 20 C.F.R. Parts 626-631 and 638

(implementing regulations)

### **C. Workforce Investment Act**

1. Enacted August 7, 1998 to replace the JTPA and is codified at 29 U.S.C. § 2911 *et seq.*
2. 29 C.F.R. Part 37 (non-discrimination regulations); 20 C.F.R. Parts 661-671 (implementing regulations). The hearing procedures for most proceedings are located at 20 C.F.R. §§ 667.800-667.860.

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## **II. Jurisdiction**

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### **A. Time period for filing exceptions to the ALJ's decision**

The implementing regulations for CETA and JTPA allowed 30 days for the aggrieved party to submit exceptions to the ALJ's decision. The WIA, however, provides for a shortened time period of 20 days for an aggrieved party to file exceptions. 20 C.F.R. § 667.830(b). The ALJ's decision will constitute the final action of the agency in the absence of a timely filing of exceptions.

#### **1. Appeal untimely; no jurisdiction**

In *Gamble v. Wisconsin Counties of Racine, Walworth, and Kenosha*, 1994-CET-1 (ARB, June 28, 1996), the ARB declined to assert jurisdiction because the dissatisfied party failed to file exceptions to the ALJ's decision within the 30-day time limit pursuant to 20 C.F.R. § 676.91(f). Although the CETA regulations had been removed from the Code of Federal Regulations in 1990, the Department of Labor asserted that these regulations would continue to apply to litigation arising under CETA. 55 Fed. Reg. 12995. As a result, the ARB held that Gamble's compliance with the JTPA procedural rules was not material. It concluded that the time period for filing exceptions to the ALJ's decision was jurisdiction and could not be waived.

In *Carmona v. Office of the Governor of Puerto Rico*, 1999-JTP-18 (ALJ, Aug. 18, 1999), the ALJ declined to accept jurisdiction based upon the respondents' failure to timely request a hearing pursuant to 29 C.F.R. § 34.51. This regulatory provision provides, *inter alia*, that a failure to timely request a hearing results in the waiver of a hearing and the waiver of a hearing, in turn, results in the Grant Officer's final determination becoming the final decision of the Secretary of Labor.

#### **2. Extraordinary administrative delay; no jurisdiction**

In **Gamble v. Wisconsin Counties of Racine, Walworth, and Kenosha**, 1994-CET-1 (ARB, June 28, 1996), the ARB held that it would not accept jurisdiction over a claim where "the extraordinary administrative delay of 17 years in bringing this matter to conclusion presents a manifest injustice to the Respondent's ability to defend against claims regarding their liability in this case." See also **Bradley v. Richmond School Board**, 416 U.S. 696, 711 (1976).

In the decision below, **Gamble v. The Wisconsin Counties of Racine, Walworth and Kenosha**, 1994-CET-1 (ALJ, Jan. 26, 1996), the employee filed a grievance alleging that he had been terminated from employment in June of 1978 for discriminatory reasons. The prime sponsor found in favor of the employee, and the sub-recipient appealed to the ETA, which sustained the prime sponsor's ruling. Conciliation efforts failed, and DOL issued a Notice of Final Determination upholding the finding in December 1980. The sub-recipient requested a hearing before an ALJ. Before the hearing took place, the sub-recipient filed for bankruptcy. In January 1984, the ALJ dismissed the matter, the sub-recipient having decided not to pursue the appeal. The ALJ concluded that the prime sponsor was now liable for any corrective action, and remanded the matter to the Grant Officer for a determination of what sanctions should be imposed against the prime sponsor. The Department of Labor made a settlement offer in November 1984, which was apparently rejected. Nearly nine years later, in September 1993, the Office of Civil Rights issued an Initial Determination, setting back pay at over \$28,000 and accumulated interest of almost \$300,000. The matter again went to hearing before a different ALJ in June 1995. The ALJ in the second proceeding found that Department's failure to issue a Final Determination until 1993 deprived him of subject matter jurisdiction because, under regulations existing at the time of the first ALJ's order, that order became final 30 days following its issuance because no party appealed. See 20 C.F.R. 676.91(f) (now removed). The first ALJ's order provided for no specific relief. Thus, the case was now "dead."

The ALJ further stated, assuming *arguendo* that the Department's enforcement action was not barred for lack of subject matter jurisdiction, the complaint must nevertheless be dismissed. He concluded that no relief was appropriate in the case before him where the delays in the case resulted in such a large accumulation of interest and the delays were largely the fault of the Department. Namely, the ALJ noted that the entities involved had changed over the years, the proposed remedy was too high given the employees' post-discharge employment history, and there was only speculative evidence presented concerning one employee's possibility of promotion had he continued with the sub-recipient.

The ALJ also took into account policy considerations and, though noting that the employee had been wronged, the ALJ observed that there was no credible evidence that the entities involved had purposefully delayed the proceedings to avoid its obligation to pay restitution, and no evidence that the differing parties had merely emerged from bankruptcy or other means as re-formulations of the same entities. He noted that the prime sponsor attempted to rectify the termination of the employee (and had waited in vain for the Department to provide an assessment of liability which it could accept or deny), and that enforcement now that the amount sought had escalated would be essentially "massive retaliation" for misstep by an entity which had become involved with a program for the purpose of assisting the disadvantaged.

The ALJ noted that the employee was an innocent bystander who possibly stood to suffer financial loss due to the termination and the failure of Department to properly and timely prosecute its case. However, the ALJ found that the proposed remedy sought by the Office of Civil Rights was so severe as to have no basis in equity, with no correlation

between the proposed remedy and the loss. The amount sought, totaling \$28,000 in back pay and \$300,000 in interest, would constitute a windfall, rather than a "make-whole" remedy. The ALJ noted that he had unsuccessfully encouraged settlement, but suggested continued efforts in that regard, especially since the named counties appeared to recognize a moral obligation to pay the employee the amount owed between termination and subsequent employment.

## **B. Effect of acceptance of appeal of ALJ's decision**

In *Nebraska Indian Inter-Tribal Development Corp. v. U.S. Dep't. of Labor*, 1987-JTP-19 (Sec'y., May 23, 1988), the Secretary held that, where an ALJ's decision has been accepted for review, it "has the status only of a recommended decision, and has no force and effect of its own until the passage of 180 days without issuance of a decision by the Secretary." As a result, the Secretary concluded that the ALJ was without authority to order that the "Grant Officer to take any action notwithstanding the pendency of appeals." Slip op. at 3.

## **C. Appealable final order of the Secretary under 29 U.S.C. § 1578(a)(1)**

In *Texas Dept. of Commerce v. U.S. Dept. of Labor*, 1990-JTP-5 (Sec'y, Nov. 1, 1993), the Secretary concluded that the ALJ properly affirmed the Grant Officer's disallowance of certain costs. The Secretary's decision, however, also required that the Grant Officer make additional determinations. On November 30, 1993, Complainant/Intervener petitioned the Fifth Circuit for review. On June 7, 1994, the Grant Officer submitted to the Secretary a memorandum on the additional determinations. The Fifth Circuit dismissed the appeal, without opposition, on August 17, 1994 after finding that the Secretary's November 1, 1993 decision was not a final order as required by Section 168(a)(1) of the JTPA, 29 U.S.C. § 1578(a)(1). See also *Jobs, Training, and Services, Inc. v. U.S. Dep't. of Labor*, 50 F.3d 1318 (5<sup>th</sup> Cir. 1995) (the district court held that it lacked jurisdiction to adjudge claims against the Department of Labor as there was no reviewable "final agency action").

## **D. Interlocutory appeals**

### **1. Impact of a stay order**

In *Cherokee Nation of Oklahoma v. U.S. Dep't. of Labor and Delaware Tribe of Indians*, 1997-JTP-12 (ARB, May 7, 1998), the ALJ issued an order staying proceedings until the federal district court ruled on whether the Delaware Tribe of Indians was properly included on the list of federally recognized Indian tribes by the Secretary of Interior. The ARB held that it ordinarily "would not review an interlocutory order such as a Stay Order, however, in this case, the practical impact of the Stay Order is the equivalent of a final order with regard to the funding of the JTPA program for Program Year 1998, which start[ed] on July 1, 1998." As a result, the ARB concluded that it had jurisdiction to address the complainant's petition for review.

### **2. Review of discovery orders**

In *Midwest Farmworker v. U.S. Dep't. of Labor*, 1997-JTP-20, 1997-JTP-21, 1997-JTP-22 (ARB, July 23, 1998), the ARB accepted the Respondent's request for emergency review of the ALJ's denial of a motion for protective order and motion to compel discovery. Respondent alleged that it opposed Complainant's requests to depose certain

individuals who were involved in the decision-making process of selecting grantees for JTPA funds based upon deliberative process privilege and attorney-client privilege. The ARB noted that, whether the deliberative process and attorney-client privileges apply to particular witnesses or documents constitutes a mixed question of fact and law. In seeking to challenge the disclosure of certain discovery based on the privileges, the ARB held that it is insufficient for the Department to merely allege that disclosure will have a "chilling effect" on agency personnel or their counsel. Citing to *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 1998 WL 336518 (D.C. Cir. June 26, 1998) and *Swindler & Berlin v. United States*, 118 S.Ct. 2081 (June 25, 1998), the ARB concluded that the Department failed to "identify the particulars of the grant application decisional process that make the deliberative process or attorney client privileges relevant and, if relevant, sufficient to justify non-disclosure."

### **3. Acceptance of appeal while motion for reconsideration is pending**

In *Central Valley Opportunity Center*, 1995-JTP-9 (ARB, Dec. 23, 1997), the ARB accepted jurisdiction over the Grant Officer's appeal in order to protect his right to request review of the ALJ's decision pending the outcome of reconsideration by the ALJ.

### **4. ALJ's refusal to dismiss case upon request of parties; voluntary dismissal proper**

In *Indiana Dep't. of Workforce Development v. U.S. Dep't. of Labor*, 1997-JTP-15 (ARB, Aug. 20, 1998), the ARB asserted jurisdiction and stayed proceedings before the ALJ where the ALJ refused to dismiss the case based on a *Stipulation of Dismissal* received by the parties.<sup>1</sup> The ALJ determined that the submission did not comply with the requirements of 29 C.F.R. § 18.9(c) for a dismissal based on a settlement of the parties. By *Final Order* dated December 8, 1998, the ARB reversed the ALJ's order denying dismissal of the case. The Board noted that the parties advised that a settlement had been reached and the ALJ subsequently requested that a copy of the executed settlement agreement be submitted. The parties submitted only a *Stipulation of Dismissal* without the settlement agreement and the Grant Officer advised the ALJ that the "agreement expressly prohibited disclosure of the agreement's contents to the ALJ." The Grant Officer then argued that dismissal was proper under the voluntary dismissal provisions at Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure as well as 29 C.F.R. § 18.9(c).

The ARB agreed that the regulatory provisions at 29 C.F.R. § 18.9(c) were applicable to JTPA cases through 29 C.F.R. § 627.805. However, it noted that neither party invoked the provisions at § 18.9(c) by requesting time to pursue a settlement agreement and the ARB found that the parties were not required to comply with § 18.9(c) as they "reached a settlement without the need for deferral or judicial supervision." From this, the ARB reasoned that it was error for the ALJ to conclude that Fed.R.Civ.P. 41(a) was inapplicable. Because the implementing regulations of the JTPA and the procedural regulations at 29 C.F.R. Part 18 did not address the type of dismissal sought in this case, Fed.R.Civ.P. 41 applied. The ARB noted that the JTPA does not require Secretarial review of settlements entered into between the Grant Officer and a grantee, unlike settlement agreements reached in whistleblower cases under the Energy Reorganization Act. See *Hoffman v. Fuel*

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<sup>1</sup> In a footnote, the ARB noted that it was not bound by the "final decision' rule," which is applicable to Article III courts; however, it stated that appeals from interlocutory orders are not normally accepted. In this case, the ARB found that the ALJ's refusal to dismiss the case qualified as an exception under the collateral order doctrine.

***Economy Contracting***, 1987-ERA-33 (Sec'y., Aug. 4, 1989). As a result, the ALJ's finding, that public interest requires his review of a settlement resolving an audit dispute, was incorrect. As a result, the ARB directed that the complaint be dismissed with prejudice pursuant to Fed.R.Civ.P. 41(a)(1)(ii).

#### **E. Issues of constitutionality**

In ***The Lower Muskogee Creek Tribe v. U.S. Dep't. of Labor***, 1997-JTP-11 (ALJ, Aug. 21, 1998), Complainant argued that the provisions of the JTPA were unconstitutional. The ALJ concluded, however, that he was without authority to rule on such an issue. See also ***Narragansett Indian Tribe v. U.S. Dep't. of Labor***, 2000-WIA-6 (ALJ, Dec. 20, 2000), *aff'd*. ARB Case No. 01-027 (July 20, 2001) ("[s]ince administrative law judges do not have the inherent authority possessed by Article III judges to rule on the validity of the Secretary's regulations, and since the WIA and its implementing regulations do not expressly give administrative law judges such authority, I lack authority to address NIT's allegation that section 668.210(a) is invalid . . .").

#### **F. Mootness**

As under the JTPA regulations, the implementing provisions for the WIA at 20 C.F.R. § 667.825(b) provides, in part, the following:

If the ALJ rules that the organization should have been selected and the organization continues to meet the requirements of 20 C.F.R. part 668 or part 669, the Department will select and fund the organization within 90 days of the ALJ's decision unless the end of the 90-day period is within six (6) months of the end of the funding period.

20 C.F.R. § 667.825(b).

In ***Job Service of North Dakota v. U.S. Dep't. of Labor***, 1997-JTP-23 (ARB, Apr. 27, 1999), the ARB held that the case before it was moot because the limited remedy available at 20 C.F.R. § 633.205(e) for migrant and seasonal workers was no longer available. Specifically, under the JTPA, if it is determined that a non-selected applicant should have been selected for a grant, then the regulation at § 633.205(e) provides that "the Department selects and funds that applicant so long as the 90-day period for the transfer of the grant will not end within six months of the end of the funding period." In the case before it, the ARB noted that less than three months remained in the program year such that, even if it "agreed with the merits of the Job Service's challenge, (it) would have no authority under the regulations to issue a final decision designating a different grantee." The ARB further rejected a request by Job Service that the improperly selected grantee "be denied the possibility of a waiver of competition for the next grant period." The ARB held that it does not have authority to award prospective relief. It acknowledged that dismissal of the appeal for lack of jurisdiction appears "harsh" in light of the fact that the delays in adjudication were attributable to the Department and not the applicants, but the circumstances of the case rendered it moot.

See also ***Midwest Farmworker Employment and Training, Inc. v. U.S. Dep't. of Labor***, 200 F.3d 1198 (8<sup>th</sup> Cir. 2000) (case was rendered moot when relief was sought within last nine months of the grant year; claim not subject to the exception to mootness doctrine of being "capable of repetition, yet evading review" because the company did not seek expedited review and the complaint addressed problems in one grant award as

opposed to departmental policies in management of the program—"a] claim based on peculiar facts, such as the typographical error in the scoring of the competition and the alleged violation of ethical rules by the program director in this case, who has since retired, is not particularly likely to recur"); **Campesinos Unidos, Inc. v. U.S. Dep't. of Labor**, 803 F.2d 1063, 1069 (9<sup>th</sup> Cir. 1986) ("[b]ecause the grant periods have expired, retroactive remedies were not requested, nor could we fashion any under the applicable statutes and regulations" and "[b]ecause the petitioner does not fall within the 'capable of repetition yet evading review' exception and we are without authority to provide any meaningful prospective relief, we dismiss the appeal as moot"); **Cherokee Nation of Oklahoma v. U.S. Dep't. of Labor**, 1997-JTP-12 (ARB, Feb. 12, 1999) (because the funding period would expire in six months, the proceeding was moot pursuant to § 632.12(a)); **Midwest Farmworker Employment & Training, Inc. v. U.S. Dep't. of Labor**, 1997-JTP-20, 1997-JTP-21, 1997-JTP-22 (ARB, Mar. 31, 1999); **Illinois Migrant Council, Inc. v. U.S. Dep't. of Labor**, 1984-JTP-10 (Sec'y. July 17, 1986) (case cannot be preserved as an exception to the mootness doctrine as "capable of repetition, yet evading review" because there was no evidence presented to establish a "reasonable expectation" or "demonstrated probability" that the same problem would reoccur).

In **Maine v. Sec'y. of Labor**, 770 F.2d 236 (1<sup>st</sup> Cir. 1985), the circuit court noted that DOL applied a "scores-within-a-competitive-range-are-not-final" theory to award JTPA funds to an incumbent provider whose scores were three points lower than the competitor. The ALJ had concluded that this amounted to "a bonus for incumbents; and, under existing procedures, such a bonus was improper." The DOL maintained that it had the authority to consider incumbency or "being in place" as a factor in selecting a recipient for funds under the JTPA. The circuit court declined to rule on the issue for two reasons. First, it noted that the DOL had recently changed its grant procedures "so that applicants are now on notice that the 'high scorer' may not always receive the grant." Second, the court found that the grant period at issue had expired such that case before it was rendered moot.

## **G. Failure to satisfy procedural requirements**

In **Hitek Learning Systems, Inc. v. South Carolina Employment Security Commission**, Case No. 2001-JTP-2 (ALJ, Jan. 25, 2002), the ALJ dismissed Complainant's case on grounds that Complainant failed to seek a final determination from the Grant Officer.

## **H. Lack of jurisdiction—miscellaneous**

### **1. By the ARB**

In **Koger v. Directorate of Civil Rights and U.S. Dep't. of Labor**, 1999-JTP-20 (ARB, Dec. 3, 1999), Complainant alleged discrimination in violation of the JTPA. Although he identified the Department's Directorate of Civil Rights as the Respondent, the ARB concluded that his case was based upon employment with the Commonwealth of Pennsylvania's Allegheny County Department of Federal Programs, which ended in 1989. As a result, the ARB declined to accept the case for review.

### **2. By the district court**

In **City of New Orleans v. U.S. Dep't. of Labor**, 825 F. Supp. 120 (E.D. La. 1993), the district court held that it lacked subject matter jurisdiction where the City of New Orleans moved for a temporary restraining order and preliminary injunction to halt an administrative hearing in a JTPA case. The hearing was to be held to adjudicate an

accounting dispute between the Department of Labor and, ultimately, the City of New Orleans. The district court found that the City's alleged "irreparable harm" was apparently due to its refusal to participate in the administrative proceeding, rather than as the result of its exclusion from the proceeding.

## **I. Grant Officer's authority**

### **1. Requirement of issuance of final determination within 180 days not jurisdictional**

In *Florida Dep't of Labor & Employment Security v. U.S. Dep't. of Labor*, 1992-JTP-21 (ALJ, May 26, 1993), the Secretary held that the ALJ properly cited to *Brock v. Pierce County*, 176 U.S. 253 (1986) to hold that the JTPA requirement that a Final Determination be issued within 180 days after receipt of a final approved audit report was not jurisdictional. See also *American Indian Community House, Inc. v. U.S. Dep't. of Labor*, 2003-JTP-3 (ALJ, Feb. 14, 2007) (revised Final Determination issued almost 11 months after audit report).

### **2. Grant Officer has authority to issue "revised" final determination while case pending before the OALJ**

In *American Indian Community House*, 2003-JTP-3 (ALJ, Feb. 14, 2007), the ALJ cited to *Florida Dep't. of Labor & Employment Security v. U.S. Dep't. of Labor*, 1992-JTP-21 (Sec'y. Aug. 16, 1994) to hold that the Grant Officer has authority to reconsider his/her Final Determination prior to full adjudication by the ALJ. Here, an OIG audit revealed \$293,419 in questionable costs by the Complainant. The Grant Officer, however, issued a Final Determination on October 4, 2002 allowing \$269,420 of the questioned costs and disallowing \$23,999 in costs. Complainant requested a hearing and, on December 18, 2002, the Grant Officer issued a Revised Determination disallowing the original amount of \$293,419 in costs.

On motion of the Grant Office, the ALJ dismissed 2003-JTP-2, which was based on Complainant's hearing request of the October 2002 Determination. The ALJ then noted assignment of case number 2003-JTP-3 for the hearing request stemming from the revised December 2002 Determination. The ALJ concluded that, "[a]lthough a Grant Officer's reconsideration and revision of a Final Determination prior to final adjudication by the ALJ should not be the normal procedure. However, in the present case, the grantee is only denied the opportunity to limit its liability based on a possibly egregious mistake made by the Grant Officer in the original Determination. The ALJ explained that Complainant "will still be afforded a full and fair opportunity in an adjudicatory setting to establish that the disallowances were erroneous."

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## **III. Standard of review**

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## A. By the ALJ

In **Commonwealth of Puerto Rico v. U.S. Dep't. of Labor and Rural Opportunities, Inc.**, Case No. 2008-WIA-4 (ALJ, Sept. 26, 2008), the administrative law judge cited to 20 C.F.R. § 667.825(a) to state that, in reviewing a Grant Officer's decision, he must determine whether "there is a basis in the record to support the [Grant Officer's] decision." Further, the judge cited to **United Tribes of Kansas v. U.S. Dep't. of Labor**, ARB Case No. 01-026 (ARB, Aug. 6, 2001) wherein the Board held that the judge's standard of review is "highly deferential" and similar to the "arbitrary and capricious" standard utilized by federal courts. Therefore, the judge held that he could not substitute his own judgment for that of the Grant Officer nor could he undertake *de novo* review of the Grant Officer's decision.

In **Municipality of San Juan v. Human Resources Occupational Development Council**, 371 F.Supp.2d 52 (D. Puerto Rico 2005), the district court dismissed Plaintiff's complaint on grounds that it failed to exhaust administrative remedies. Plaintiff alleged that the Department of Labor denied it due process of law and engaged in discrimination based on political affiliation when it decided to audit Plaintiff's WIA programs. The district court noted that, under WIA, the Grant Officer's determination is, on request, reviewed by an administrative law judge and then the Department's Administrative Review Board before judicial review by the appropriate court of appeals. The district court cited to **McCarthy v. Madigan**, 503 U.S. 140 (1992) to state that exhaustion of remedies "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." As a result, Plaintiff's complaint was dismissed without prejudice.

## B. By the ARB

On appeal, in **United Urban Indian Council, Inc. v. U.S. Dep't. of Labor**, ARB Case No. 01-025, 2000-WIA-4 (ARB, May 18, 2001), the ARB held that its review of the ALJ's decision was limited to a determination of "whether there is a basis in the record to support the Department's decision." See 20 C.F.R. § 667.825.(a). In reviewing the facts of the case, the ARB stated that it was a well-settled principle of administrative law that an agency's construction of its own regulations is entitled to "substantial deference." As a result, the ARB held that the Grant Officer has "wide latitude in effectuating the purposes of the WIA INA regulations; we will not substitute our judgment for that of the agency which wrote the regulations at issue and must apply them in sometimes widely different circumstances." See also **Commonwealth of Puerto Rico v. U.S. Dep't. of Labor**, 2007-WIA-10 (ALJ, Nov. 13, 2007), *appeal dismissed*, ARB No. 08-019 (ARB, Feb. 6, 2008) (a decision by the grant officer "must be affirmed unless the party challenging the decision can demonstrate that the decision lacked any rational basis); **United Tribes of Kansas and Southeast Nebraska, Inc. v. U.S. Dep't. of Labor**, ARB Case No. 01-026 (ARB, Aug. 6, 2001).

## C. By the circuit court

In **Arizona Dep't. of Economic Security v. U.S. Dep't. of Labor**, 125 F.3d 857 (9<sup>th</sup> Cir. 1997), the circuit court held it would accord "substantial deference" to the ARB's findings, which resulted in a determination that the grantee committed fraud.

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## IV. Evidence

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### A. Burden of proof, generally

Under the implementing regulations to the WIA at 20 C.F.R. § 667.810(e), the following is provided regarding the burden of production and persuasion:

The Grant Officer has the burden of production to support his or her decision. To this end, the Grant Officer prepares and files an administrative file in support of the decision which must be made a part of the record. Thereafter, the party or parties seeking to overturn the Grant Officer's decision has the burden of persuasion.

20 C.F.R. § 667.810(e). See also **Westchester-Putnam Counties Consortium for Worker Education and Training, Inc.**, ARB Case No. 10-081, Case No. 2007-WIA-7 (ARB, Oct. 18, 2010); **Commonwealth of Massachusetts v. U.S. Dep't. of Labor**, Case No. 1998-JTP-6 (ALJ, Oct. 29, 2001), *aff'd.*, ARB Case No. 04-170 (ARB, Mar. 11, 2005), *aff'd. sub nom. Edmonds v. Chao*, 449 F.3d 51 (1st Cir. 2006) (similar regulatory framework under JTPA at 20 C.F.R. § 627.802(e)).

### B. Expenditures

#### 1. Government burden to establish *prima facie* unlawful expenditure

##### [a] Established

In **Illinois Dep't. of Commerce and Community Affairs v. U.S. Dep't. of Labor**, 1999-JTP-15 (ALJ, Apr. 21, 2000), the ALJ held that the Grant Officer met its burden of production under 20 C.F.R. § 627.802(e) to establish that state agency failed to expend its funds in a lawful manner. The ALJ further noted that the agency "has not established that the Grant Officer's determination of the disallowed amount or the basis for that finding should be overturned" and "[i]n fact, (the agency) had never challenged those elements." As a result, the ALJ proceeded to determine the propriety of imposing the sanction of repayment. See also **Westchester-Putnam Counties Consortium for Worker Education and Training, Inc.**, ARB Case No. 10-081, Case No. 2007-WIA-7 (ARB, Oct. 18, 2010) (reliance on testimony of the OIG's auditor in charge was proper); **Commonwealth of Massachusetts v. U.S. Dep't. of Labor**, ARB Case Nos. 02-011 and 02-021, 1998-JTP-6 (ARB, June 13, 2002), *aff'd.*, ARB Case No. 04-170 (ARB, Mar. 11, 2005), *aff'd. sub nom. Edmonds v. Chao*, 449 F.3d 51 (1st Cir. 2006); **State of Louisiana Dep't. of Labor v. U.S. Dep't. of Labor**, 108 F.3d 614 (5<sup>th</sup> Cir. 1997) (the circuit court affirmed an ALJ's order that disallowed costs be repaid by the state to the federal government where substantial evidence supported a finding that accurate and reliable records, in compliance with the JTPA, were not maintained by the grant recipient).

In **Florida Dep't. of Labor and Employment Security v. U.S. Dep't. of Labor**, 1993-JTP-2 (ARB, May 13, 1998), the ARB held that Complainant failed to produce documentation of the "necessary specificity" to establish that certain claimed costs were allowable under its JTPA contract. As a result, the ARB affirmed the Grant Officer's

disallowance of costs and Complainant was ordered to repay the amount disallowed to the "United States Department of Labor in non-Federal funds."

In **Florida Dep't. of Labor and Employment Security v. U.S. Dep't. of Labor**, ARB Case No. 04-168, 1999-JTP-16 (ARB, Feb. 28, 2005), *aff'd.*, Case No. 05-11664 (11<sup>th</sup> Cir. Apr. 24, 2006), the Board held that, if a recipient's records are inadequate to demonstrate that it spent funds lawfully, then the Grant Officer "meets the burden (of establishing a *prima facie* case) by establishing the inadequacy of the records." The Board further noted that, "[i]n presenting a *prima facie* case, a Grant Officer should demonstrate an understanding of statutory and regulatory requirements that are imposed on the recipient."

### **[b] Not established**

In **Commonwealth of Puerto Rico v. U.S. Dep't. of Labor**, 2000-JTP-6 (ALJ, Dec. 21, 2001), the ALJ concluded that the Grant Officer failed to carry its burden of establishing a *prima facie* case to disallow certain costs. In particular, the ALJ noted the following:

At the least, the changes in the Grant Officers' positions show the arbitrariness of their determinations in disallowing these (on-the-job-training) costs as excessive. At worst, by retroactively applying a newly created theory of cost disallowance against DHLR and not informing DLHR of the legal basis for that theory until the second day of the hearing, DHLR has been denied due process.

Slip op. at 10. The ALJ further noted that the Grant Officer "frequently changed" positions with regard to the disallowance of costs and had never used the *Dictionary of Occupational Titles* to determine the time limits for on-the-job-training. The ALJ stated that Respondent "failed to articulate even a colorable rationale, either legally or factually, to support its disallowance of" Complainant's on-the-job-training costs. As a result, the disallowance of costs was reversed.

In **Texas Dep't. of Commerce v. U.S. Dep't. of Labor**, 1994-JTP-20, slip op. at 9-10 (ARB, Dec. 11, 1996), the ARB determined that the ALJ misapplied the holding in **Director, OWCP v. Greenwich Collieries**, 114 S. Ct. 2251 (1998), to the burden of proof required in JTPA cases. In **Greenwich Collieries**, the Court addressed a narrow area of administrative law and emphasized that the government could not presume that a defending party had violated the law. Because the burden of parties in JTPA cases has been provided for by statute, that general premise is not applicable. Twenty C.F.R. § 636.10(g) "provides the most rational allocation of burdens that would be consistent with the JTPA statutory scheme, *viz.*, the burden of producing the basis for disallowed costs falling on the Secretary's designee and the burden of persuasively challenging such disallowances falling on the grant recipient who seeks to have the Grant Officer's decision overturned." Slip op. at 10.

However, on appeal in **Texas Dep't. of Commerce v. U.S. Dep't. of Labor**, 137 F.3d 329 (5<sup>th</sup> Cir. 1998), the circuit court held that the Department failed to establish a *prima facie* case that Texas Commerce expended JTPA funds unlawfully and it reversed the Department's decision. The circuit court noted that the ARB determined that the burden of persuasion lie with Texas Commerce which was "required to trace expenditures for employment generating activities to specific, identifiable individuals before those

expenditures could be charged to participant support." In assessing the burdens of the parties, the circuit court stated the following:

Texas Commerce was required to maintain records adequate to show that JTPA funds were spent lawfully. These records enable the DOL to audit these JTPA programs to determine which expenditures should be allowed. Texas Commerce does not bear the initial burden of justifying its expenditures before the ALJ, however. That burden rests upon the DOL which must produce evidence sufficient to establish a *prima facie* case. This requires evidence sufficient for a reasonable person to conclude that JTPA funds were spent unlawfully. If the records of Texas Commerce were inadequate to show that JTPA funds were spent lawfully, the DOL could meet its burden by establishing the inadequacy of the records. The DOL maintains that these records were inadequate because they did not trace expenditures for employment generating activities to specific, identifiable individuals. We find that the DOL and the Board, which accepted the DOL's argument, are in error.

Participant support costs are those costs that directly benefits JTPA-eligible individuals by assisting them in their participation in JTPA training programs. These costs may include 'transportation, health care, special services and materials for the handicapped, child care, meals, temporary shelter, financial counseling, and *other reasonable expenses for participation in the training program.*' Although these expenses are all ones that benefit individuals, there is not support in the statute or the regulations that each expenditure must be traced to a specific, identified individual. The DOL's interpretation is not a reasonable one to which we must defer.

The ALJ found that the DOL failed to establish a *prima facie* case that JTPA funds were spent unlawfully. We agree. The DOL auditors conceded that the challenged employment generating activities expenditures directly benefitted JTPA-eligible individuals. The DOL did not review the Texas Commerce records to determine whether these legitimate employment generating activity expenditures were ones that could be charged to participant support. Instead, the DOL relied upon faulty legal interpretations to justify the denials.

Slip op. at 3 (italics in original; footnote references omitted).

In *Arizona Dep't of Economic Security v. U.S. Dep't. of Labor*, 1994-JTP-18 (ARB, June 7, 1996), *aff'd.* (9th Cir. 1997)(table), the ALJ ruled that the Department failed to carry its initial burden of production because the record did not contain evidence sufficient to establish a case under § 164(e)(1) of the JTPA, which was the only JTPA section referenced in the Grant Officer's final determination. The ALJ opined that a *prima facie* case might have been presented had the Grant Officer referenced § 164(d). The Board disagreed and held that "[a] notification that references § 164(e)(1) implicitly and necessarily incorporates a finding of liability under § 164(d)." Slip op. at 6. Therefore, the ALJ erred in "presum[ing] that §§ 164(d) and 164(e)(1) rely on different theories of liability. [Rather] liability under § 164(e)(1) is premised on a finding under § 164(d) that funds were not expended in accordance with the JTPA." *Id.* The Board also found that the sole citation of § 164(e)(1) did not deny Complainant due process.

## **2. Burden to timely submit documentation upon grant applicant**

In **Nato Indian Nation v. U.S. Dep't. of Labor**, 1997-JTP-13 (ALJ, Oct. 7, 1998), the Grant Officer did not select Complainant for a JTPA grant based upon its failure to provide all specifically requested documentation with its Final Notice of Intent. Complainant did submit the documentation with a motion for reconsideration, but the Grant Officer refused to consider it. In approving of the Grant Officer's refusal to consider newly submitted evidence on reconsideration, the ALJ found that his "testimony indicated that 'NATO's application and additional information was treated no differently than would any other applicants in a similar position." The ALJ determined that the Grant Officer's "actions were consistent with the express wording of the implementing regulations" and that he "properly refused to consider 'NATO's additional information, regardless of content, submitted with their motion for reconsideration." See also **Westchester-Putnam Counties Consortium for Worker Education and Training, Inc.**, ARB Case No. 10-081, Case No. 2007-WIA-7 (ARB, Oct. 18, 2010) (the Grant Officer gave the recipient "the opportunity to provide . . . documentation regarding whether costs were properly classified as program costs versus administrative costs"); **Commonwealth of Massachusetts v. U.S. Dep't. of Labor**, Case No. 1998-JTP-6 (ALJ, Oct. 29, 2001), *aff'd.*, ARB Case Nos. 02-011 and 02-021 (ARB, June 13, 2002) as well as a subsequent decision issued by the Board in the same case at ARB Case No. 04-170 (ARB, Mar. 11, 2005), *aff'd. sub nom. Edmonds v. Chao*, 449 F.3d 51 (1st Cir. 2006).

### **3. Burden shifts to recipient – burden of persuasion**

Once the Grant Officer meets the initial burden of production showing that funds were unlawfully spent, the burden then shifts to the recipient "who shall have the 'burden of persuasion' to offer persuasive evidence to the contrary." The Board held:

Overcoming a *prima facie* case of 'misspent' funds requires the grantee to present cogent evidence and argument regarding how it has either met the specific requirements the JTPA imposes or has compensated for any deficiencies through other means.

*Slip op.* at 7-8. **Florida Dep't. of Labor and Employment Security v. U.S. Dep't. of Labor**, ARB Case No. 04-168, 1999-JTP-16 (ARB, Feb. 28, 2005), *aff'd.*, Case No. 05-11664 (11<sup>th</sup> Cir. Apr. 24, 2006). The same holds true for WIA-related cases. **Westchester-Putnam Counties Consortium for Worker Education and Training, Inc.**, ARB Case No. 10-081, Case No. 2007-WIA-7 (ARB, Oct. 18, 2010).

### **C. Designation of Native American grantee under the WIA**

In **United Urban Indian Council, Inc.**, ARB Case No. 01-025, 2000-WIA-4 (ARB, May 18, 2001), the ARB upheld the Grant Officer's interpretation of the regulations and use of U.S. Bureau of Census data to determine which Native American tribe had "legal jurisdiction" over a particular area for the purpose of receiving grant monies. See 20 C.F.R. § 668.296(b)(3).

### **D. Admissibility of evidence withheld during discovery**

In **United Tribes of Kansas and Southeast Nebraska, Inc. v. U.S. Dep't. of Labor**, ARB Case No. 01-026 (Aug. 6, 2001), United Tribes attempted, through discovery, "to obtain the identity of review panelists and information regarding their purported expertise, the documents on which the panel members relied in making their recommendation, the analysis and deliberations of the panel, and the panelists' scores and

recommendations." ETA asserted that such information was protected by the deliberative process privilege and did not disclose the information. However, certain parts of the information were admitted during the course of the hearing. The ARB held that the evidentiary rule at 20 C.F.R. § 667.810(d) "is clear: unless the documentation sought to be introduced at the hearing has been made available to the opposing party for review pursuant to the procedures set forth therein, its use at the hearing is barred." However, the Board held that, because United Tribes "was already aware of virtually all of the information that ETA introduced during the hearing over United Tribes' objection," the error in admitting such withheld evidence was harmless.

#### **E. Grantee bound by terms of the grant**

In **Westchester-Putnam Counties Consortium for Worker Education and Training, Inc.**, ARB Case No. 10-081, Case No. 2007-WIA-7 (ARB, Oct. 18, 2010), the Board held that the Consortium was bound by terms of the grant, which limited administrative expenditures to ten percent of the grant amount. As a result, the Administrative Law Judge properly affirmed the Grant Officer's disallowance of \$91,939.00 in administrative costs as being in excess of the ten percent cap.

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## **V. Discovery**

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### **A. Privileges**

#### **1. Deliberative process**

##### **[a] Requirements**

In **United Tribes of Kansas and Southeast Nebraska, Inc. v. U.S. Dep't. of Labor**, 2000-WIA-3 (ALJ Order, Nov. 17, 2000), *aff'd. in relevant part*, ARB Case No. 01-026 (ARB, Aug. 6, 2001), the government sought to invoke the deliberative process privilege "related to the disclosure of materials and information about a review panel which had made recommendations to the Grant Officer concerning grant applications." The ALJ held that, pursuant to 20 C.F.R. § 667.800(a), Complainant had a right to inquire as to the constitution of the review panel. However, the government asserted that such information was protected by the "deliberative process privilege."

In determining whether the deliberative process privilege would apply, the ALJ noted that three threshold requirements must be met: (1) the head of the agency or authorized high-ranking subordinate must personally review the subject material and invoke the privilege; (2) the material covered by the privilege must be specifically described; and (3) the reasons for asserting the privilege must be articulated. See **Midwest Farmworker v. U.S. Dept. of Labor**, 1997-JTP-20 and 22 (ARB, July 23, 1998). Citing to **FTC v. Warner Communications, Inc.**, 742 F.2d 1156, 1161 (9<sup>th</sup> Cir. 1984) and **First Eastern Cor. v.**

**Mainwaring**, 21 F.3d 465, 468 n. 5 (D.C. Cir. 1994), the ALJ stated that, even where the privilege applies, "nondisclosure is not automatic." Rather, competing interests must be weighed.

In the case before him, the ALJ concluded that the deliberative process privilege did not apply "to the identity of the panel members, their qualifications, and information or documents related to any potential conflicts of interest on their part." The ALJ reasoned that the case did not present simple enforcement issues where the government's actions would not normally be in question; it involved the subjective decision-making of panel members. The ARB stated that deliberative process privilege "contemplates a particular means of assertion":

First, there must be a formal claim of privilege lodged by the head of the department that has control over the matter, after actual consideration by that officer. Second, the responsible agency official must provide precise and certain reasons for asserting the confidentiality over the information or the documents. Third, the government information or documents sought to be shielded must be identified and described.

Slip op. at 6, n. 5. The ARB then concluded that ETA's assertion of the privilege was "clearly inadequate" because ETA merely stated that "[a]ny documents which reflect the identity, analysis, discussion or deliberations of the panel have been withheld, because they are properly protected from disclosure under the deliberative process privilege." Slip op. at 7, n. 5.

In **Florida Dep't. of Labor and Employment Security v. U.S. Dep't. of Labor**, 1999-JTP-16 (ALJ, Aug. 7, 2000), *rev'd. on other grounds*, ARB Case No. 04-168 (ARB, Feb. 28, 2005), *aff'd.*, Case No. 05-11664 (11<sup>th</sup> Cir. Apr. 24, 2006), the government refused to disclose certain documents asserted the deliberative process, informant's, and self-evaluative privileges. The ALJ held that three threshold requirements must be met before the deliberative process privilege could properly be asserted:

[T]he head of the agency or a high ranking subordinate with proper delegation must personally review the subject material and invoke the privilege. In addition, the assertion of the privilege must specifically describe the material covered, and finally, the reason for preserving the confidentiality of the requested documents must be articulated. See, **Coastal States Corp. v. Dep't. of Energy**, 617 F.2d 854 (D.C. Cir. 1980); **Charlesgate Constr. Co.**, Case No. 1996-BCA-2, 1997 DOL BCA LEXIS 2 at 7-8 (BCA, Mar. 7, 1997).

The ALJ concluded that the Acting Inspector General, in the case before him, complied with these requirements. Citing to **Mapother v. Dep't. of Justice**, 3 F.3d 1533 (D.C. Cir. 1993) and **NLRB v. Sears, Roebuck & Co.**, 421 U.S. 132, 151 (1975), the ALJ stated that, if material is pre-decisional in nature and is generated as part of a continuing process of agency decision-making, then it may be protected as part of the deliberative process privilege. Upon review of the documents requested by Complainant, the ALJ held the following:

FDLES demands production of Project Proposal 1997. This four page document anticipates an audit of FDLES' discretionary expenditures of the JTPA Title III funds. It contains 'allegations received by OIG . . . subjective impressions of the Florida program . . . the manner and means by which the

OIG could conduct an audit, the project time and cost, and . . . possible scope of findings . . .' The Acting IG describes the report as 'very preliminary' and typical of the types of report audit managers use to decide what audits to perform. This document is predecisional and deliberative in nature, and, in addition contains the identity or details which could lead to the identification of informants who communicated with the IG.

FDLES then sought a seven page independent review of the audit report of the IG. The ALJ stated that "[t]he IG's affidavit explains that the General Accounting Office and internal OIG procedures require independent review of audits prior to issuance." Citing to **U.S. v. Weber Aircraft Corp**, 465 U.S. 792, 802 (1984), the ALJ determined that the deliberative process privilege is sustained where a third-party communication "is necessary to ensure efficient governmental operations." In this vein, the ALJ concluded that the document was not only pre-decisional, but it "ensures compliance by the OIG with proper audit standards, and this process clearly promotes governmental efficiency in the public interest."

Finally, the ALJ held that the deliberative process privilege applied to six early electronic drafts of the audit report. The Inspector General asserted that the drafts were different from the final audit report. The ALJ noted that the designation of a document as a "draft" did not end the inquiry; rather, in this case, "a comparison of the draft versions with the final product would reveal the evolution of the thought processes and the policy judgments of the decision-makers which is "precisely the sort of information the deliberative process privilege is designed to shield." The ALJ then stated that FDLES had the burden to overcome the deliberative process privilege by "demonstrating a compelling need for the documents being withheld." As the FDLES asserted that the documents "may aid in its defense of its expenditures," the ALJ held that it failed to provide a "specific enough" reason to require disclosure of the privileged information.

In **Midwest Farmworker v. U.S. Dep't. of Labor**, 1997-JTP-20, 1997-JTP-21, 1997-JTP-22 (ARB, July 23, 1998), the ARB accepted the Respondent's request for emergency review of the ALJ's denial of a motion for protective order and motion to compel discovery. Respondent alleged that it opposed Complainant's requests to depose certain individuals who were involved in the decision-making process of selecting grantees for JTPA funds based on the deliberative process privilege and attorney-client privilege. The ARB noted that, whether the deliberative process and attorney-client privileges apply to particular witnesses or documents constitutes a mixed question of fact and law. In seeking to challenge the disclosure of certain discovery based on the privileges, the ARB held that it is insufficient for the Department to merely allege that disclosure will have a "chilling effect" on agency personnel or their counsel. Citing to **In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency**, 1998 WL 336518 (D.C. Cir. June 26, 1998) and **Swindler & Berlin v. United States**, 118 S.Ct. 2081 (June 25, 1998), the ARB concluded that the Department failed to "identify the particulars of the grant application decisional process that make the deliberative process or attorney client privileges relevant and, if relevant, sufficient to justify non-disclosure."

#### **[b] Improper assertion; adverse inference**

In **Northwest Community Action Programs of Wyoming, Inc. v. U.S. Dep't. of Labor**, 2003-WIA-5 (ALJ, Jan. 20, 2004), the ALJ held that the Department improperly attempted to invoke the "deliberative process privilege" to quash production of panel rating sheets. The ALJ noted that counsel, "and no one at the agency itself, elected to assert the deliberative process privilege." The ALJ concluded that counsel's refusal to provide the panel rating sheets, in light of improper involvement in the selection process by the

Program Office, "supports an inference that (the rating sheets) reflected unfavorably on the Respondent."

## **2. Informant's and self-evaluative**

In *Florida Dep't. of Labor and Employment Security v. U.S. Dep't. of Labor*, 1999-JTP-16 (ALJ, Aug. 7, 2000), *rev'd. on other grounds*, ARB Case No. 04-168 (ARB, Feb. 28, 2005), *aff'd.*, Case No. 05-11664 (11<sup>th</sup> Cir. Apr. 24, 2006), the government refused to disclose certain documents asserted the deliberative process, informant's, and self-evaluative privileges. FDLES sought a seven page independent review of the IG's audit report. The ALJ stated that "[t]he IG's affidavit explains that the General Accounting Office and internal OIG procedures require independent review of audits prior to issuance." Citing to *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 802 (1984), the ALJ determined that the deliberative process privilege is sustained where a third-party communication "is necessary to ensure efficient governmental operations." In this vein, the ALJ concluded that the document was not only pre-decisional, but it "ensures compliance by the OIG with proper audit standards, and this process clearly promotes governmental efficiency in the public interest." Moreover, the ALJ concluded that the process by which the government seeks independent review of its audit reports is inherently "self-evaluative" in nature. He determined that, to the extent the self-evaluative privilege exists, it would apply to the independent review. See, *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970); *Morgan v. Union Pacific Railroad Co.*, 182 F.R.D. 261 (N.D. Ill. 1998); *Resnick v. American Dental Ass'n.*, 95 F.R.D. 372 (N.D. Ill. 1982); *O'Conner v. Chrysler Corp.*, 86 F.R.D. 211 (D. Mass. 1980); *Sheppard v. Consolidated Edison Co.*, 89 F. Supp. 6 (E.D.N.Y. 1995); *Reichhold Chemicals v. Textron, Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994); *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423 (9<sup>th</sup> Cir. 1992). The ALJ stated, however, that an *in camera* inspection of the requested documents would be required because the documents were not dated and, therefore, it could not be determined whether the independent review was "pre-decisional."

### **B. In camera inspection**

In *Florida Dep't. of Labor and Employment Security v. U.S. Dep't. of Labor*, 1999-JTP-16 (ALJ, Aug. 7, 2000), *rev'd. on other grounds*, ARB Case No. 04-168 (ARB, Feb. 28, 2005), *aff'd.*, Case No. 05-11664 (11<sup>th</sup> Cir. Apr. 24, 2006), the ALJ noted that *in camera* inspection of documents is permitted by 29 C.F.R. §§ 18.15(a)(5) and 18.46 as well as by the Freedom of Information Act at 5 U.S.C. § 552(a)(4)(b). However, he further stated that an *in camera* inspection is within the discretion of the ALJ and is used under exceptional circumstances. Where the affidavit asserting a privilege blocking disclosure of a document is sufficiently detailed for the fact-finder to assess whether the privilege should be applied, and in the absence of bad faith, an *in camera* inspection is unnecessary. The ALJ concluded that an "*in camera* review is not invoked merely on the theory that 'it can't hurt.'" Applying these standards, the ALJ determined that he would conduct an *in camera* review of undated documents before him in order to determine whether they were pre-decisional such that the deliberative process privilege asserted by the government would be invoked.

### **C. Default judgment**

In *Opportunities Industrialization Centers of America, Inc. v. U.S. Dep't. of Labor*, 1998-JTP-4 (ALJ, Mar. 29, 1999), the ALJ entered an order of default judgment against Complainant for its failure to respond to the "Notification of Receipt of Request for

Hearing and Prehearing Order." See 29 C.F.R. § 18.6(d)(2)(v). As a result, Complainant was ordered to pay the disallowed costs.

#### **D. Subpoena authority**

Pursuant to § 667.810(c) of the regulations implementing the WIA, the ALJ has authority to issue subpoenas:

Subpoenas necessary to secure the attendance of witnesses and the production of documents or other items at hearings must be obtained from the ALJ and must be issued under the authority contained in section 183(c) of the Act, incorporating 15 U.S.C. § 49.

20 C.F.R. § 667.810(c).

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## **VI. The selection process**

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### **A. Standard for experience review**

In ***Tennessee Opportunity Program v. U.S. Dep't. of Labor***, 1995-JTP-1 (ALJ, June 18, 1996), Complainant argued that the Grant Officer could only consider experience that applicants had attained in providing services to migrant and seasonal farm workers under Title IV. The ALJ held, to the contrary, that consideration of other experience was appropriate and consistent with the JTPA. The solicitation for the grant application stated that the applicant should describe its experience in administering employment and training programs in general, not only experience in administering programs related to migrant and seasonal farmworkers.

In ***The Lower Muskogee Creek Tribe v. U.S. Dep't. of Labor and Florida Governor's Council on Indian Affairs, Inc.***, 1997-JTP-11 (ALJ, Aug. 21, 1998), the ALJ concluded that the Grant Officer did not abuse his discretion in awarding a grant to the Council as opposed to Complainant on the following grounds: (1) the Council had staff in place to execute the requirements of the grant award whereas the Tribe did not; and (2) the Tribe did not demonstrate experience in employment and training programs.

### **B. Selection of grantee**

#### **1. Native Americans**

##### **[a] Properly included on federal list**

In ***Cherokee Nation of Oklahoma v. U.S. Dep't. of Labor and Delaware Tribe of Indians***, 1997-JTP-12 (ARB, May 7, 1998), the ALJ issued an order staying JTPA proceedings pending the outcome of a circuit court case regarding whether the Delaware

Tribe of Indians was properly included on the list of federally recognized Indian tribes by the Secretary of Interior. The ARB reversed the stay order and directed further proceedings to address the "substantive legislation embedded in the 1992 Department of the Interior and Related Agencies Appropriations Act, which appears to restrict any federal funding within the Cherokee Nation jurisdictional service area solely to the Cherokee Nation." The ARB reasoned that this issue must be resolved, notwithstanding the outcome of the district court litigation as to the status of the Delaware Tribe of Indians. *But see 'Nato Indian Nation v. U.S. Dep't. of Labor*, 1997-JTP-13 (ALJ, Oct. 7, 1998) (Native American tribe submitted documentation to support that they had their own reservation with a motion for reconsideration after its grant application was denied; the ALJ held that the Grant Officer properly declined to consider the late evidence and 'NATO was not awarded the grant).

## **[b] Non-selection**

### **i. Based on failure to repay CETA debt**

In *St. Croix Tribal Council v. U.S. Dep't. of Labor*, 1985-JTP-9 (Sec'y., Nov. 14, 1986), the Secretary concluded that Complainant was prohibited from challenging an established CETA debt three years after the final determination was made in an effort to overturn its non-designation for a JTPA grant. Specifically, because the Tribal Council had not repaid a debt owed under CETA, the Grant Officer did not select it to receive JTPA grant monies. The Secretary held that the Grant Officer's decision was proper as "[t]he JTPA regulations deny financially non-responsible grantees the opportunity to repeat their unsatisfactory management through new grants." See 20 C.F.R. § 632.10(c).

### **ii. Based on lack of qualifications**

In *MaChis Lower Creek Indian Tribe of Alabama v. U.S. Dep't. of Labor*, 2000-WIA-2 (ALJ, Oct. 5, 2000), the ALJ held that it was not arbitrary, capricious, or an abuse of discretion for the Grant Officer to not select Complainant for a grant award. The ALJ found that the record supported the Grant Officer's finding that Complainant "did not present evidence of any experience in operating an employment and training program, or ability to operate such a program" as required in the solicitation.

### **iii. Failure to timely submit documentation**

In *'Nato Indian Nation v. U.S. Dep't. of Labor*, 1997-JTP-13 (ALJ, Oct. 7, 1998), the ALJ found that Complainant submitted documentation to support that they had their own reservation with a motion for reconsideration after their grant application was denied. The ALJ held that the Grant Officer properly declined to consider the late evidence and 'NATO was not awarded the grant.

## **[c] "Highest priority for designation"**

The regulations implementing the WIA at 20 C.F.R. § 668.210(a) provide that Indian tribes and Alaska native entities are to be accorded the "highest priority for designation" of grant monies:

Federally-recognized Indian tribes, Alaska native entities, or consortia that include a tribe or entity will have the highest priority for designation. To be designated, the organizations must meet the requirements in this Subpart. These organizations will be designated for those geographic areas over which they have legal jurisdiction. (WIA section 166(c)(1)).

20 C.F.R. § 668.210(a).

In **United Tribes of Kansas and Southeast Nebraska, Inc. v. U.S. Dep't. of Labor**, 2000-WIA-3 (ALJ, Dec. 18, 2000), *aff'd. in relevant part*, ARB Case No. 01-026 (Aug. 6, 2001), the ALJ noted that, under 20 C.F.R. § 668.210(a), neither the grantee and Complainant were entitled to the "highest priority of designation." As a result, the ALJ held that the Grant Officer properly exercised her discretion to utilize the competitive procedures at 20 C.F.R. § 668.250(b) and require that the applicants undergo panel review. Upon consideration of the record, the ALJ concluded that it supported the Grant Officer's decision to select a new WIA grantee over a "well-performing incumbent." The ARB agreed that neither applicant was entitled to "highest priority of designation." In a footnote, the ARB stated the following:

Federally-recognized tribes or other enumerated organizations receive the 'highest priority' over any other organization if they possess the capability to administer the program and to meet eligibility and regulatory requirements; the priority extends only to areas over which the organizations exercise 'legal jurisdiction,' such as their reservations. 20 C.F.R. § 668.210. *See United Urban Indian Council, Inc. v. U.S. Dep't. of Labor*, ARB No. 01-025, ALJ No. 2000-WIA-4 (ARB, May 18, 2001).

Slip op. at 3, n. 2. The ARB also upheld the Grant Officer's selection of a new applicant over an incumbent as "the Grant Officer explained that she considered the question of continuity of service and fragmentation of service areas, but declined to re-designate an incumbent simply to avoid service disruptions, especially given the fact that the Wyandottes' application outscored the United Tribes' application by 23 points." Slip op. at 10.

## **2. Size of the population to qualify for "service delivery area"**

In **Cruz v. Sec'y. of Labor**, Case No. 85-1375 (1<sup>st</sup> Cir. 1985) (unpub.), the Secretary argued that Congress gave the Department of Labor discretion to determine "factual population questions" such that the Department's denial of JTPA funding for three small Puerto Rican towns, which it determined were too small to constitute a service delivery area, was proper. The circuit court disagreed with the Secretary to state that it had the authority to review agency decisions, including factual populations questions, for abuse of discretion. However, the court found that the denial of funding was lawful. It concluded that the Department's use of official Census Bureau/Planning Board numbers with regard to the populations of the towns, over preliminary projections made by a Planning Board, was reasonable and not arbitrary and capricious. *See also Narragansett Indian Tribe v. U.S. Dep't. of Labor*, 2000-WIA-6 (ALJ, Dec. 20, 2000), *aff'd.* ARB Case No. 01-027 (July 20, 2001).

## **3. Incumbents**

### **[a] "Scores-within-a-close-competitive-range" theory**

In **Maine v. Sec'y. of Labor**, 770 F.2d 236 (1<sup>st</sup> Cir. 1985), the circuit court noted that DOL applied a "scores-within-a-competitive-range-are-not-final" theory to award JTPA funds to an incumbent provider whose scores were three points lower than the competitor. The ALJ concluded that this amounted to "a bonus for incumbents and, under existing procedures, such a bonus was improper." The DOL maintained that it had the authority to

consider incumbency or "being in place" as a factor in selecting a recipient for funds under the JTPA. The circuit court declined to rule on the issue for two reasons. First, it noted that the DOL had recently changed its grant procedures "so that applicants are now on notice that the 'high scorer' may not always receive the grant." Second, the court found that the grant period at issue had expired such that case before it was rendered moot.

#### **[b] Non-selection due to fraud**

In **Northwest Community Action Programs of Wyoming, Inc. v. U.S. Dep't. of Labor**, 2003-WIA-5 (ALJ, Jan. 20, 2004), NOWCAP applied for a grant as an incumbent in the service area for more than 26 years "without current programmatic or audit problems." Respondent did not provide the individual panel rating sheets in the administrative file and refused to produce them in discovery based on the deliberative process privilege. The ALJ ordered that the panel sheets be produced and noted the following:

Ms. Boyd testified that [name omitted], counsel for Respondent asked her to search for the original panel score sheets, and she subsequently provided him with copies of them. She then received a phone message from [name omitted], also counsel for Respondent, asking her to 'redact' the rating sheets. She could not recall the specifics of this message, but understood only that she was supposed to make the sheets 'clear.' On one set of panel rating sheets, the original numbers had been scratched out, and different numbers written down, resulting in the total score being changed from 82 to 59. In order to make this sheet 'neat,' Ms. Boyd cut out a section of a blank panel rating sheet, placed it over the scratched out rating sheet, and used a copy machine to create a new blank copy. She then wrote the numbers on this copy, and provided it to counsel. She testified that she did not change any of the numbers.

The ALJ concluded that this conduct was clearly improper and lent further support to the impropriety of the Department's non-selection of the incumbent.

#### **[c] Improper use of a "cut-off" score**

In **Northwest Community Action Programs of Wyoming, Inc. v. U.S. Dep't. of Labor**, 2003-WIA-5 (ALJ, Jan. 20, 2004), the ALJ found that the Department used a "cut-off score of 80" in determining not to award the grant to Complainant. The ALJ concluded that this was illegal and stated the following:

This in itself is sufficient grounds to overturn Ms. Saunders' determination. As the Complainant correctly points out, there is nothing in the SGA or in the WIA that establishes a panel score of 80, or any other number, as the basis for disqualification of an applicant.

The ALJ further determined that the use of a cut-off score "improperly convert[ed] the process into a nationwide competition."

#### **[d] Selection of incumbent based on prior performance**

In **Lifelines Foundations, Inc. v. U.S. Dep't. of Labor**, 2004-WIA-2 (ALJ, Mar. 23, 2005), Complainant and incumbent received low panel scores and, although the

incumbent received the lowest score, it was determined that the Grant Officer properly awarded the grant to the incumbent. Both applicants received scores well below the cut-off of 70 and, as permitted by the SGA, the Grant Officer had the option of not selecting either applicant. However, the Grant Officer concluded that non-selection would result in an area not being serviced and, therefore, he permissibly sought a "responsibility review of the applicants" by the Division of Indian and Native American Programs (DINAP). Based on DINAP's input, the Grant Officer awarded the grant to the incumbent, even though Complainant received a higher panel score. In affirming the Grant Officer's decision, the ALJ reasoned:

[O]nce (the panel scoring) process has concluded with no applicant scoring higher than the cutoff, the application phase is essentially concluded. At that point, the Grant Officer's focus changes to a search for an established service provider with demonstrated capabilities to administer the grant.

The ALJ upheld the Grant Officer's selection of the incumbent, which had a proven track record in administering WIA programs according to DINAP. The ALJ concluded that such a selection was "reasonable, not arbitrary or capricious, an abuse of discretion, or not in accordance with the law."

In **Commonwealth of Puerto Rico v. U.S. Dep't. of Labor and Rural Opportunities**, ARB Case No. 09-011 and 09-013, Case No. 2008-WIA-4 (ARB, Apr. 10, 2009), the Board reversed the ALJ's decision to vacate the Grant Officer's decision to award Rural Opportunities, Incorporated (ROI) the grant at issue. The Grant Officer's stated reasons for selecting ROI were: (1) "I have found that it is in the best interests of the participants being served to have the continuity of service from the current provider"; (2) he had verified that the current provider (ROI) was "performing successfully"; (3) there was "no other organization that is clearly superior in serving the needs of the participants"; and (4) he could not "justify a change in service provider if that change would not significantly benefit the participants"). The ALJ concluded that these constituted invalid bases for awarding the grant to ROI.

The ARB held, to the contrary, and agreed with the Department of Labor and ROI that "the ALJ, without citing any legal authority, invented a distinction between performance under a valid versus an invalid grant award." Consequently, the ARB concluded that the Grant Officer properly considered the foregoing factors in awarding the grant to the incumbent, ROI. Specifically, the ARB concluded that "the grant officer did not abuse his discretion in awarding the grant to ROI on the basis of its demonstrated successful performance."

Moreover, the ALJ determined that information received by the Grant Officer from the Program Office was "of questionable value and could not reasonable form the basis for (the) decision." The ARB disagreed and concluded that the ALJ had impermissibly substituted his opinion for the Grant Officer's opinion. The Board concluded that "neither an ALJ nor the Secretary may reverse the (Grant Officer's) determination merely because he might weigh the same information and call the balance differently."

#### **4. Improper involvement of the "Program Office"**

In **Northwest Community Action Programs of Wyoming, Inc. v. U.S. Dep't. of Labor**, 2003-WIA-5 (ALJ, Jan. 20, 2004), the ALJ noted that applications for a grant are reviewed by a panel of technical experts, who assign scores based on certain criteria. The Grant Officer reviews the panel ratings and applications and requests a "pre-award

clearance on the applicants, referred to as a 'responsibility review,' to ensure that there are no problems with fraud, debt collection problems, or disallowed costs on audit." The ALJ found, however, that the Grant Officer improperly relied on information from the Department of Labor's Program Office, which Respondent refused to divulge based on deliberative process privilege. In addition to finding that the privilege was not properly asserted, the ALJ cited to ***Commonwealth of Puerto Rico v. U.S. Dep't. of Labor***, 1997-JTP-24 (ALJ, Dec. 10, 1997), wherein a government official testified that the Program Office should not be involved in decisions of the Grant Officer "to insure that the Grant Officer's decision is the Grant Officer's decision, that the Grant Officer may not be bullied by or intimidated by or have undue pressure by people outside of the procurement process. It is to keep it clean." The ALJ noted that NOWCAP was not selected for a grant based, in part, on improper outside input from the Department's Program Office.

#### **5. Misapplication of solicitation of grant applications (SGA) criteria**

In ***Commonwealth of Puerto Rico v. U.S. Dep't. of Labor***, 2007-WIA-10 (ALJ, Nov. 13, 2007), *appeal dismissed*, ARB No. 08-019 (ARB, Feb. 6, 2008), the ALJ vacated the selection of a grant applicant ROI on grounds that a competing applicant's "disqualification was not based on a rational and legitimate record." Specifically, the ALJ found that the selection panel misapplied the criteria contained in the Solicitation of Grant Applications to disqualify the competing applicant and the Grant Officer's decision was based on the panel's actions. On appeal to the ARB, ROI withdrew its challenge to the ALJ's decision and the appeal was dismissed.

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## **VII. Allowances and disallowances by the grant officer**

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### **A. Under the CETA; administrative costs**

In ***U.S. Dep't. of Labor v. City of Detroit, Michigan***, 1983-CTA-084, 158, 193, 201, 1984-CTA-080,174, 1985-CTA-070,110,113,120 (Sec'y., July 31, 1995), the Secretary addressed the allowance of administrative costs under the CETA. The Secretary's findings were as follows:

1. In this case, the City charged administrative costs from every city agency employing CETA employees to the CETA grant. The City incorrectly believed that, because CETA employees worked in each of the agencies, the indirect cost of each agency was recoverable. However, the Secretary informed the City that only an agency listed as grantee may charge administrative costs to CETA. Indirect CETA administrative costs must be "necessary and reasonable" for proper and efficient administration of the program and are limited to those necessary to effectively operate the program.
2. CETA does not allow for costs incurred by agencies other than the grantee. It excludes costs of "supervision of a general nature such as that provided by the head of a department and his staff assistant not directly involved in operations." Federal Management Circular 74-4, Attach. A § c(1).
3. Under CETA, a grantee may claim only the central service costs which it has included as part of its central service cost allocation plan.

4. The City was obligated to account for and keep records to document the proper allocation of costs charged to the CETA grant.
5. Overhead costs could not be charged as administrative costs under CETA.

## **B. Costs of employment generating activities allowed**

Under the implementing regulations for the WIA at § 667.267, the following is stated with regard to allowable costs:

(a) Under WIA section 181(e), WIA title I funds may not be spent on employment generating activities, economic development, and other similar activities, unless they are directly related to training for eligible individuals. For purposes of this section, employer outreach and job development activities are directly related to training for eligible individuals.

20 C.F.R. § 667.267(a).

Under the JTPA program, in **Texas Dep't. of Commerce v. U.S. Dep't. of Labor**, 137 F.3d 329 (5<sup>th</sup> Cir. 1998) (1994-JTP-20), the circuit court held that the ALJ correctly determined that the grantee's activities at issue constituted "employment generating activities," as opposed to "economic development activities," where the expenditure of funds benefited JTPA participants by providing placement in jobs at specific businesses whose development was aided by the funds. Economic development activities are broad-based efforts that are not chargeable to JTPA grant funds. On the other hand, employment generating activities are allowed pursuant to section 204(19) of the Act, 29 U.S.C. § 1604(19), if the grantee demonstrates that the activity directly resulted in the placement of JTPA eligible individuals and participants into jobs created by the activities. 20 C.F.R. § 629.37(a).

The circuit court held, however, that Texas Commerce was not required to trace expenditures to a specific, identified individual in order to allow costs associated with employment generating activities. In this vein, the court noted that "DOL auditors conceded that the challenged employment generating activities expenditures directly benefitted JTPA-eligible individuals." Consequently, it determined that the "DOL relied upon faulty legal interpretations to justify the denials" and it did not sustain its burden of establishing a *prima facie* case that JTPA funds were spent unlawfully.

In **Commissioner, Employment Security of the State of Washington v. U.S. Dep't. of Labor**, 1990-JTP-29, 1991-JTP-11, 1992-JTP-34 (ALJ, Jan. 1, 1995), the ALJ examined whether Section 123 of the JPTA permitted expenditure of eight percent of funds on employment generating activities, or whether such expenditures were confined to payments for services specifically directed to enrolled participants under the Act. The JTPA defines a participant as one who is enrolled and receiving services under the grant program. The ALJ held that the eight percent of funds expended under Section 123 on "related services" under Title II should be limited to services benefitting participants. 29 U.S.C. § 1533(c)(1). Further, he stated that employment generating activities should be considered as "related services" if the expenditure of eight percent funds benefits participants. Incubator and loan packaging projects that create financing for businesses are acceptable employment generating activities when these projects provide a benefit, *i.e.*, increased job opportunity for its participants.

### **C. Costs of economic development activities not allowed**

Under the implementing regulations for the WIA at § 667.267, the following is stated with regard to allowable costs:

(a) Under WIA section 181(e), WIA title I funds may not be spent on employment generating activities, economic development, and other similar activities, unless they are directly related to training for eligible individuals. For purposes of this section, employer outreach and job development activities are directly related to training for eligible individuals.

20 C.F.R. § 667.267(a).

Under the JTPA, economic development activities were considered to be broad-based efforts which were not chargeable to grant funds. In **State of Texas Dep't. of Commerce v. U.S. Dep't. of Labor**, 1994-JTP-20, slip op. at 5-6 (ARB, Dec. 11, 1996), the ARB held that funds spent on the identification of products and industries, rather than on the creation of jobs for JTPA participants, should have been disallowed as economic development activities. It further held that the ALJ erred in relying on the development of a truck driving program, resulting from the sub-grantee's research contract, to conclude that the contract resulted in the creation of jobs for JTPA individuals. The ARB noted that providing training with the intent of preparing participants to perform jobs is distinguishable from the actual creation of jobs. Thus, the funds at issue were disallowed.

### **D. Single unit charge contractors**

#### **1. Costs allowed**

Citing **Texas Dep't. of Commerce and Forth Worth Consortium v. U.S. Dep't of Labor**, 1990-JTP-5 (Sec'y., Nov. 1, 1993), the ARB held that, when single unit charge agreements do not comply with the specific requirements of 20 C.F.R. § 629.38(e)(2), they fail to qualify for the regulatory exception to allocate costs by category and are subject to the statutory administrative cost limitation. **Florida Dep't. of Labor and Employment Security v. U.S. Dep't. of Labor**, 1993-JTP-2, slip op. at 5 (ARB, Nov. 27, 1996). A single unit charge contractor must provide training *and* place participants who completed the training in unsubsidized employment in the occupation trained for to qualify for the regulatory exception. Slip op. at 4. The ARB reversed the ALJ's disallowance of costs claimed by FDLES and its subcontractors under the contracts funded by JTPA. Under the facts presented, FDLES had entered into a series of single unit charge contracts with a number of Service Delivery Areas (SDAs), which solicited training and employment opportunities for JTPA participants. They provided pre-employment assessment and employment placement services, but did not provide specific occupational training to participants. However, the ARB found that their activities complied with the regulatory requirements of § 629.38(e)(2) such that the costs were allowed. Slip op. at 4, 5.

#### **2. Profits disallowed; no arms-length negotiation**

In **Florida Dep't. of Labor and Employment Security v. U.S. Dep't. of Labor**, 1992 -JTP-17 (Sec'y., Dec. 5, 1994), *aff'd. on recon.*, (Sec'y., Jan. 20, 1995), *aff'd.*, 83 F.3d 435 (11<sup>th</sup> Cir. 1996)(table), the issue presented was whether the State of Florida, through its employment security department, operated "a vertical monopoly over the federal JTPA funds with respect to the contracts in question, thereby creating an obvious conflict of

interest." The Secretary noted that, although the state produced its contracting procedures for the record, "this production does not rebut a presumption of a potential conflict of interest with the concomitant less than arm's length contract negotiations, given the pattern of significant profits earned by a unit of a State agency contracting with another unit of the same State agency." The Secretary found that the "fixed unit price" mode of contracting was permissible during the years in question and there was no question that "an entrepreneurial service provider would be allowed to made a profit if it was able to satisfy the terms of the contract for less cost than the negotiated amount." However, the Secretary also held that such a mode of contracting requires arm's-length negotiation and that "[w]here . . . the contracting parties are organizationally linked, there has to be of necessity, a punctilious showing that the contracts were rigorously negotiated at arm's length." Slip op. at 5. The Secretary determined that such a showing was not made by the state in this case and, because the state failed to comply with the provisions of 20 C.F.R. § 629.38(e)(2), the Grant Officer properly disallowed \$961,003 in profits.

#### **E. Over-expenditure of contract amount; attempt to shift costs to subsequent contract year not permitted**

Under the facts of *Central Valley Opportunity Center v. U.S. Dep't. of Labor*, 1995-JTP-9 (ARB, June 22, 1998), Complainant contractor was awarded grants under Section 402 of the JTPA to provide training and employment services to migrant and seasonal farm workers in 1991 and 1992. Upon auditing Complainant's records, the Grant Officer disallowed \$33,008 in over-expenditures, where Complainant billed the over-expenditures from the 1991 grant award against the 1992 grant award without first obtaining permission from the Grant Officer. The ALJ concluded that the costs should be allowed since Complainant was not required to re-compete for the 1992 grant award.

The ARB held to the contrary and stated that "[t]he relevant cost principle does not allow costs allocable to one award period to be shifted to another award period, absent the approval of the grant agency." The ARB noted that the Grant Officer's *Notice of Obligation* did not contain language permitting the carry-over of funds from one year to the next and, even though he had the authority to give a single grant award for two program years under § 633.205(a) of the regulations, he elected not to do so in this case. In *dicta*, the ARB noted stated that "in the practical world of program administration it is possible that such carry-over expenditures might be approved, had the request been timely." It further stated that the record demonstrated that the total expenditure of funds by Complainant did not exceed the total amount of the grant awards for both years and that the funds were spent for proper purposes. In this vein, the ARB maintained the following:

Although such negligent behavior by a grantee (in failing to timely request approval for carry-over of expenditures) cannot be condoned, under the facts before us we see little advantage to the Department or to the public in imposing on a non-profit agency the substantial sanction advanced by the Grant Officer in this instance, *if* such shifting of costs ordinarily would have been authorized by the Grant Officer in response to a timely request by a grantee.

Slip op. at 6. Although the ARB ordered that Complainant repay the Department of Labor the amount of \$33,008, it directed the Grant Officer to review, *de novo*, Complainant's request to shift the 1991 over-expenditure to the 1992 grant award and "[t]o the extent

any such shifting of costs might have been approvable if timely requested, the Grant Officer is directed to reduce the monies assessed against (Complainant) accordingly."

In **Commonwealth of Pennsylvania, Dep't. of Labor and Industry v. U.S. Dep't. of Labor**, 1992-JTP-12 (Sec'y., Mar. 5, 1995), errata (Apr. 5, 1995), the Secretary affirmed the ALJ's decision ordering Pennsylvania to repay over \$500,000 from non-Federal funds based his findings that the Northwest Pennsylvania Training Partnership Consortium, Inc. (NPTPC) misspent 1985 grant funds by its inclusion of costs incurred in the 1983-1984 transition period; that NPTPC willfully disregarded JPTA regulations by the unilateral modification of certain subcontracts to get around the impermissibility of shifting costs from one grant period to another; and that the state failed to demonstrate that it substantially complied with the requirements set forth in Section 164(e)(2)(A)-(D) of the JPTA, 29 U.S.C. § 1574(e)(3).

## **F. Profits disallowed; cannot fund "duplicate" services**

### **1. No arm's length negotiation**

In **Florida Dep't. of Labor and Employment Security v. U.S. Dep't. of Labor**, 1992 -JTP-17 (Sec'y., Dec. 5, 1994), the issue presented was whether the State of Florida, through its employment security department, operated "a vertical monopoly over the federal JPTA funds with respect to the contracts in question, thereby creating an obvious conflict of interest." The Secretary noted that, although the state produced its contracting procedures for the record, "this production does not rebut a presumption of a potential conflict of interest with the concomitant less than arm's length contract negotiations, given the pattern of significant profits earned by a unit of a State agency contracting with another unit of the same State agency."

The Secretary found that the "fixed unit price" mode of contracting was permissible during the years in question and there was no question that "an entrepreneurial service provider would be allowed to made a profit if it was able to satisfy the terms of the contract for less cost than the negotiated amount." However, the Secretary also held that such a mode of contracting requires arm's-length negotiation and that "[w]here . . . the contracting parties are organizationally linked, there has to be of necessity, a punctilious showing that the contracts were rigorously negotiated at arm's length." Slip op. at 5. The Secretary determined that such a showing was not made by the state in this case and, because the state failed to comply with the provisions of 20 C.F.R. § 629.38(e)(2), the Grant Officer properly disallowed \$961,003 in profits.

### **2. Not necessary and reasonable**

In **Mississippi Dep't. of Economic & Community Development v. U.S. Dep't. of Labor**, 90 F.3d 110 (5th Cir. 1996) (1990-JTP-32), the Fifth Circuit found that substantial evidence supported the ALJ's finding that profits earned by a state subdivision under a negotiated contract, whereby that subdivision received funding to provide job training and referral services for qualified participants, were not "necessary and reasonable for proper and efficient administration of the program" pursuant to 20 C.F.R. § 629.37(a). Section 629.37(a) implements 29 U.S.C. § 1574(d), which requires repayment to the United States of amounts not expended in accordance with the JPTA. Section 629.37(a) only allows costs that are "necessary and reasonable for proper and efficient administration of the program . . . ." The ALJ's finding that the profits earned were not "necessary and reasonable for proper administration of the program" was based primarily on undisputed evidence that fixed contract amount of \$2,000 per participant generated substantially more revenue for the

state subdivision than it needed to perform its job training services under the JTPA. It was proper, therefore, for the ALJ to conclude that profits in the amount of \$976,600.35 be paid to the federal government, along with interest.

The court was not persuaded by the grantee's argument that the Department had no policies or interpretations regarding fixed unit price contracts at the time it entered into such a contract. The court found, to the contrary, that the JTPA "plainly required recipients to repay amounts found not have been spent in accordance with the Act . . ." The court also affirmed the ALJ's disallowance of the use of the profits by the subdivision on a "Project Upgrade" in later years (the purpose of which was to allow employers to upgrade individuals to higher skill levels and make room for other participants) because the Respondent did not demonstrate that the upgraded individuals were "economically disadvantaged." See 29 U.S.C. § 1603.

In ***Florida Dep't. of Labor and Employment Security v. U.S. Dep't. of Labor***, ARB Case No. 04-168, 1999-JTP-16 (ARB, Feb. 28, 2005), *aff'd.*, Case No. 05-11664 (11<sup>th</sup> Cir. Apr. 24, 2006), the Board concluded that Complainant misspent JTPA funds where it developed an "incentive award" program using general JTPA funds as additional revenue for area community colleges and school districts. The Board disagreed with the ALJ's conclusion that the "incentive" program "provided Florida's community colleges and school district programs the incentive to take on the added costs, which state appropriations did not cover, to serve more JTPA Title III eligible students." To the contrary, the Board noted that one of Complainant's witnesses "conceded that JTPA Title III students and other (incentive award) eligible disadvantaged students were *not* excluded from the total number of FTE students considered when determining the annual (state) appropriation." Slip op. at 15 (emphasis added). Moreover, the Board found that Complainant's officials conceded that "the schools could use the JTPA Title III funds for any vocational education purpose, whether it served a JTPA Title III eligible student or any other student enrolled in vocational education, including a general student or any other (incentive award) eligible student." Consequently, the Board held that, because incentive awards using JTPA funds were disbursed to cover costs that were the responsibility of the State and, not for a specific JTPA purpose, the funds were misspent in violation of JTPA section 164(a)(2)(c). Complainant was liable for repayment of \$11,419,499 in misspent funds.

### **G. Use of Dictionary of Occupational Titles**

In ***Commonwealth of Puerto Rico v. U.S. Dep't. of Labor***, 2000-JTP-6 (ALJ, Dec. 21, 2001), the ALJ noted that the Grant Officer used the *Dictionary of Occupational Titles* for the first time to disallow costs charged by Complainant for on-the-job-training. In particular, the Grant Officer determined that, based on the DOT, the training of youths and unskilled, economically disadvantaged adults in certain farming occupations should take no longer than one month, *i.e.* 30 days. Therefore, the Grant Officer maintained that Complainant improperly charged for training which lasted in excess of one month and these costs were disallowed. Complainant argued that the training received was more complex, thus requiring more time. The ALJ noted that, when the JTPA was originally enacted in 1982, there was no time limit for on-the-job-training. By 1993, the Act was amended to provide a time limit of six months for such training pursuant to § 141(g)(2). The ALJ rejected the Grant Officer's use of 20 C.F.R. § 653.103, which references the *Dictionary of Occupational Titles* and it was "promulgated under the Wagner-Peyser Act, not the JTPA, and has absolutely nothing to do with duration of training or (on-the-job-training) contracts." The ALJ found that "[n]one of the (on-the-job-training) for which costs have been disallowed in this case exceeded six months" set forth in the statute. As a result, the Grant Officer's determination to disallow \$732,232 in on-the-job-training costs was

reversed. The ALJ cautioned against using the DOT in determining the reasonableness of costs charged. He noted the following: (1) the DOT is not intended to be used to set mandatory standards; (2) the DOT may not contain occupational codes for the jobs in which the participants were receiving training; and (3) the specific vocational preparation listings cannot be applied to JTPA participants.

#### **H. Subrecipient and subgrantee**

In **Westchester-Putnam Counties Consortium for Worker Education and Training, Inc.**, ARB Case No. 10-081, Case No. 2007-WIA-7 (ARB, Oct. 18, 2010), the Board addressed the issue of "subrecipients" and "subgrantees":

[T]he Consortium argues that because the grant indicates that the Consortium had a contractual relationship with the NADAP to implement the programs provided for under the grant, the NADAP is a subrecipient of the grant as defined at 20 C.F.R. § 660.300. Thus, the Consortium asserts that the NADAP, as a subrecipient, is not subject to the grant's 10% administrative cost limitation the grant imposed in accordance with 20 C.F.R. § 667.210(b), as the NADAP performed both administrative functions and programmatic functions under the grant and not just solely administrative functions. In such circumstances, all of the subrecipient's costs are considered program costs and not administrative costs under 20 C.F.R. § 667.220(c)(1) and (4).

The Board disagreed with this argument and stated:

Because the Consortium had a contract with the NADAP to implement the programs provided for under the grant, the NADAP could be considered 'an entity to which a subgrant is awarded.' However, to be considered a subrecipient as defined under section 660.300, the NADAP also must be accountable to the Consortium, the recipient of the grant. The Grant Officer agreed with the OIG audit's finding that the NADAP cannot be considered a subrecipient because the Consortium did not provide sufficient documentation that it monitored the NADAP's grant activities as required under the WIA's implementing regulations or held the NADAP 'accountable' as also required under section 660.300. Specifically, the Grant Officer noted that the Consortium did not provide sufficient documentation to show how the grant funds were expended, such as documentation of invoices that the NADAP submitted to the Consortium for payment, minutes from joint Consortium-NADAP meetings, or documentation showing how the Consortium monitored the NADAP.

Instead, the Grant Officer and the ALJ agreed with the OIG audit's finding that the NADAP acted and performed administrative functions as if it were the prime grantee or recipient. Thus, they concluded that the NADAP was functionally indistinguishable from the Consortium and, therefore, was not subrecipient as defined under the section 660.300 that was accountable to the Consortium, the recipient of the grant. Consequently, the Consortium's administrative costs were improperly claimed as the NADAP's program costs.

*Slip op.* at 11-13.

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## VIII. Retaliation

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In *Felix Lugo v. Office of the Governor of Puerto Rico*, 1999-JTP-5 (ALJ, Dec. 11, 2001), the ALJ found that Complainants engaged in protected activity, which was a motivating factor in their discharge by Respondent. In particular, the ALJ noted that Complainants were "engaged in conduct protected by the First Amendment, in that they were actively and publicly involved in the defeated PDP political party." It was noted that the NPP political party controlled the Office of the Governor. The ALJ found that "[p]ublic identification with the defeated political party makes employees 'especially conspicuous targets' for discrimination." Citing to *Acevado-Diaz v. Aponte*, 1 F.3d 62, 68 (1<sup>st</sup> Cir. 1993), the ALJ concluded that political activities, including planning campaign appearances, organization or participating in political rallies, serving as party coordinators for women and youth committees, and serving as polling unit officers or electoral college representatives, constituted "sufficient proof of protected conduct." Slip op. at 9. The ALJ further concluded that the protected conduct was a motivating factor in the termination of Complainants' employment. The ALJ found that many of the complainants were discharged after only a cursory review of their personnel record, but some of them had performed their jobs for five years. Thus, their length of service and the manner of their discharges supported a finding of retaliation. The ALJ further noted that the proximity in time between the change in political parties and Complainants' dismissals supported a finding that political affiliation discrimination occurred. Moreover, the ALJ noted that NPP affiliates were hired to fill the Complainants' positions. As a result, the ALJ concluded that Complainants were subjected to illegal retaliation and their discharges constituted adverse employment actions. The ALJ then found that Respondent's defense that it was undergoing a reduction in force and was reorganizing was pretextual. The ALJ stated the following:

The timing and circumstances of the Complainants' dismissals, along with their public identification with the PDP party and the 'highly charged' political atmosphere, raise an inference that the Complainants' political affiliation was a substantial or motivating factor for their dismissals.

. . .

The Respondent asserted that the Complainants were dismissed due to a reduction in force and reorganization which was implemented to increase efficiency in the office. However, the weight of the evidence refutes this assertion and show this to be nothing more than a pretext for illegal discriminatory animus. [D]uring the time of the downsizing, the Respondent actively attempted to hire new employees to fill the Complainants' positions. Moreover, the timing and manner in which the dismissals were implemented show that the alleged reduction in force is a 'sham.' The evidence shows that the Complainants were summarily dismissed soon after the election. The quality of Complainants work was not taken into consideration. Moreover, the Complainants were not recalled to fill vacancies which became available after their discharge. Furthermore, at no time were the Complainants told that they were being discharged because of a reduction in force. In fact, shortly before the terminations, the Complainants had been assured of their job security by the new administration.

Slip op. at 12-13. The ALJ concluded that Complainants were entitled to back pay, interest, and reinstatement as permitted at 29 C.F.R. § 34.44(b)(2). The ALJ further ordered that the \$1,278,038.67 in back pay and interest could not be paid out of any federal funding for JTPA or WIA grants.

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## **IX. Relief**

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### **A. Statute of limitations at 28 U.S.C. § 2462 to recover JTPA overpayment**

In ***Mississippi Dep't. of Economic & Community Development v. U.S. Dep't. of Labor***, 90 F.3d 110 (5th Cir. 1996) (1990-JTP-32), the Fifth Circuit rejected the Respondent's argument that 28 U.S.C. § 2462 barred the Department's action to recover a JTPA overpayment. The overpayment at issue occurred in 1984 and the Grant Officer's final determination was issued on July 25, 1990. Section 2462 provides that, "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceedings for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." The court, assumed *arguendo* that the Department's action was commenced more than five years after it accrued and noted that it previously held that "Congress may create a right of action without restricting the time within which the right may be exercised" and that "courts have long held that the United States is not bound by any limitations period unless congress explicitly directs otherwise." *Id.* (quoting ***United States v. City of Palm Beach Gardens***, 635 F.2d 337 (5th Cir.), *cert. denied*, 454 U.S. 1081 (1981)). Finally, the court noted that the repayment action involved in the instant case was not a claim for a civil fine, penalty, or forfeiture under section 2462; rather it was in the nature of a suit to collect a debt. See also ***United States v. Native American Educational Services, Inc.***, 2007 WL 917384 (N.D. Ill. 2007) (the Department's April 5, 2004 lawsuit to collect a debt of misspent funds stemmed from the Grant Officer's April 1, 1998 Final Determination and was not time-barred).

### **B. Repayment of misspent funds**

#### **1. Statute in effect at time of grant award controlling in recovery of misspent funds**

In ***Florida Dep't. of Labor and Employment Security v. U.S. Dep't. of Labor***, ARB Case No. 04-168, 1999-JTP-16 (ARB, Feb. 28, 2005), *aff'd.*, Case No. 05-11664 (11<sup>th</sup> Cir. Apr. 24, 2006) the Board noted that, although WIA superceded the JTPA, under 1 U.S.C. § 109 the "JTPA is treated as remaining in effect for purposes of the Grant Officer's action to recover misspent JTPA funds."

#### **2. No willful disregard or gross negligence**

### **[a] Offset against federal funds**

Section 667.740(a)(2) of the regulations implementing the WIA provides that the "Grant Officer may approve an offset request . . . if the mis-expenditures were not due to willful disregard of the requirements of the Act and regulations, gross negligence, failure to observe accepted standards of administration or a pattern of mis-expenditure."

Similarly, under the JTPA, in *Job Service of North Dakota v. U.S. Dep't. of Labor*, 1991-JTP-5 (Sec'y., June 30, 1992), the ALJ affirmed the Grant Officer's denial of a request for a waiver of liability for \$877.71 in disallowed costs submitted by North Dakota. However, instead of ordering repayment from non-Federal funds, the ALJ ordered that the funds be offset against other federal funds to which North Dakota would be entitled under the JTPA. Citing to 29 U.S.C. § 1574(d), Secretary may require an offset of the amount "against any other amount to which the recipient is or may be entitled under this chapter" unless the mis-expenditure was due to a "willful disregard" of JTPA's requirements in which case repayment must be made through use of non-Federal funds. Under the facts of this case, the Secretary turned to 29 U.S.C. § 1574(e)(2) for guidance. Although this section addresses waiver of recoupment of misspent funds, "the standards offer a useful guide in formulating appropriate sanctions for recovering mis-expended JTPA funds" and these standards include prompt corrective action and diligent monitoring activities. The Secretary then found that the Grant Officer did not challenge the ALJ's characterization of North Dakota's mis-expenditure of funds as "good faith errors" and that the errors were discovered through North Dakota's own internal monitoring procedures. In light of the small amount of funds at issue as well as the facts of the case, the Secretary affirmed the ALJ's order that the funds be offset against other federal funds to which North Dakota may be entitled under the JTPA.

On the other hand, in *Commonwealth of Massachusetts v. U.S. Dep't. of Labor*, ARB Case No. 04-170, 1998-JTP-6 (ARB, Mar. 11, 2005) *aff'd. sub nom. Edmonds v. Chao*, 449 F.3d 51 (1st Cir. 2006), the Board cited to 29 U.S.C. § 1574(e)(1) and ordered repayment of \$8,925,381 in disallowed costs from non-federal funds.

### **[b] Offset against non-JTPA or non-WIA funds**

In *Illinois Dep't. of Commerce and Community Affairs v. U.S. Dep't. of Labor*, 1999-JTP-15 (ALJ, Apr. 21, 2000), the ALJ held that it must be determined whether the four "gateway" criteria at 29 U.S.C. § 1574(e)(2) are met to support imposition of the sanction of repayment. First, the ALJ considered whether the agency "adhered to an appropriate system for the award and monitoring of contracts with sub-grantees which contain(ed) acceptable standards for ensuring accountability." In this vein, he concluded that, although the agency's staff members conducted "timely and frequent monitoring visits," the agency did not have an appropriate system for the award of contracts with sub-grantees in place. The ALJ found that the sub-grantee in this case had a management system which "reflected conflicts of interest" in that the Director of the sub-grantee employed his daughter and her husband. There were other conflicts of interest noted by the ALJ. He noted that "Frierson was both the Union President and (the sub-grantee's) Director while the Union was (the sub-grantee's) creditor." The ALJ found that this sub-grantee was a "high risk."

With regard to the second element, the ALJ found that the agency had demonstrated that it entered into a written contract with the sub-grantee and the contract contained "clear goals and obligations on unambiguous terms." However, the ALJ found that the agency did not comply with the third element at § 1574(e)(2), *i.e.* the agency "did not adequately

demonstrate that it had acted with due diligence to monitor the implementation of the sub-grantee contract, including the carrying out of appropriate monitoring activities at reasonable intervals, because (the agency) did not show it had a system whereby claimed costs are compared and verified with costs actually paid, it was seemingly unconcerned with the red flag raised by (the sub-grantee's) activities with the Grant requirements, it did not audit (the sub-grantee) and it failed to ensure (that the sub-grantee) conducted a required audit." With regard to the final criterion, the ALJ found that the agency did not present evidence sufficient to demonstrate that it took prompt and appropriate corrective action upon being made aware of the sub-grantee's violations of the Act and implementing regulations.

In determining whether an offset against federal funds or repayment from non-JTPA funds would be appropriate, the ALJ stated that it must first be determined whether the mis-expenditure of funds was due to willful disregard of the Act's requirements, gross negligence, or a failure on the part of the agency to observe accepted standards of administration. The parties agreed that willful disregard and gross negligence were not at issue; rather, it must only be determined whether the agency failed to observe accepted standards of administration. The ALJ concluded that the agency did fail to observe accepted standards of administration in failing to conduct a proper financial audit of the sub-grantee which was "compounded by (the agency's) failure to enforce the audit requirement and its lack of internal communications . . . ." As a result, the ALJ ordered repayment of \$40,870.00 in misspent funds from non-JTPA or non-WIA funds. See also ***Felix Lugo v. Office of the Governor of Puerto Rico***, 1999-JTP-5 (ALJ, Dec. 11, 2001).

### **3. Waiver permitted under limited circumstances**

Section 667.720 of the regulations implementing the WIA provide for a waiver of liability under certain circumstances:

(a) A recipient may request a waiver of liability, as described in WIA section 184(d)(2), and a Grant Officer may approve such a waiver under WIA section 184(d)(3).

(b)(1) When the debt for which a waiver of liability is desired was established in a non-Federal resolution proceeding, the resolution report must accompany the request.

(2) When the waiver request is made during the ETA Grant Officer resolution process, the request must be made during the informal resolution period described in § 667.510(c) of this part.

(c) A waiver of the recipient's liability shall be considered by the Grant Officer only when:

(1) the misexpenditure of WIA funds occurred at the subrecipient's level;

(2) The misexpenditure was not due to willful disregard of the requirements of title I of the Act, gross negligence, failure to observe accepted standards of administration, or did not constitute fraud;

(3) If fraud did exist, it was perpetrated against the recipient/subrecipients; and

(i) The recipient/subrecipients discovered, investigated, reported, and cooperated in any prosecution of the perpetrator of the fraud; and

(ii) After aggressive debt collection action, it has been documented that further attempts at debt collection from the perpetrator of the fraud would be inappropriate or futile;

(4) The recipient has issued a final determination which disallows the misexpenditure, the recipient's appeal process has been exhausted, and a debt has been established; and

(5) The recipient requests such a waiver and provides documentation to demonstrate that it has substantially complied with the requirements of section 184(d)(2) of the Act, and this section.

(d) The recipient will not be released from liability for misspent funds under the determination required by section 184(d) of the Act unless the Grant Officer determines that further collection action, either by the recipient or subrecipients, would be inappropriate or would prove futile.

20 C.F.R. § 667.720.

The JTPA also provided for a waiver of the imposition of sanctions against the recipient due to a sub-grantee's misappropriation of funds, if the recipient adequately demonstrated that it substantially complied with the requirements set forth in Section 164(e)(2) of the JTPA. 29 U.S.C. § 1574(e)(3); 20 C.F.R. § 627.704 (1996-97). The statute, however, could not be read as foregoing the collection of a debt that was incurred by the impermissible actions of the recipient. In ***Commissioner, Employment Security of the State of Washington v. U.S. Dep't. of Labor***, 1990-JTP-29, 1991-JTP 11 and 1992-JTP-34 (Sec'y., Sept. 13, 1995), the Secretary held that the state's own policies, which permitted sub-grantees to expend eight percent funds without a concomitant guarantee that these activities would be targeted for the benefit of program participants, precluded waiver of sanctions.

The ALJ had waived repayment of certain disallowed costs based on the premise that the state would not have misspent the funds but for the Department's confusing and inconsistent administration of the JTPA. The Secretary disagreed that this was a ground to support waiver given that the JTPA is unambiguous in only allowing costs that are directly attributable to participant activity. The Secretary noted that despite the ALJ's unflattering characterization of the Department's administration of the JTPA, he did not suggest that the Grant's Officer's inaction rose to the threshold of estoppel. The Secretary, however, did adopt the ALJ's recommendation that the state should be permitted to augment the case record with regard to the possibility of using excess matching funds as stand-in costs for the disallowed costs.

See, in regard to the definition of stand-in costs, USDOL ETA Field Memorandum 78-82 (Apr. 28, 1982). See also, in regard to allowance of excess costs as stand-in for disallowed costs, Comptroller General Decision b-208871.2 (Feb. 9, 1989); 20 C.F.R. §§ 626.5, 627.481(b) (1994) (both post-dating the period in question in the instant case). See also ***Commonwealth of Massachusetts v. U.S. Dep't. of Labor***, Case No. 1998-JTP-6 (ALJ, Oct. 29, 2001), *aff'd.*, ARB Case Nos. 02-011 and 02-021 (ARB, June 13, 2002) and by subsequent decision of the Board in ARB Case No. 04-170 (ARB, Mar. 11, 2005), *aff'd. sub nom. Edmonds v. Chao*, 449 F.3d 51 (1st Cir. 2006) (the ALJ concluded "that the Commonwealth has not demonstrated that it adhered to an appropriate system for the award and monitoring of contracts with its subgrantees as required by section 164(e)(2)(A)" and that "[h]aving failed to comply with its own monitoring policies, the Commonwealth cannot avail itself of the JTPA's waiver of repayment provisions").

In ***Commonwealth of Massachusetts v. U.S. Dep't. of Labor***, ARB Case No. 04-170 (ARB, Mar. 11, 2005), *aff'd. sub nom. Edmonds v. Chao*, 449 F.3d 51 (1st Cir. 2006), the Board concluded that waiver is proper "when, despite the recipient's having established

appropriate oversight standards and having diligently adhered to those standards, the recipient could not prevent the sub-recipient from violating the Act."

In **Commonwealth of Pennsylvania, Dep't. of Labor and Industry v. U.S. Dep't. of Labor**, 1992-JTP-12 (Sec'y., Mar. 5, 1995), errata (Apr. 5, 1995), the Secretary affirmed the ALJ's decision ordering Pennsylvania to repay over \$500,000 from non-Federal funds based his findings that the Northwest Pennsylvania Training Partnership Consortium, Inc. (NPTPC) misspent 1985 grant funds by its inclusion of costs incurred in the 1983-1984 transition period; that NPTPC willfully disregarded JPTA regulations by the unilateral modification of certain subcontracts to get around the impermissibility of shifting costs from one grant period to another; and that the state failed to demonstrate that it substantially complied with the requirements set forth in Section 164(e)(2)(A)-(D) of the JPTA, 29 U.S.C. § 1574(e)(3). On review, the Secretary considered the authority to forego collection of the debt as inappropriate pursuant to 20 C.F.R. § 629.44(d)(5). The Secretary held that "[w]hen the Act and implementing regulations are read in context, they require the recovery of misspent program funds by the Secretary except when specific requirements are met." The Secretary further stated that "[t]hese requirements were not met and, therefore, the Secretary is precluded from granting the State permission to forego debt collection from NPTPC." The Secretary explained that the state failed to act with due diligence in monitoring the sub-recipient's contract.

The regulations at 20 C.F.R. § 629.44(d)(4) provide that the Secretary may forego collection of misspent funds from a sub-recipient, where the sub-recipient was not at fault with respect to the liability requirements set forth at Section 164(e)(2)(A)-(D) of the Act. In effect, the regulations extend the waiver provision, which pertains to recipients in the Act, to sub-recipients who might otherwise be subjected to the recovery of funds due to the impermissible actions of its sub-grantees. The regulations cannot be read as foregoing the collection of a debt that was incurred by the actions of the sub-recipient. This interpretation is supported by the reference to paragraph (d)(3) at § 629.44(d)(4) which provides for the Governor to describe and assess the sub-recipient's actions to collect the misspent funds from its sub-grantees. Therefore, within the context of the Act and the pertinent regulations, the word "inappropriate," as it appears in subsection (d)(5), pertains to a waiver of liability with regard to a sub-recipient insofar as a sub-grantee misspent program funds, provided the sub-recipient acted in a manner consonant with the Act at § 164(e)(2)(A)-(D). Slip op. at 4-6.<sup>2</sup>

#### **4. Fraud established**

##### **Repayment by cash required**

In **Arizona Dep't. of Economic Security v. U.S. Dep't. of Labor**, 1994-JTP-18 (ARB, June 7, 1996), *aff'd.*, 125 F.3d 857 (9<sup>th</sup> Cir. 1997)(table), the ARB held that "[i]t is clearly within the Secretary's authority to require cash repayments in those instances where the mis-expenditure is the result of fraud." In the instant case, two employees of a subcontractor were found to have fraudulently schemed to claim the placement of 34 ineligible persons into JTPA funded positions, which resulted in approximately \$80,000 in wrongful payments. The grantee sought Departmental approval of a repayment plan

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<sup>2</sup> The Secretary noted that the JPTA regulations were revised in 1992, and that the pertinent regulations for this case were last published in the 1992 edition of the Code of Federal Regulations.

whereby the subcontractor would submit in-kind services in lieu of repayment of the mis-expended funds. The Department, however, rejected the offer and informed the grantee that repayment of mis-expenditures that arose from fraud must be remitted in cash from non-Federal sources.

The ARB disagreed with the ALJ's finding that the Grant Officer's failure to plead § 164(d) rendered liability determinable only under § 164(e)(1), but found that even under § 164(e)(1) -- which would require the Grant Officer to prove that the grantee had "extraordinarily mal-administered" the program before wrongful expenditures could be recouped -- Complainant was liable. The ARB found that the subcontractor's administrative personnel failed to conduct even rudimentary oversight. The ARB's decision was affirmed by the Ninth Circuit in ***Arizona Dep't. of Economic Security v. U.S. Dep't. of Labor***, 125 F.3d 857 (9<sup>th</sup> Cir. 1997) wherein the court held it would accord "substantial deference" to the ARB's findings which resulted in a determination that the grantee committed fraud. See also ***United States v. Orr***, 129 F.3d 1265 (6<sup>th</sup> Cir. 1997)(table) (a qui tam relator filed a claim under the False Claims Act at 31 U.S.C. §§ 3729, 3730(b)(1), and 3732 alleging that a city employment training agency made fraudulent statements and violated provisions of the JTPA; the circuit court dismissed the claim under the doctrine of res judicata).

## **C. Interest allowed**

### **1. Willful violation**

In ***Commonwealth of Massachusetts v. U.S. Dep't. of Labor***, 1985-JTP-1 (Sec'y., Nov. 26, 1985), Massachusetts retained five percent of a JTPA grant award, or over \$1,000,000, for state monitoring and administration of the Summer Youth Employment and Training Programs. Notwithstanding several requests by Department of Labor officials for Massachusetts to allocate all JTPA funding to its Service Delivery Areas (SDAs), the state refused to do so on grounds that the JTPA and its implementing regulations permitted its retention of five percent of the funding. After a hearing, the ALJ found that the state was in "willful disregard" of the JTPA's requirements and he ordered repayment of the \$1,000,000, with interest, "of the misspent funds from funds other than those received under JTPA." Massachusetts argued that the JTPA does not provide for the assessment of interest on any amount owed and the Debt Collection Act of 1982, at 31 U.S.C. §§ 3701-3717, prohibited the charging of interest against a state government for a debt owed to the United States government. The Secretary held, to the contrary, that the Debt Collection Act did not prohibit an award of interest on an obligation owed by the state to the federal government. He reasoned that "[h]ere, Massachusetts has had the use of money which should have been allocated to the service delivery areas, the use which Congress intended, or returned to the United States Treasury where it would have earned interest." Consequently, the Secretary affirmed the ALJ's assessment of nine percent simple interest on the amount owed by Massachusetts.

### **2. Pre-judgment interest**

In ***Mississippi Dep't. of Economic & Community Develop. v. U.S. Dep't. of Labor***, 90 F.3d 110 (5<sup>th</sup> Cir. 1996) (1990-JTP-32), the Fifth Circuit held that prejudgment interest is properly awarded in a Department of Labor suit to collect an overpayment under the JTPA. See also ***Commonwealth of Massachusetts v. U.S. Dep't. of Labor***, 1985-JTP-1 (Sec'y., Nov. 26, 1985).

## **D. Money to be used only after grant awarded**

In **Commonwealth of Virginia v. U.S. Dep't. of Labor**, 1993-JTP-24 (ALJ, May 19, 1995), the ALJ held that the Unemployment Insurance Automation Support Account Grant could only be used for expenditures incurred after the grant was awarded.

#### **E. Equal Access to Justice Act (EAJA) applicable**

In **Indian Human Resource Center, Inc. v. U.S. Dep't. of Labor**, 1983-JTP-4 (Sec'y. Jan. 2, 1986), the Secretary remanded an ALJ's award of attorney's fees under EAJA to state that the ALJ improperly awarded an hourly rate of \$85.00, contrary to the hourly rate limitation of \$75.00 set forth at 5 U.S.C. § 504(b)(1)(A). The Secretary agreed, however, that the Resource Center was entitled to attorney's fees incurred for representation in contesting the appeal as well as reasonable costs necessary in pursuing the action. See 29 C.F.R. § 16.107(a)(2).

#### **F. Rule 11 Sanctions**

In **Northwest Community Action Programs of Wyoming, Inc. v. U.S. Dep't. of Labor**, 2003-WIA-5 (ALJ, Jan. 20, 2004) (order), the ALJ ordered that the Department show cause why Claimant's attorney's fees and costs should not be awarded against the Department. The ALJ noted that actions of the Department's counsel reflected, "at best, a cavalier attitude toward their obligations as officers of the court and advocates for an agency of the United States." The ALJ cited to counsels' (1) misleading statements to Chief Judge Vittone regarding the status of the grants at issue, (2) use of "doctored panel rating sheet" as "evidence" in the case, and (3) attempted concealment of material subject to discovery. See also **Black Hills v. U.S. Dep't. of Labor**, 2003-WIA-6 (ALJ, Feb. 2, 2004) (order) (order to show cause why Rule 11 sanctions should not be awarded against Respondent where it originally argued that Complainant's appeal based on non-selection was "premature" because no determination letter had been sent with regard to the grant but ALJ later learned that the Grant Officer "had already made her determination and had signed a contract with another applicant").

In these cases, the ALJ subsequently determined that express authority to award Rule 11 sanctions was not conferred by the WIA or its implementing regulations. **Northwest Community Action Programs of Wyoming, Inc. v. U.S. Dep't. of Labor**, 2003-WIA-5 (ALJ, Oct. 15, 2004); **Black Hills v. U.S. Dep't. of Labor**, 2003-WIA-6 (ALJ, Oct. 15, 2004).

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## **X. Types of Dispositions**

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### **A. Dismissal**

#### **1. Based on submitted settlement**

Under § 667.840 of the regulations implementing the WIA, the following is provided regarding settlements:

(a) Parties to a complaint which has been filed according to the requirements of § 667.800 of this part may choose to waive their rights to an administrative hearing before the OALJ. Instead, they may choose to transfer the settlement of their dispute to an individual acceptable to all parties who will conduct an informal review of the stipulated facts and render a decision in accordance with applicable law. A written decision must be issued within 60 days after submission of the matter for informal review.

(b) The waiver of the right to request a hearing before the OALJ will automatically be revoked if a settlement has not been reached or a decision has not been issued within 60 days provided in paragraph (a) of this section.

(c) The decision rendered under this informal review process will be treated as a final decision of an Administrative Law Judge under section 186(b) of the Act.

20 C.F.R. § 667.840.

In ***Cantu v. North American Indian Ass'n.***, 1995-JTP-23 (ALJ, July 15, 1998), a claim was dismissed with prejudice under the JTPA based upon a settlement reached by the parties. See also ***Commonwealth of Puerto Rico v. United States***, 49 Fed. Cl. 24 (Fed. Cl. 2001) (addressing interpretation and enforcement of terms of settlement agreement); ***Commonwealth of Massachusetts v. U.S. Dep't. of Labor***, 1985-JTP-1 (Sec'y., Jan. 7, 1986); ***State of Georgia v. U.S. Dep't. of Labor***, 1995-JTP-22 (ALJ, Jan. 4, 1999). See 20 C.F.R. § 636.10(c); 29 C.F.R. § 18.9(c)(2).

## **2. Voluntary dismissal under Fed.R.Civ.P. 41 permitted;**

### **no requirement to submit settlement**

In ***Indiana Dep't. of Workforce Development v. U.S. Dep't. of Labor***, 1997-JTP-15 (ARB, Aug. 20, 1998), the ARB asserted jurisdiction and stayed proceedings before the ALJ where the ALJ refused to dismiss the case based upon a *Stipulation of Dismissal* received by the parties. The ALJ determined that the submission did not comply with the requirements of 29 C.F.R. § 18.9(c) for a dismissal based on a settlement of the parties.<sup>3</sup> By *Final Order* dated December 8, 1998 in the same case, the ARB reversed the ALJ's order denying dismissal of the case. Under the facts of the case, the parties advised that a settlement had been reached and the ALJ subsequently requested that a copy of the executed settlement agreement be submitted. The parties submitted only a *Stipulation of Dismissal* without the settlement agreement and the Grant Officer advised the ALJ that the "agreement expressly prohibited disclosure of the agreement's contents to the ALJ." The Grant Officer then argued that dismissal was proper under the voluntary dismissal provisions at Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure as well as 29 C.F.R. § 18.9(c).

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<sup>3</sup> In a footnote, the ARB noted that it was not bound by the "'final decision' rule" which is applicable to Article III courts; however, it stated that appeals from interlocutory orders are not normally accepted. In this case, the ARB found that the ALJ's refusal to dismiss the case qualified as an exception under the collateral order doctrine.

The ARB agreed that the regulatory provisions at 29 C.F.R. § 18.9(c) were applicable to JTPA cases through 29 C.F.R. § 627.805. However, it noted that neither party invoked the provisions at § 18.9(c) by requesting time to pursue a settlement agreement and the ARB found that the parties were not required to comply with § 18.9(c) as they "reached a settlement without the need for deferral or judicial supervision." From this, the ARB reasoned that it was error for the ALJ to conclude that Fed.R.Civ.P. 41(a) was inapplicable. Because the implementing regulations of the JTPA and the procedural regulations at 29 C.F.R. Part 18 did not address the type of dismissal sought in this case, Fed.R.Civ.P. 41 applied. The ARB noted that the JTPA does not require Secretarial review of settlements entered into between the Grant Officer and a grantee, unlike settlement agreements reached in whistleblower cases under the Energy Reorganization Act. See **Hoffman v. Fuel Economy Contracting**, 1987-ERA-33 (Sec'y., Aug. 4, 1989). As a result, the ALJ's finding that public interest requires review of a settlement resolving an audit dispute to be reviewed by an ALJ was incorrect. Based on this determination, the ARB directed that the complaint be dismissed with prejudice pursuant to Fed.R.Civ.P. 41(a)(1)(ii). See also **Role Models of America, Inc.**, 2002-WIA-6 (ALJ, Nov. 27, 2006); **Maui Economic Opportunity, Inc.**, 2005-WIA-3 (ALJ, Dec. 13, 2005) (case dismissed with prejudice; although Complainant not selected as grantee of program funds, the state contracted with Complainant to provide the same services); **Vega Baja Computer Corp.**, 2005-WIA-1 (ALJ, Mar. 8, 2005) (the ALJ dismissed case with prejudice).

### 3. Mootness

In **Job Service of North Dakota v. U.S. Dep't. of Labor**, 1997-JTP-23 (ARB, Apr. 27, 1999), the ARB held that the case was moot because the limited remedy available at 20 C.F.R. § 633.205(e) for migrant and seasonal workers was no longer available. Specifically, under the JTPA, if it is determined that a non-selected applicant should have been selected the regulation at § 633.205(e) provides, generally, that "the Department selects and funds that applicant so long as the 90-day period for the transfer of the grant will not end within six months of the end of the funding period." In the case before it, the ARB noted that less than three months remained in the program year such that, even if it "agreed with the merits of the Job Service's challenge, (it) would have no authority under the regulations to issue a final decision designating a different grantee." The ARB further rejected a request by Job Service that the improperly selected grantee "be denied the possibility of a waiver of competition for the next grant period." The ARB held that it does not have authority to award prospective relief. It acknowledged that dismissal of the appeal for lack of jurisdiction appears "harsh" in light of the fact that the delays in adjudication were attributable to the Department and not the applicants, but the circumstances of the case rendered it moot.

See also **Midwest Farmworker Employment and Training, Inc. v. U.S. Dep't. of Labor**, 200 F.3d 1198 (8<sup>th</sup> Cir. 2000) (case was rendered moot when relief was sought within last nine months of the grant year; claim not subject to the exception to mootness doctrine of being "capable of repetition, yet evading review" because the company did not seek expedited review and the complaint addressed problems in one grant award as opposed to departmental policies in management of the program—"[a] claim based on peculiar facts, such as the typographical error in the scoring of the competition and the alleged violation of ethical rules by the program director in this case, who has since retired, is not particularly likely to recur"); **Campeños Unidos, Inc. v. U.S. Dep't. of Labor**, 803 F.2d 1063, 1069 (9<sup>th</sup> Cir. 1986) ("[b]ecause the grant periods have expired, retroactive remedies were not requested, nor could we fashion any under the applicable statutes and regulations" and "[b]ecause the petitioner does not fall within the 'capable of repetition yet evading review' exception and we are without authority to provide any meaningful

prospective relief, we dismiss the appeal as moot"); **Cherokee Nation of Oklahoma v. U.S. Dep't. of Labor**, 1997-JTP-12 (ARB, Feb. 12, 1999) (because the funding period would expire in six months, the proceeding was moot pursuant to § 632.12(a)); **Midwest Farmworker Employment & Training, Inc. v. U.S. Dep't. of Labor**, 1997-JTP-20, 1997-JTP-21, 1997-JTP-22 (ARB, Mar. 31, 1999); **Illinois Migrant Council, Inc. v. U.S. Dep't. of Labor**, 1984-JTP-10 (Sec'y. July 17, 1986) (case cannot be preserved as an exception to the mootness doctrine as "capable of repetition, yet evading review" because there was no evidence presented to establish a "reasonable expectation" or "demonstrated probability" that the same problem will reoccur).

#### **4. Based on untimely hearing request**

In **Powhatan Renape Nation v. U.S. Dep't. of Labor**, 2000-JTP-8 (ALJ, Dec. 7, 2000), the ALJ dismissed a JTPA complaint on grounds that the hearing request was untimely filed. In an *Order to Show Cause* which preceded a dismissal order, the ALJ noted that 20 C.F.R. § 636.10 requires that a hearing request be filed within 21 days of receipt of a grant officer's final determination. The ALJ noted that the hearing request before her was filed two months after receipt of the final determination.

#### **B. Withdrawal of request for hearing**

In **Oklahoma Tribal Assistance Program, Inc. v. U.S. Dep't. of Labor**, 2000-WIA-1 (ALJ, June 5, 2000), the ALJ noted that Complainant filed a request for administrative hearing pursuant to the provisions at 20 C.F.R. § 660.844 "as an appeal to Respondent's denial of its application for designation as a Workforce Investment Act, Title I, Section 166 grantee for Program years 2000 and 2001." Complainant subsequently sought to withdraw its hearing request and the Department did not object. As a result, the ALJ approved of the withdrawal of its request for hearing.

#### **C. Default judgment and summary judgment**

In **Opportunities Industrialization Centers of America, Inc. v. U.S. Dep't. of Labor**, 1998-JTP-4 (ALJ, Mar. 29, 1999), the ALJ entered an order of default judgment against Complainant for its failure to respond to the "Notification of Receipt of Request for Hearing and Prehearing Order." See 29 C.F.R. § 18.6(d)(2)(v). As a result, Complainant was ordered to pay the disallowed costs. See also **McDowell County Action Network v. U.S. Dep't. of Labor**, 2005-WIA-6 (ALJ, Aug. 10, 2006) (the Department's motion for summary judgment was granted and \$50,000 in costs were disallowed where "[t]he evidence show(ed) that despite opportunities available at multiple stages of these proceedings, Complainant . . . consistently failed to provide any evidence to support its position that the funds in question should not be disallowed"). See also **Rocky Mountain/Hawaii Regional Consortium v. U.S. Dep't. of Labor**, Case No. 2007-WIA-6 (ALJ, June 12, 2008) (the ALJ granted Respondent's motion for summary judgment pursuant to 29 C.F.R. § 18.40(d); no genuine issue of material fact, Complainant failed to file a timely response, and Respondent demonstrated that the "Grant Officer is not required to award a grant to organizations that have failed to demonstrate the capability to effectively administer grant funds for a housing assistance program as reflected in their proposals").

#### **D. Contempt proceedings**

##### **Premature**

In ***Commonwealth of Puerto Rico v. U.S. Dep't. of Labor and Rural Opportunities, Inc.***, Case No. 2007-WIA-10 (ALJ, Dec. 4, 2007), the ALJ, in previous proceedings, had vacated a grant award to Rural Opportunities after finding that Right to Employment Administration (REA) should have been found qualified to compete for the grant at issue. The judge then directed that another competition be held to determine whether Rural Opportunities, Inc. (ROI) or REA would receive the grant. In response, REA moved for immediate termination of grant funding to Rural Opportunities. The Department, however, concluded that "ROI would continue as the grantee for Puerto Rico while the new grantee selection process is underway, to maintain continuity for migrant and seasonal farmworkers."

The judge noted that the applicable regulations do not "mandate a specific timeframe for those actions and certainly does not direct immediate termination of grant funding." He further observed that "this case does not involve a situation in which a valid grantee has been designated so that a transition may occur." Consequently, the ALJ concluded that "the motion for an order directing immediate termination of grant funding to ROI, as a precursor to the initiation of contempt proceedings under 29 C.F.R. § 18.29(b), is premature and denied at this time." (emphasis in original).