In the Matter of:

INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT,

ARB CASE NO. 98-155

COMPLAINANT,

ALJ CASE NO. 97-JTP-15

v.

UNITED STATES DEPARTMENT OF LABOR,

DATE: December 8, 1998

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondent:
Charles D. Raymond, Esq., Harry L. Sheinfeld, Esq., Jinny Chun, Esq.
U.S. Department of Labor, Washington, D.C.

FINAL ORDER
DISMISSING COMPLAINT

This case arises under the Job Training Partnership Act of 1982, as amended (JTPA or the Act), 29 U.S.C. §§1501-1791 (1994), and the regulations issued thereunder at 20 C.F.R. Parts 626-638 (1997). On August 12, 1998, the Employment and Training Administration Grant Officer filed a petition with the Board seeking review of an order of a Department of Labor Administrative Law Judge (ALJ) declining to dismiss the case as requested by the parties. On August 20, 1998, we asserted jurisdiction, stayed the proceedings pending further order of the Board, and invited briefing. We now have reviewed the parties' briefs and the record in this case and reverse the ALJ's Order denying dismissal of the case.

BACKGROUND

On May 14, 1997, the Grant Officer issued a Final Determination regarding audits of Indiana Department of Workforce Development (Indiana) programs and activities that had been funded by the Employment Training Administration under the JTPA. For two audit periods spanning October 1, 1992, through June 30, 1994, the Grant Officer determined that $18,415 in funds remained subject to recovery by the Department of Labor and that four unresolved administrative findings remained subject to resolution by Indiana. On June 9, 1997, Indiana

requested a hearing before an ALJ, challenging a number of the administrative and monetary findings of the Grant Officer.[1]

On June 23, 1997, Chief Judge John M. Vittone issued a pre-hearing order advising the parties to notify the Office of Administrative Law Judges immediately if a settlement of the issues set for hearing were reached. The pre-hearing order also advised the parties that a settlement judge could be appointed at the request of the parties, pursuant to 29 C.F.R. §18.9(e), and that requests for such appointment should be directed to either the Chief Judge or to the ALJ who would subsequently be assigned to hear the case.

On April 13, 1998, ALJ Rudolph L. Jansen, to whom the case had been assigned, issued a Notice of Hearing advising the parties that the hearing was scheduled for June 30, 1998, and setting deadlines for the completion of discovery, the parties' pre-hearing submissions and exchanges, and the filing of any preliminary motions. By letter of April 21, 1998, Indiana informed the ALJ that the parties had reached an oral settlement agreement and requested that the ALJ remove the case from his hearing docket. Indiana also indicated that the parties would submit a copy of the signed settlement agreement to the ALJ upon its execution. On April 24, 1998, the ALJ's office advised Indiana by telephone that the case would be removed from the ALJ's hearing schedule after he had received the settlement agreement. On June 30, 1998, the ALJ convened the hearing, at which Indiana informed the ALJ that the parties had executed a settlement agreement and that a joint stipulation requesting dismissal of the case was being drafted. The ALJ stated that he would leave the record open until July 10, 1998, for submission of the settlement documentation.

On July 7, 1998, the Grant Officer filed the parties' Stipulation of Dismissal, without a copy of the settlement agreement. The ALJ subsequently requested a copy of the settlement agreement. The Grant Officer responded by letter of July 13, 1998, advising the ALJ that the parties' agreement expressly prohibited disclosure of the agreement's contents to the ALJ. In addition, the Grant Officer requested that the ALJ dismiss the case based on the joint stipulation of the parties, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure (FRCP). The Grant Officer urged that such a dismissal was permitted by 29 C.F.R. §18.9(c).

On July 21, 1998, the ALJ issued an order declining to dismiss the case unless the parties' settlement agreement was submitted to him for review, and conditioning dismissal of the case upon his approval of the terms of the agreement. Specifically, the ALJ concluded that the parties' Stipulation of Dismissal did not fulfill the requirements of 29 C.F.R. §18.9(c) for dismissal based on a settlement between the parties. The ALJ determined that Section 18.9 was controlling, and interpreted that regulation to require ALJ review of a settlement agreement upon which parties based a stipulation of dismissal. The ALJ thus concluded that voluntary dismissal under Rule 41(a)(1)(ii) was precluded. Order at 2-3. This appeal followed.

---

[1] On June 19, 1997, Indiana amended its hearing request to reduce the number of findings contested from seven to three.

DISCUSSION

The ALJ ruled that 29 C.F.R. §18.9 is applicable to this case, that Rule 41 of the FRCP is not, and that public policy requires review of a settlement of a JTPA audit action. For the reasons discussed below, we disagree, and dismiss this case.

First, we disagree with the ALJ's conclusion that 29 C.F.R. §18.9 is applicable to the circumstances involved in this case. Section 18.9 is included in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges (OALJ rules). 29 C.F.R. Part 18. As the ALJ noted, regulations promulgated under the JTPA provide for application of the OALJ rules to hearings requested by JTPA grantees to dispute Grant Officers' audit determinations. 20 C.F.R. §627.802(a) (1998). Section 18.9 expressly applies when the parties request deferral of the hearing to pursue "negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding." 29 C.F.R. §18.9(a) (1998); *see also* 58 Fed. Reg. 3822 (Jan. 11, 1993) (notice of proposed rulemaking, addition of subsection (e), settlement judge procedure, to 29 C.F.R. §18.9); 58 Fed. Reg. 38498 (July 16, 1993) (final rule, 29 C.F.R. §18.9(e)).

In the instant case, the parties did not request a period of time in which to pursue a settlement agreement. Rather, Indiana (as the JTPA grantee that had requested the hearing) advised the ALJ more than two months before the hearing date that the parties had agreed to a settlement. Indiana ltr. of Apr. 21, 1998. Although the parties have offered no explanation for their failure to submit their joint Stipulation of Dismissal until after the scheduled hearing date, the fact remains that the parties did not request deferral in order to reach a settlement, or the formal supervision of a settlement judge, or the informal supervision of the ALJ assigned to the case. *Cf.* 29 C.F.R. §18.9(a), (c), (e) (1998); 29 C.F.R. §627.805 (providing for alternative dispute resolution of appeals from Grant Officer's final determinations). Thus, no provisions of Section 18.9 were ever invoked by the parties; nor need they have been, given the fact that the parties reached a settlement without the need for deferral or judicial supervision. Without a request for deferral or ALJ supervision of settlement negotiations, Section 18.9 simply does not apply.

It follows, therefore, that the ALJ's conclusion that "the Federal Rules [of Civil Procedure] are not applicable to this case since our own procedural rules provide guidelines for disposition . . ." is erroneous. Order at 2. Section 18.1 of the OALJ rules requires that the FRCP "shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." 29 C.F.R. §18.1(a) (1998). Although, as we have held above, Section 18.9(c)(2) does not *provide for* dismissal of a case based on the mutual agreement of the parties without the prior invocation of Section 18.9, that regulation clearly does not *prohibit* such dismissal action. Consequently, the mandate of Section 18.1(a) regarding resort to the FRCP would apply, unless such dismissal action were governed by other regulatory or statutory provision or executive order. 29 C.F.R. §18.1(a) (1998); *see generally Nolder v. Raymond Kaiser Engineers,* Case No. 84-ERA-5, Sec. Dec., June 28, 1985, slip op. at 5-7 (holding resort to FRCP appropriate under 29 C.F.R. §18.1(a)). Inasmuch as neither the provisions of the JTPA nor the regulations promulgated thereunder address the dismissal action that is sought by the parties in

this case, FRCP Rule 41 applies. *See* 29 U.S.C. §§1574-76 (1994); 29 C.F.R. Part 627, Subpart H (1998).

Finally, the ALJ erroneously concluded that the public interest requires review by the ALJ of a settlement resolving an audit dispute between the Department of Labor and a JTPA grantee. In drawing that conclusion, the ALJ relied on the Secretary's decision in *Hoffman v. Fuel Economy Contracting,* Case No. 87-ERA-33, Sec. Ord. Denying Request to Reconsider, Aug. 4, 1989. Order at 2. *Hoffman* involved a whistleblower complaint filed under the Energy Reorganization Act (ERA), 42 U.S.C. §5851, and is clearly distinguishable from the instant case arising under the JTPA.

In *Hoffman*, the Secretary rejected the parties' reliance on FRCP 41 and 29 C.F.R. §18.9(c)(2) to support dismissal because such dismissal would be in conflict with the ERA. Specifically, the Secretary concluded that dismissal based on the parties' stipulation under FRCP 41(a)(1)(ii) or Section 18.9(c)(2) would have been improper because the parties' stipulation was linked to a settlement agreement that had not been reviewed and approved by the Secretary as required by a provision of the ERA, 41 U.S.C. §5851(b)(2)(A) (1988). *Hoffman*, slip op. at 2-4. Thus, the *Hoffman* decision applies the Section 18.1(a) principle that the FRCP and the OALJ rules must yield when inconsistent with a controlling statutory provision. *Hoffman*, slip op. at 2-4; *see* 29 C.F.R. §18.1(a). In contrast to the ERA, there is no statutory provision under the JTPA requiring Secretarial approval of parties' settlements of audit disputes. *See* 29 U.S.C. §1576 (1994); *see also* 29 C.F.R. Part 627 (1998).

Inasmuch as the JTPA does not require Secretarial review of settlements entered into between a Grant Officer and a grantee, the Rule 41 provision allowing for dismissal based on the stipulation of the parties should be applied. *Cf. U.S. Department of Labor v. UGI Corp.,* Case No. 89-OFC-36, Sec. Notice of Case Closing, Sept. 25, 1990 (applying FRCP 41(a)(1)(ii) to dismiss case and holding that review of settlement was not necessary under the Vietnam Era Veterans Readjustment Assistance Act of 1974, 38 U.S.C. §2012 (1972), and the Rehabilitation Act of 1973, 29 U.S.C. §793 (1982)). We therefore reverse the ALJ's Order denying dismissal of the case and apply Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure to the parties' Stipulation of Dismissal. The parties' stipulation provides that the complaint be dismissed with prejudice, which is permitted by the terms of Rule 41(a)(1)(ii).

ORDER

The case is therefore **DISMISSED** with prejudice.

SO ORDERED.

PAUL GREENBERG
Member

CYNTHIA L. ATTWOOD
Acting Member