U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

JOB SERVICE NORTH DAKOTA, **ARB CASE NO. 99-020**

COMPLAINANT, **ALJ CASE NO. 97-JTP-23**

v. **DATE: April 27, 1999**

UNITED STATES DEPARTMENT OF LABOR,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Jennifer L. Gladden, *Executive Director*, *Job Service North Dakota*
Bismarck, North Dakota

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

ORDER OF DISMISSAL

This case arises under the Job Training Partnership Act (JTPA), 29 U.S.C. §1501 *et seq.* (1994), and implementing regulations at 20 C.F.R. Parts 626-638 (1998). Complainant, Job Service North Dakota ("Job Service"), initiated this action to reverse the Department of Labor Grant Officer's award of grant funds to Motivation Education & Training, Inc. (Motivation) for training migrant and seasonal workers in the state of North Dakota.[1/] Job Service's challenge involved funding for the program years 1997 (July 1, 1997 through June 30, 1998) and 1998 (July 1, 1998 through June 30, 1999).

[1/] The JTPA provision for migrant and seasonal worker programs is codified at 29 U.S.C. §1672 (1994).

The Administrative Law Judge (ALJ) issued a Decision and Order (D&O) in which he found that Job Service and another unsuccessful applicant had not been given "a fair opportunity to compete for the JTPA section 402 grants for North Dakota." The ALJ ordered Respondent, the Department of Labor ("the Department"), to recompete the 1997 and 1998 grant. D&O at 8.

The Department filed exceptions to the ALJ's decision. We asserted jurisdiction in an Order issued December 31, 1998. We find that the ALJ's decision is moot, vacate it, and dismiss the complaint.

BACKGROUND

1. Regulatory Scheme

Competitions for grants under JTPA Section 402, providing funds for training migrant and seasonal workers, are conducted every two years. 29 U.S.C. §1672(c)(2). The applicable regulations are found at 20 C.F.R. §633.201 through §633.205.

Not all grants are competed every two years. The JTPA provides, at 29 U.S.C. §1672(c)(2):

> The competition for grants under this section shall be conducted every two years, except that if a recipient of such a grant has performed satisfactorily under the terms of the existing grant agreement, the Secretary may waive the requirement for such competition upon receipt from the recipient of a satisfactory two-year program plan for the succeeding two-year grant period.

Thus, at the discretion of the Secretary, an incumbent grantee with a successful record of performance may be eligible for a new grant without making a competitive application.

Applicants who intend to apply for the grant must file a Preapplication for Federal Assistance pursuant to 20 C.F.R. §633.202(b). The Department conducts a "responsibility review" to determine whether the applicant has established overall responsibility to administer federal funds. 20 C.F.R. §633.204.

The Department reviews the applications under criteria listed at 20 C.F.R. §633.203, one of which is "a familiarity with the area to be served." 20 C.F.R. §633.203(b). The reviewers recommend to the Grant Officer which applicant should be awarded the grant. The Grant Officer reviews the recommendations and makes an independent determination that the recommendations are correct. Grants are awarded only to applicants that have been found to be financially responsible. 20 C.F.R. §633.204(b).

The Grant Officer notifies unsuccessful applicants in writing. 20 C.F.R. §633.205(c). An unsuccessful applicant may request an administrative review for a determination "with respect to whether there is a basis in the record to support the Department's decision." 20 C.F.R. §633.205(e). The review does not interfere with the funding of the selected applicant. *Id.* As for the remedy under the regulations, as the Sixth Circuit has explained:

> The only remedy for an applicant found to have been wrongfully denied selection as a grantee under the migrant programs is to be funded by the Department of Labor for the remainder of the two year grant period. 20 C.F.R. §633.205(e); [case citations omitted]. The regulations provide that funding to an applicant wrongfully denied a grant will be [achieved] within 90 days of the decision finding wrongful denial, unless the end of the 90 day period is within six months of the end of the funding period. *Id*. Thus, unless an unsuccessful applicant receives a final decision from either the Department of Labor or a Court of Appeals finding that the applicant was wrongfully denied the grant prior to nine months before the end of the funding period, the applicant has no remedy.

Lake Cumberland Community Svcs. Organization v. United States Dep't of Labor, 929 F.2d 701 (table), 1991 WL 43905 (6th Cir. 1991) at **1.

2. This Case

Midwest Farmworker Employment & Training, Inc. ("Midwest") was the long term incumbent grantee of JTPA Section 402 training funds for North Dakota, South Dakota, and Minnesota.[2/] Beginning in 1995, the Department received reports from Midwest employees of personnel abuses, including coercion to make donations to Midwest. After an investigation, the Department announced that Midwest had not performed satisfactorily for the program years 1995 and 1996, and issued a Solicitation for Grant Application (SGA)[3/] inviting competition for grants in the three states for the next two program years. Application of Waiver Provision and Solicitation for Grant Application, 62 Fed. Reg. 6272-76, Feb. 11, 1997; *see* 29 U.S.C. 1672(c)(2).

After receiving the applications for migrant and seasonal worker training grants for the 1997 and 1998 program years, a three member reviewing panel deliberated, rated the

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[2/] Although Job Service sought review only of the grant for North Dakota, the facts concerning the grants for South Dakota and Minnesota are connected to the facts concerning North Dakota. For ease of reference, we will refer to South Dakota, North Dakota, and Minnesota as "the three states."

[3/] The SGA contained a typographical error that reduced from 25 to 15 the points available for "familiarity with the area to be served." This error had the effect of reducing the total rating points available to all applicants to 90, instead of 100.

applications, and submitted its report to the Grant Officer. Based on the panel's scoring and geographic issues, the Grant Officer determined that applicant Motivation Education & Training, Inc. was the best qualified to receive the grant for North Dakota. Accordingly, Motivation was awarded the grant.

Job Service sought administrative review challenging its non-selection for the grant in North Dakota. In support of its challenge regarding the North Dakota training grant award, Job Service asserted that it was possible that Motivation's application was not submitted timely and, in any event, the application should have been rejected as non-responsive to the SGA because it was not double spaced. Job Service Statement of Support (Statement) at 3-4. Job Service further contended that as a state agency, it did not receive equal consideration for the grant by the Department; that the weaknesses listed by the Department when issuing a lower rating score for Job Service's application were based upon speculation; and that the reviewing panel's ratings of the applications were biased in favor of Motivation and therefore unreliable. Statement at 4-6.[4/]

3. The ALJ's Decision

A. Consolidation

The ALJ's procedural handling of the separate challenges brought by Job Service and Midwest is unclear and confusing, particularly with regard to whether the two sets of

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[4/] Midwest also submitted a challenge to its non-selection for the North Dakota grant, as well as challenges to its non-selection for the Minnesota and South Dakota training grants. *See Midwest Farmworker Employment & Training, Inc. v. United States Dep't of Labor*, ARB Case Nos. 99-007, 99-056, 99-057, 99-058, 99-059, and 99-060, ALJ Case Nos. 97-JTP-20, -21, and -22, Order of Dismissal, March 31, 1999 (*Midwest Farmworker*). The *Job Service* case and the *Midwest Farmworker* cases were assigned to the same administrative law judge for hearing.

Although Midwest's challenges also focused on alleged technical errors in the grant solicitation process, Midwest additionally alleged a series of ethical violations by Department personnel involved in the JTPA grant program. Midwest assailed the "prejudicial altering of the point totals available under the SGA," arguing that the alteration had harmed its chances of winning the grant. Midwest also contended that Charles Kane, the Director of the Division of Migrant and Seasonal Farmworker Programs at the Department, had an improperly close relationship with Motivation's Director, Frank Acosta, who had sent gifts of foodstuffs to Kane's home. *See generally, Midwest Farmworker, supra.*

Although Motivation was not a party to the *Midwest Farmworker* proceeding, Acosta submitted to the ALJ a written defense of Kane's conduct. Midwest argued that Acosta's letter documented further instances showing the improperly close social relationship between Kane and Acosta. *Id.*

Midwest also noted that a Motivation employee, Sammy Ibarra, had embezzled JTPA funds. Midwest argued in its challenge that because of the embezzlement, Motivation was not a "responsible" entity within the meaning of the JTPA and could not lawfully receive a grant. *Id.*

proceedings were consolidated. Prior to the scheduled hearings in *Job Service* and *Midwest Farmworker*, the Department moved to consolidate the cases. Motion for Consolidation and Assignment, dated March 20, 1998. Job Service and Midwest (which had the status of party-in-interest in the *Job Service* case) separately opposed the consolidation motion, and Job Service moved for a decision on the administrative record without oral hearing. March 30, 1998 Memorandum Letter. There is no indication in the record that the ALJ acted to consolidate the cases at this stage of the proceeding, and he proceeded to convene separate hearings on the matters.

Upon convening the hearing in the *Job Service* case, the ALJ indicated that he had asked counsel for the Department to speak with the representative of Job Service (a non-lawyer) to find out "what her position was and whether she would appear [at the hearing], or how she wanted this case to be handled." *Job Service* Hearing Transcript (JSND T.) at 5. In response, the Department's counsel stated that he and the representative of Job Service "have agreed that the Job Service of North Dakota and the Respondent will file briefs, presenting documents supporting their respective positions within 40 days of the mailing of the transcripts which address the Midwest Farmworkers challenge to the selection of Motivation, Education and Training as the Section 402 grantee in North Dakota." *Id.* Although this statement is not entirely clear, we interpret it to be a stipulation that the parties were free to refer to the hearing transcript from the *Midwest Farmworkers* case when submitting their posthearing briefs in the *Job Service* case. [5/] Thus, although it does not appear that there had been a formal consolidation of the cases at the time of the hearing, it appears that there was general agreement that materials from the *Midwest Farmworker* record would be incorporated into the *Job Service* record.

After stating that Job Service's claim would be adjudicated on the record, the ALJ concluded the hearing in this case. JSND T. 8. The ALJ then convened the hearing in *Midwest Farmworker*.

The ALJ issued a decision in the *Midwest Farmworker* case on September 29, 1998, and a decision in this case on October 19, 1998. After this Board had asserted jurisdiction in *Midwest Farmworker,* but prior to our assertion of jurisdiction in this case, the ALJ issued an Order of Consolidation and Denying Motion for Reconsideration in *Job Service*. November 13, 1998 Order. In that Order, the ALJ stated that "[a]t the time of hearing, [the *Job Service*] case was consolidated with [the *Midwest Farmworker* case]" and indicated that "it is appropriate that the cases also be consolidated for appeal." [6/]

[5/] As further support for this proposition, we note that on July 15, 1998, the Department filed a Motion for Extension of Time to File Posthearing Briefs, stating that Job Service's receipt of the transcripts in this case and in the *Midwest Farmworker* case had been delayed, and that Job Service "needs time to review the transcripts and incorporate pertinent information in its posthearing brief." (emphasis added).

[6/] Other than the ALJ's post-decisional statement that the *Midwest Farmworker* and *Job Service*

(continued...)

B. The Merits

In his Decision and Order finding in favor of Job Service, the ALJ paid little attention to the arguments initially raised by Job Service in this matter. Instead, the ALJ incorporated into the *Job Service* decision major portions of his earlier decision in *Midwest Farmworker*. The ALJ examined the evidence in the *Midwest Farmworker* record concerning the relationship between Charles Kane, the Department's Director of the Division of Migrant and Seasonal Farmworker Programs, and Frank Acosta, the Director of Motivation. D&O at 6. The ALJ found that Acosta's letter defending Kane's behavior "demonstrates that [the letter] was in fact solicited by Mr. Kane following his testimony." *Id.* at 8. The ALJ also found other evidence of an improper relationship between the Department and Motivation. He credited the testimony of a Midwest employee that Motivation offered her a job prior to the award of the grants to Motivation, and that someone at the Department of Labor told Motivation in advance that it would receive the grants. *Id.*

On the basis of an incident that occurred after the award of the grant at issue, the ALJ decried Kane's "prejudice" against farmworkers. D&O at 7-8. The ALJ also noted that the incident led to the removal of Kane from his position.[7/] *Id.* at 7.

The ALJ examined evidence of financial wrongdoing on the part of Motivation. The ALJ found that the embezzlement of federal funds by Ibarra, who had been the manager of Motivation's office in Eagle Pass, Texas, was not an isolated incident. D&O at 8. The ALJ also stated that there was no evidence that the embezzled funds had been returned. *Id.*

The ALJ found that a "prudent grant officer" with knowledge of Kane's activities, Acosta's gifts, and Ibarra's embezzlement would terminate the grants to Motivation. D&O at 8. The ALJ further found that the reduction in point value for the criterion, "familiarity with service area," compromised the grantee selection process. *Id.* at 9.

The ALJ found that the reviewing panel had formed an unbiased opinion of the strengths and weaknesses of the grant applications. D&O at 9. He also absolved Grant Officer DeLuca, who selected Motivation, of any knowledge of Acosta's gifts to Kane. *Id.* Nevertheless, the

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[6/](...continued)
cases had been consolidated "at the time of hearing," we find no evidence that a decision to consolidate had been made by the ALJ. Indeed, the fact that the ALJ issued separate decisions in the cases suggests that the two proceedings had *not* been consolidated officially, even if it somehow had been decided that the record from one case could be cited in the other. The ALJ's unusual post-decision Order attempting to consolidate the *Midwest Farmworker* and *Job Service* cases on appeal before the Board exceeded the ALJ's authority.

[7/] Kane has since retired from the Department. *Midwest Farmworker* hearing transcript (MFET T.) at 552.

ALJ found that DeLuca had been given unspecified information by Kane, who had not disclosed to DeLuca his relationship with Acosta. *Id.*

Ultimately, the ALJ concluded that the selection of Motivation as the grantee for North Dakota violated "ethical, statutory, and regulatory requirements" and overturned the grants to Motivation for training in Minnesota and North Dakota. D&O at 9. The ALJ concluded that both Job Service and Midwest were not given a fair opportunity to compete for the grant for North Dakota and ordered the Department to recompete the 1997-1998 Section 402 grant for that state.[8/] *Id.* at 10.

The Department filed with the ALJ a Motion for Reconsideration in which it contended that this proceeding is moot and should be dismissed. The ALJ denied the motion.

DISCUSSION

The Department argues that the case is moot because the limited remedy available under the applicable regulation, 20 C.F.R. §633.205(e), is no longer available. We agree.

The regulation governing administrative review of JTPA grant challenges contains a provision designed to avoid undue disruption of service to program participants within the two year grant period. Where an ALJ rules that a non-selected applicant should have been selected, 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. 20 C.F.R. §633.205(e). This regulation represents the Department's judgment that it would be too disruptive to change the grantee within nine months of the time that the grant funds will expire. Significantly, transfer of the grant to the applicant not originally selected is the sole remedy available under the regulation. *Id.*

It is well established, pursuant to this provision, that appeals of non-selection are moot where the ALJ has not ordered the only available relief – designation of a different applicant – within the first 15 months of the grant period. *See State of Maine v. United States Dep't of Labor*, 770 F.2d 236, 239-40 (lst Cir. 1985) (under the Department's regulation, a claim that the Department violated its own regulation in awarding a grant is moot once the grant period has ended); *Campesinos Unidos, Inc. v. United States Dep't of Labor*, 803 F.2d 1063, 1069 (9th Cir. 1986) ("[I]t is clear that the regulation does not provide any remedy for an applicant improperly denied funding if the Department's determination is not reached until the grant period is within nine months of its expiration.")[9/]; *North Dakota Rural Development Corp. v. United States Dep't*

[8/] The ALJ did not, however, address most of the issues Job Service raised concerning the merits of its application. *See* p.6, *supra.*

[9/] The *Campesinos* decision involved an unsuccessful applicant's challenge of grants for training migrant and seasonal workers during two distinct grant periods. The first of the two grant programs (continued...)

of Labor, 819 F.2d 199, 200 (8th Cir. 1987) (same); *Lake Cumberland,* 1991 WL 43905 at **1 ("[U]nless an unsuccessful applicant receives a final decision from either the Department of Labor or a Court of Appeals finding that the applicant was wrongfully denied the grant prior to nine months before the end of the funding period, the applicant has no remedy" and the case is moot); *see also Cherokee Nation of Oklahoma v. United States Dep't of Labor*, ARB Case No. 98-153, ALJ Case No. 97-JTP-12, Order of Dismissal, Feb. 12, 1999, slip op. at 4 (under analogous provision of regulation governing the Indian and Native American Employment and Training Provisions of the JTPA, at 20 C.F.R. §632.12(a)) and *Illinois Migrant Council v. United States Dep't of Labor*, Case No. 84-JTP-10, Sec. Final Dec. and Ord., July 17, 1986, slip op. at 9-11 (case moot where the funding period had expired).

In this case, the ALJ ruled on October 19, 1998, that the Department should recompete the grant process for North Dakota for the 1997-1998 program years. D&O at 13. Under the regulations, however, there was only one remedy available, and only if there were more than nine months remaining in the funding year: an order that Job Service or some other applicant be designated the grantee for North Dakota for the remainder of the program year. *See, e.g., Nebraska Indian Inter-Tribal Dev. Corp. v. United States Dep't of Labor,* Case No. 87-JTP-19, Sec. Dec. and Ord. of Remand, May 23, 1988, slip op. at 10 (analogous provision governing JTPA Native American grants, 20 C.F.R. §632.12(a), "limits the available remedy in an appeal from denial of designation as a Native American JTPA grantee to the right to be designated in the future. The regulation sets a clear limit on the ALJ's authority in a case of this kind.").

In this case, fewer than three months now remain until the end of the 1998 program year on June 30, 1999.[10/] Even if this Board agreed with the merits of Job Service's challenge, we would have no authority under the regulations to issue a final decision designating a different grantee. For that reason, this case is moot.

Job Service argues that this case is not moot because there is a prospective effect to the ALJ's ruling: "the assurance that funding will be competed for the two-year grant period beginning July 1, 1999. In the absence of an order to compete funding, the Department could exercise its option to waive competition for the two-year grant period beginning July 1, 1999." Job Service's Statement of Support (Statement) at 2. Job Service appears to concede, however, that "[f]unding for the two-year grant period ending June 30, 1999, may be moot." *Id.*

[9/](...continued)
involved was authorized by the Comprehensive Employment and Training Act (CETA) and the second was authorized by CETA's successor statute, the JTPA. At the time of the court's decision, the grant periods had expired for both of the challenged grants. Relying upon the regulation at 20 C.F.R. §633.205(e), the Ninth Circuit found the controversy moot as to both of the challenged grants.

[10/] The ALJ's decision was issued on October 19, 1998. The ninetieth day following issuance of his decision was January 17, 1999, which in turn was less than six months prior to the end of the funding period on June 30, 1999.

In effect, Job Service asks that Motivation be denied the possibility of a waiver of competition for the next grant period. This type of prospective relief has been rejected by both the Secretary and a court as unavailable under the terms of the regulation, 20 C.F.R. §633.205(e).

Quoting *State of Maine, supra*, the Secretary explained in *Illinois Migrant Council*, slip op. at 4, that "[t]o follow a determination of wrong with a remedy applicable to the next grant period threatens to interfere unfairly with other applicants who have legitimately and properly received the award for the next period." Likewise, the Ninth Circuit has disallowed any form of preference for disappointed grant applicants in future funding periods. *Campesinos,* 803 F.2d at 1069.

Under the Secretary's and court precedent, we find that there is no provision in the JTPA regulations permitting us to fashion an order of the sort that Job Service seeks, requiring the Department not to accord Motivation the benefit of the waiver provision for the forthcoming funding years even if Motivation otherwise meets the standard for a waiver. We recognize that the result that we reach, *i.e.,* dismissal, may seem harsh in this case, since "the availability of [the] remedy depends on the speedy processing of [the petitioner's] appeal by the Department."[11/] The petitioner in *Campesinos* encountered "inexcusable" delays in obtaining a final decision from the Grant Officer and an adjudication of its claims within the agency, but the Ninth Circuit nevertheless found that "it is an injustice that we could not remedy without doing a greater injustice." 803 F.2d at 1071. This reasoning applies with equal force in this matter.[12/]

[11/] Job Service has not challenged the regulation before the Administrative Review Board, and even if it had, the Board is without jurisdictional authority to rule on the validity of duly promulgated Department regulations. Secretary's Order 2-96, 61 Fed. Reg. 19,978 (May 23, 1996).

[12/] Because we dismiss this case as moot, it is unnecessary for us to reach any conclusions on the merits of the case. However, we note that even if the case were not moot, and even if the ALJ had awarded the proper remedy under the regulations, our doubts concerning several of the ALJ's key findings of irregularities in the grant application process would compel us to reevaluate the ALJ's conclusions. For example, the finding that Kane was "prejudiced" against farmworkers, discussed at length by the ALJ, was based upon comments Kane made at a meeting in Coeur D'Alene, Idaho, *after* the award of the grants at issue. Moreover, any purported prejudice against farmworkers on Kane's part would apply equally to the successful applicant, Motivation, which was operated by farmworkers. MFET T. 489. Because Kane did not review the application or select Motivation, Kane's alleged prejudice against farmworkers – which was an important element of the ALJ's analysis – seems irrelevant.

The ALJ also appeared to err in assessing the facts concerning the embezzlement of funds by one of Motivation's employees, Ibarra. After the ALJ raised questions at the hearing about the Ibarra incident, the Department reported that "the OIG is not aware of any evidence indicating that anybody within [Motivation] besides Mr. Ibarra was involved in" or "aware of" the embezzlement of JTPA funds,

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Where, as here, a case has become moot because of circumstances unattributable to the parties, it is appropriate to vacate the ALJ decision. *Cherokee Nation*, slip op. at 4. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23 (1994) ("vacatur must be decreed for those judgments whose review is, in the words of *[United States v.] Munsingwear*, 340 U.S. 36 (1950) 'prevented through happenstance' – that is to say, where a controversy presented for review has 'become moot due to circumstances unattributable to any of the parties.' *Karcher v. May*, 484 U.S. 72, 82 (1987).").

[12/](...continued)
and that "Motivation officials were completely cooperative during the investigation of Ibarra's activities." *Midwest Farmworker* record: Shapiro affidavit, attached to June 10, 1998 report to ALJ. Moreover, the Department explained that Ibarra had been ordered to pay restitution, *id.,* and the *Midwest Farmworker* record contains a photocopy of the judgment in Ibarra's criminal case, noting that Ibarra had paid some $14,052.80 in restitution. *Midwest Farmworker* record: Midwest Exhibit 1, Judgment, at pp. 2,4. Notwithstanding this evidence, the ALJ curiously found that Ibarra's embezzlement of funds was not an isolated incident and that "there is no evidence that the embezzled funds were returned." D&O at 8. We question those findings.

We also question the ALJ's finding that Kane's alleged bias in favor of Motivation made the grantee selection process unfair, when the weight of the evidence suggests that the persons charged with conducting the review were free from bias. The selection process began when DOL employee Irene Pindle arranged for publishing the SGA for grants in the three states. MFET T. 913. After publication, Pindle discovered the typographical error in the number of points allotted for "familiarity with area served." MFET T. 914. The ALJ found that Pindle did not act with any bias. D&O at 9. Next in the grant application process, three panel members evaluated the grant applications. The chair of the panel, Roland Brack, testified that he had no conversations with Kane about the work of the panel. MFET T. 881-882. Likewise, panel member Ronald Rubbin knew none of the applicants and believed that the scoring process was done fairly. MFET T. 999. After the panel made its recommendations, Grant Officer James DeLuca reviewed the recommendations and selected the grantees. The ALJ found that DeLuca did not act with prejudice and did not know anything about gifts from Acosta to Kane. D&O at 9.

Based on the record in this and the *Midwest Farmworker* cases, it appears that the people who actually performed the selection did not act with bias against the disappointed applicant, Job Service, or with bias in favor of the grantee, Motivation. The ALJ simply did not explain how any prejudice or bias on the part of Kane affected the selection process conducted by Pindle, the panel members, and DeLuca.

Accordingly, in view of the mootness of this case, the ALJ's October 19, 1998 Decision and Order is hereby **VACATED** and this case is **DISMISSED**.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member