



In the Matter of:

**COMMONWEALTH OF PUERTO RICO,
DEPARTMENT OF LABOR AND HUMAN
RESOURCES, RIGHT TO EMPLOYMENT
ADMINISTRATION,**

**ARB CASE NOS. 09-011
09-013**

ALJ CASE NO. 2008-WIA-004

COMPLAINANT,

DATE: April 10, 2009

v.

UNITED STATES DEPARTMENT OF LABOR,

RESPONDENT,

and

RURAL OPPORTUNITIES, INC.,

INTERVENOR.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**Steven D. Cundra, Esq., *Roetzel & Andress, LPA*, Washington, District of
Columbia**

For the Respondent:

**Stephen R. Jones, Esq., Harry L. Sheinfeld, Esq., Gary M. Buff, Esq., *United
States Department of Labor*, Washington, District of Columbia**

For the Intervenor:

**Thomas A. Fink, Esq., Dennis J. Annechino, Esq., *Davidson Fink, LLP*,
Rochester, New York**

FINAL DECISION AND ORDER

This case arises under Section 167 of the Workforce Investment Act of 1998 (WIA), as amended, and its implementing regulations.¹ That section authorizes the United States Department of Labor (DOL), through the National Farmworker Jobs Program (NFJP), to award grants to eligible entities for the purpose of providing support to eligible migrant and seasonal farmworkers through employment opportunities, training programs, educational assistance, and other “workforce investment activities.”² Here, a DOL grant officer awarded a NFJP grant for the Puerto Rico service area to Rural Opportunities, Inc. (ROI). A competing grant applicant, the Commonwealth of Puerto Rico’s Department of Labor and Human Resources, Right to Employment Administration (REA), appealed the grant officer’s award to ROI. After a hearing, a DOL Administrative Law Judge (ALJ) vacated the grant officer’s award but did not award the grant to REA. We reverse that part of the ALJ’s decision in which he vacated the grant award to ROI.

BACKGROUND

Statutory and Regulatory Scheme, Federal Register

Under Section 167, every two years the Secretary of Labor “shall, on a competitive basis, make grants to, or enter into contracts with, eligible entities to carry out” certain activities.³ The regulations state that the purpose of the National Farmworker Jobs Program “is to strengthen the ability of eligible migrant and seasonal farmworkers and their families to achieve economic self-sufficiency.”⁴ “To be eligible to receive a grant or enter into a contract under this section, an entity shall have an

¹ 29 U.S.C.A. § 2912 (West 1999 & Supp. 2008); 20 C.F.R. Parts 667, 669 (2008).

² 29 U.S.C.A. § 2912; 20 C.F.R. Part 669.

³ 29 U.S.C.A. § 2912(a). “Authorized activities” include “workforce investment activities (including youth activities) and . . . related assistance for eligible migrant and seasonal farmworkers, which may include employment, training, educational assistance, literary assistance, an English language program, worker safety training, housing, supportive services, dropout prevention activities, followup [sic] services for those individuals placed in employment, self-employment and related business enterprise development education as needed . . . and technical assistance relating to capacity enhancement in such areas as management information technology.” 29 U.S.C.A. § 2912(d).

⁴ 20 C.F.R. § 669.100.

understanding of the problems of eligible migrant and seasonal farmworkers (including dependents), a familiarity with the area to be served, and the ability to demonstrate a capacity to administer effectively a diversified program of workforce investment activities (including youth activities) and related assistance for eligible migrant and seasonal farmworkers.”⁵

In April 2007, DOL published a Solicitation for Grant Application (SGA) in the Federal Register.⁶ The solicitation contains the procedures by which a grant officer from DOL’s Employment and Training Administration (ETA) selects the grantee who would receive funds to operate the NFJP in a designated state service area.⁷ These grants were to be awarded for two years: Program Year 2007 (July 1, 2007 - June 30, 2008) and Program Year 2008 (July 1, 2008 - June 30, 2009). The latter grant was “dependent on the availability of funds through the [fiscal year] 2008 appropriations process.”⁸

Under the SGA, the grant officer first selects a potential grantee(s) and then makes a final selection “based on what best meets the needs of eligible migrants and seasonal farmworkers in the area to be served.”⁹ In the selection process, the grant officer “may consider any information that comes to his or her attention, including past performance under a previous grant and information from the program office.”¹⁰

The SGA provided that a review panel, convened by the grant officer, would rate each applicant according to certain specified “criteria scoring factors.”¹¹ The panel would recommend for grant award those applicants that scored at least eighty out of a possible one-hundred points; the panel would not recommend applicants rated below eighty points.¹² The SGA specifies, however, that “panel reviews are critical to the

⁵ 29 U.S.C.A. § 2912(b).

⁶ 72 Fed. Reg. 19,972-19,980 (April 20, 2007). Published by the Office of the Federal Register, National Archives and Records Administration, the Federal Register is the official daily publication for rules, proposed rules, and notices of Federal agencies and organizations, as well as executive orders and other presidential documents.

⁷ *Id.*

⁸ *Id.* at 19,974.

⁹ *Id.* at 19,979.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

selection of grantees but are advisory in nature, and their recommendations are not binding on the Grant Officer.”¹³

The SGA also provides that when none of the applicants score eighty or above, the grant officer must follow the process set forth in Section II.¹⁴ Section II states that in cases where a state agency (like REA) is an applicant and all of the applicants are found to be “not fundable,” as in this case, DOL “reserves the right to designate another organization to operate the [National Farmworker Jobs Program] in that state.”¹⁵

The SGA also mandates that DOL conduct a “responsibility review” of each potential grantee. The SGA explains, “The responsibility review relies on examining available records to determine if an applicant has a satisfactory history of accounting for Federal funds and property.”¹⁶ “The responsibility review is independent of the competitive process” and applicants “failing to meet the standards of the responsibility review may be disqualified for selection as grantees, irrespective of their standing in the competition.”¹⁷ The regulation lists 14 points of inquiry, two of which address performance.¹⁸

Facts and Procedural History

This litigation began when a DOL grant officer selected ROI over REA for the Program Year 2007-2008 NFJP Puerto Rico grant. REA, which had previously administered the NFJP grant in Puerto Rico, objected and requested a hearing. But before the hearing, DOL moved to remand the case to the grant officer, alleging that the selection process may have been flawed. A DOL ALJ granted that motion on August 14, 2007.¹⁹

Following the remand and a new selection process, the grant officer again awarded the grant to ROI. REA again objected, requested a hearing, and moved for summary decision. On November 13, 2007, ALJ Stansell-Gamm denied the motion, but

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 19,974.

¹⁶ *Id.* See 20 CFR § 667.170.

¹⁷ 72 Fed. Reg. 19,974.

¹⁸ See 20 CFR § 667.170(a)(5), (a)(6).

¹⁹ *Commonwealth of Puerto Rico v. U.S. Dept’t of Labor*, 2007-WIA-003 (ALJ Aug. 14, 2007).

without actually removing ROI as grantee, he vacated the award to ROI because he determined that the review panel misapplied the scoring criteria.²⁰ He also suggested the need for a new selection process.²¹

ROI then petitioned the Administrative Review Board (ARB or Board) to review ALJ Stansell-Gamm's November 13, 2007 decision. While ROI's appeal was pending, REA filed a motion requesting that ALJ Stansell-Gamm order DOL to discontinue funding ROI's grant award, which, if granted, would effectively remove ROI as the grantee in Puerto Rico. On December 4, 2007, ALJ Stansell-Gamm denied that motion because the ARB had not yet determined whether to accept ROI's petition for review.²² Also, the regulation regarding grantee removal does not mandate immediate termination of grant funding. Instead, it provides for a transition period.²³ But when ROI learned that DOL intended to institute a third panel review, it withdrew its appeal to the ARB.²⁴

DOL thereafter appointed a new grant officer who undertook an entirely new selection process. The panel applied the SGA selection criteria and rendered scores for both ROI and REA below the eighty-point threshold. Consistent with the SGA, the panel recommended neither applicant. The grant officer testified that he therefore gave no further consideration to the panel review scores.²⁵ He then informed Alina Walker of DOL's NFJP program office that neither applicant had scored eighty or more points and, consistent with the SGA's terms, asked her if she knew of another entity that was familiar with the Puerto Rico service area and capable enough to operate the NFJP there. Walker did not know of such an organization.²⁶

²⁰ *Commonwealth of Puerto Rico v. U.S. Dep't of Labor*, 2007-WIA-010, slip op. at 6, 7 (ALJ Nov. 13, 2007).

²¹ *Id.* at 7.

²² *Commonwealth of Puerto Rico v. U.S. Dep't of Labor*, 2007-WIA-010, slip op. at 2 (ALJ Dec. 4, 2007).

²³ "Any organization selected and/or funded as a WIA [Indian and Native American Programs] or [National Farmworker Jobs Program] grantee is subject to being removed as grantee in the event an ALJ decision so orders. The Grant Officer provides instructions on transition and close-out to a grantee which is removed." 20 C.F.R. § 667.825(c). Further, the Secretary of Labor can terminate an organization's designation as a grantee for cause in emergency circumstances and the grant officer can so terminate "if there is a substantial and persistent violation" of the WIA's requirements or its implementing regulations. 20 C.F.R. § 669.230.

²⁴ *See* ARB's February 6, 2008 Final Decision and Order Dismissing Appeal (ARB No. 08-019) slip op. at 2.

²⁵ Hearing Transcript (T.) at 263, 273.

The grant officer also conducted the “responsibility review.” He sought and received information from Walker pertaining to the responsibility review criteria.²⁷ Specifically, Walker provided statistics and other performance and financial information on both ROI and REA.²⁸ Walker characterized as “impressive” ROI’s performance as the NFJP grantee in Puerto Rico from July 1, 2007, through March 31, 2008 – the latest data available at that time.²⁹

In his ensuing June 10, 2008 decision, the grant officer awarded the grant to ROI. One of the reasons for doing so was ROI’s satisfactory performance as the NFJP grantee in Puerto Rico from July 2007 through March 2008.³⁰ REA objected and requested a hearing. The ALJ held a hearing from August 12-14, 2008, in Washington, D.C. In his September 26, 2008 Decision and Order (D. & O.), the ALJ concluded that because the grant officer relied on ROI’s performance under a grant that ALJ Stansell-Gamm later vacated, the grant officer acted unreasonably in awarding the grant to ROI. Therefore, the ALJ vacated the award to ROI.³¹ He decided, however, that the grant officer’s decision not to select REA was not unreasonable, arbitrary or unlawful.³²

DOL and ROI filed exceptions to that part of the ALJ’s D. & O. wherein he vacated the grant award to ROI. Both ask us to reverse the ALJ’s order vacating the grant award to ROI. REA filed a response brief addressing both appeals. REA urges us to affirm the ALJ’s order vacating the grant award to ROI and also requests that we designate it as the NFJP grantee in Puerto Rico for the remainder of the grant term. DOL and ROI filed rebuttal briefs.

²⁶ *Id.*

²⁷ Respondent’s Exhibit 2. *See* 20 C.F.R. § 667.170.

²⁸ Respondent’s Exhibit 2. As stated earlier, REA had previously served as the NFJP grantee in Puerto Rico.

²⁹ *Id.*

³⁰ Administrative Record (AR), Tab B. The Administrative Record is marked “Respondent’s Exhibit 1.”

³¹ D. & O. at 11.

³² *Id.* at 10-11.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 20 C.F.R. § 667.830. By regulation, our review of the grant officer's June 10, 2008 decision is limited to determining "whether there is a basis in the record to support the decision."³³ This standard is highly deferential and is akin to the "arbitrary and capricious" standard that federal courts use.³⁴ Under this standard, the grant officer's decision must be affirmed unless the party challenging the decision can demonstrate that the decision lacked any rational basis.³⁵ As the Secretary of Labor noted in *North Dakota Rural Development Corp.*, "This is a difficult standard and properly so, because there must be considerable discretion exercised in determining the award of Department funds among multiple grant applications."³⁶ When there is a basis in the record for the grant officer's decision, "neither an ALJ nor the Secretary may reverse the determination merely because he might weigh the same information and call the balance differently."³⁷

DISCUSSION

The ALJ Erred When He Vacated the Grant Officer's Award to ROI

The ALJ determined that the panel review process and the responsibility review process were conducted properly.³⁸ But he held that because the grant officer awarded ROI the grant because of his concern for "continuity of service" and on the basis of its performance as the "incumbent" grantee, the grant officer acted arbitrarily and unreasonably since ALJ Stansell-Gamm had previously invalidated ROI's appointment as the Puerto Rico NFJP grantee. The ALJ explained:

³³ 20 C.F.R. § 667.825(a).

³⁴ *United Tribes of Kansas & Southeast Nebraska, Inc. v. U.S. Dep't of Labor, ETA*, ARB No. 01-026, ALJ No. 2000-WIA-003, slip op. at 5 (ARB Aug. 6, 2001).

³⁵ *Id.*, citing *North Dakota Rural Dev. Corp. v. U.S. Dep't of Labor*, 1985-JTP-004 (Sec'y Mar. 25, 1986).

³⁶ *North Dakota Rural Dev. Corp.*, slip op. at 5.

³⁷ *Id.*

³⁸ D. & O. at 5, 11. The grant officer testified that because the panel review process resulted in a score of less than 80 points for each applicant, the scores served to "throw[] ... out" both applicants from the overall selection process. T. at 263, 404. He testified that those scores "were irrelevant to my next phase." *Id.* at 273. The grant officer also testified that he "made no determination that either applicant failed the responsibility test." *Id.* at 285.

Although the Grant Officer stated that he considered ROI's performance data, all the performance he considered took place pursuant to an invalidated grant.[] (Tr. 304) The incumbency and performance data on which he relied was wholly undertaken pursuant to a selection that had previously been adjudged to be irrational, arbitrary and not in accordance with law. The Department of Labor may not ignore with impunity a judicial ruling vacating its selection, retain the selected grantee as the NFJP administrator, and then point to incumbency under the vacated, invalid ruling as a reasonable basis for re-selecting the party. Such conduct is arbitrary, capricious, in conflict with judicial orders, and it does not form a reasonable basis on which to select a grantee under the WIA. This tribunal so holds.^[39]

DOL acknowledges that ROI's grant will expire June 30, 2009, and states that its "primary purpose at this stage is to vindicate the grant officers' authority, under this and subsequent grantee selection processes, to select the applicants that best meet the needs of the service populations, using all information that comes to their attention."⁴⁰ DOL asks the Board to reverse the ALJ's decision vacating the grant officer's grant award to ROI, arguing that the ALJ disregarded pertinent law and evidence and abused his discretion by substituting his judgment for the grant officer's.

DOL and ROI point out that the grant officer's reliance on ROI's demonstrated successful performance in serving the migrant and seasonal farmworkers in Puerto Rico is consistent with the SGA. As noted earlier, the SGA specifically authorizes the grant officer to "consider any information that comes to his or her attention, including past performance under a previous grant and information from the program office."⁴¹ The grant officer considered the performance statistics the program office communicated to him, including data from July 1, 2007, when ROI began its term as grantee, through March 31, 2008.⁴² And, in his June 10, 2008 decision, the grant officer wrote that he selected ROI as grantee because, among other reasons, he "verified that ROI is performing successfully," and he "found that it is in the best interests of the participants being served to have the continuity of service from the current provider ROI."⁴³

³⁹ D. & O. at 10.

⁴⁰ Respondent's Rebuttal Brief at 2.

⁴¹ 72 Fed. Reg. 19,979.

⁴² Respondent's Exhibit 2; AR Tab B; T. at 308, 453-54.

⁴³ AR. Tab B.

Thus, the record supports the fact that the grant officer specifically considered information that the SGA directs him to employ in awarding a grant. According to the ALJ, however, the information that Walker provided to the grant officer was “of questionable value and could not reasonably form the basis for his decision.”⁴⁴ But when an ALJ substitutes his opinion for the grant officer’s, he abuses his discretion. This is so because, as we noted earlier, where there is a basis in the record for the grant officer’s decision, “neither an ALJ nor the Secretary may reverse the determination merely because he might weigh the same information and call the balance differently.”⁴⁵

DOL and ROI further argue that the ALJ erred in holding that the grant officer’s reasons for awarding the grant to ROI - continuity of service and performance as the incumbent grantee - were arbitrary and capricious and in conflict with judicial orders because ROI was operating under a vacated grant award.⁴⁶ As authority for the grant officer’s decision, DOL and ROI point to *Lifelines Foundations, Inc. v. U.S. Dep’t of Labor* in which the ALJ upheld the grant officer’s selection of an incumbent grantee despite its lower panel score on the basis of a demonstrated capacity to provide services under the WIA’s Indian and Native American Programs.⁴⁷ The ALJ distinguished *Lifelines* from the present case because the incumbent grantee in *Lifelines* “was operating pursuant to a valid, legal grant” whereas “the entirety” of ROI’s performance as the incumbent NFJP grantee in Puerto Rico “was premised on a grant award that had been legally invalidated.”⁴⁸ DOL and ROI contend that the ALJ, without citing any legal authority, invented a distinction between performance under a valid versus an invalid grant award.

We accept the argument that there is no basis for a distinction. Moreover, the SGA specifically permitted the grant officer to consider “any information that comes to his or her attention, including past performance under a previous grant and information from the program office.”⁴⁹ Since the ALJ substituted his judgment for that of the grant officer about what the grant officer may consider, and no legal authority supports that judgment, he abused his discretion. We find that the grant officer did not abuse his discretion in awarding the grant to ROI on the basis of its demonstrated successful performance.

⁴⁴ D. & O. at 6, 10.

⁴⁵ *North Dakota Rural Dev. Corp.*, slip op. at 5.

⁴⁶ Respondent’s Brief at 10-12; ROI’s Brief at 17-21.

⁴⁷ 2004-WIA-002 (ALJ Mar. 23, 2005).

⁴⁸ D. & O. at 9. The ALJ’s indication that the “entirety” of ROI’s performance occurred under an invalidated grant is inaccurate because the grant began July 1, 2007, and ALJ Stansell-Gamm did not vacate it until November 13, 2007.

⁴⁹ 72 Fed. Reg. 19,972, 19,979 (emphasis added).

REA's Arguments

REA argues that both the panel review process and the responsibility review were faulty. With regard to the panel, REA argues that the grant officer “hand-picked” panel members who were unqualified for the work.⁵⁰ REA also contends that the panel misapplied the scoring criteria.⁵¹ The ALJ rejected these arguments, finding that the record contains no evidence of misapplication of the scoring criteria and neither the regulations nor the SGA requires that the panel contain WIA experts.⁵² We concur with the ALJ because the record and applicable regulations support these findings. Furthermore, these issues did not inform the grant officer’s decision to select ROI over REA.⁵³

With regard to the responsibility review, REA argues that Walker provided performance and financial information to the grant officer which the grant officer did not verify and which, REA asserts, is incorrect.⁵⁴ It contends that the ARB should disregard this information because Walker was not called to testify at the hearing and because, REA asserts, her testimony was impeached in other NFJP cases.⁵⁵ REA also argues that it was DOL’s responsibility, not the grant officer’s, to conduct the responsibility review. Alternatively, to the extent that it was the grant officer’s responsibility, REA asserts that he improperly allowed Walker “dispositive involvement” in his selection decision.⁵⁶ The ALJ rejected these arguments, finding that “the record supports the Grant Officer’s process for conducting his responsibility review,” that neither the regulations nor the SGA precludes the grant officer from performing the responsibility review, and that “[c]onsultation with the Program Office is expressly permitted, and the response the Grant Officer received indicates that the information was based on records in the Department’s possession.”⁵⁷ The ALJ’s rulings on these issues are proper because, again, the record, the SGA, and the applicable regulations support them. We also note the grant

⁵⁰ Complainant’s Response Brief at 15-19, 32-33.

⁵¹ *Id.* at 33-34.

⁵² D. & O. at 5 n.2, 8.

⁵³ T. at 263, 273, 404.

⁵⁴ Complainant’s Response Brief at 8-11, 12-14.

⁵⁵ *Id.* at 19-20.

⁵⁶ *Id.* at 29.

⁵⁷ D. & O. at 8, 10.

officer's testimony that he "made no determination that either applicant failed the responsibility test."⁵⁸

REA also contends that the Board should affirm the ALJ's decision to vacate the grant officer's selection of ROI as the NFJP grantee in Puerto Rico because the grant officer failed to meet his burden of production.⁵⁹ The grant officer "has the burden of production to support her or his decision" and "[t]o this end, the Grant Officer prepares and files an administrative file in support of the decision which must be made part of the record."⁶⁰ REA argues that the Administrative Record "contains no evidence at all," let alone any evidence sufficient to support the grant officer's decision.⁶¹

At the hearing, REA objected to admission of Respondent's Exhibit 2, e-mail exchanges between the grant officer and Walker concerning ROI's performance as the NFJP grantee. It argued then, and now to us, that since the grant officer did not include the e-mails as part of his administrative file, they should not be part of the overall administrative record. The ALJ admitted the e-mails because, pursuant to regulation, he had a duty to determine if "there is a basis in the record to support the [grant officer's] decision."⁶² The ALJ ruled that "record," as used therein, meant the information that the grant officer relied upon to make his decision and not merely the contents of the administrative file.⁶³ Further, REA cannot argue that it was surprised when DOL proffered the exhibit.⁶⁴ Thus, since the ALJ's ruling is consistent with his duty to determine if a basis exists for the grant officer's award, he did not abuse his discretion in admitting the exhibit.

Finally, in denying REA's request to be selected as the NFJP grantee in Puerto Rico, the ALJ found that REA did not prove that the grant officer's decision not to select it was unreasonable, arbitrary, or not in accordance with law.⁶⁵ REA did not file any exception to the ALJ's ruling with us. Only in rebuttal to DOL and ROI's briefs in support of their respective appeals does REA contend that the grant officer should have

⁵⁸ T. at 285.

⁵⁹ Complainant's Response Brief at 21-24.

⁶⁰ 20 C.F.R. § 667.810(e).

⁶¹ Complainant's Response Brief at 22.

⁶² T. at 366-409. *See* 20 C.F.R. § 667.825(a).

⁶³ T. at 385.

⁶⁴ *Id.* at 386-389.

⁶⁵ D. & O. at 11.

selected it.⁶⁶ The regulations state that any exception not specifically urged is deemed to have been waived.⁶⁷ Therefore, REA waived its challenge to the grant officer's decision not to select it.

CONCLUSION

The ALJ erred in vacating the grant officer's decision to award the Program Year 2007 and Program Year 2008 NFJP grants for the Puerto Rico service area to ROI because the record contains a rational basis for that decision, and the relevant regulations support it. Therefore, we **REVERSE** the ALJ's Decision and Order vacating the award to ROI and **AFFIRM** the grant officer's award.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

⁶⁶ Complainant's Response Brief *passim*.

⁶⁷ 20 C.F.R. § 667.830(b).