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84ofc20c.htm

DATE: January 23, 1989

CASE NO. 84-OFC-20

IN THE MATTER OF

OFFICE OF FEDERAL CONTRACT COMPLIANCE
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
PLAINTIFF,

V.

THE UNIVERSITY OF NORTH CAROLINA (UNC),
DEFENDANT.

BEFORE: THE ACTING SECRETARY OF LABOR[1]

DECISION AND FINAL ADMINISTRATIVE ORDER

The issue in this case is whether government contracts entered into by certain branches of the University of North Carolina (UNC) confer jurisdiction over other branches of UNC which hold no government contracts, under the three procurement-related equal employment opportunity laws administered by Plaintiff: Executive Order No. 11,246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §793 (1982); and Section 402 of the Vietnam Era Veterans Readjustment Assistance Act, as amended, 38 U.S.C. §2012 (1982).

Plaintiff filed this action on July 20, 1984,[2] alleging that Defendant violated the above laws when Defendant refused to permit access to records and to permit onsite inspection by Plaintiff for the purpose of conducting compliance reviews at the University of North Carolina-Asheville (UNC-A) and the North Carolina School of the Arts (NCSA). It is undisputed that various constituent institutions of Defendant were awarded Federal contracts between March 1, 1981 and June 1985 with a total value of \$56,153,343.00, although none of these contracts was awarded to either UNC-A or NCSA. See generally 41 C.F.R. SS 60-1.40, 60-2.1, 60-250.5, 60-741.5, and 41 C.F.R. Part 60-60 (1987). Defendant moved to dismiss the complaint on the grounds that each constituent institution of UNC is a separate state agency and that, therefore, Plaintiff had no jurisdiction over UNC-A or NCSA because neither institution holds government contracts.

Administrative Law Judge (ALJ) David A. Clarke, Jr. denied

[PAGE 2]

Von Brand granted Plaintiff's motion for summary judgment based on ALJ Clarke's ruling. Recommended Decision and order (R.D. and O.) of December 12, 1986, at 2. Defendant filed exceptions to the R.D. and O. and a supporting brief, and Plaintiff filed responses.

Defendant asserted four exceptions to the R.D. and O. Each exception, however, challenges a conclusion of the ALJ which is dependent upon a determination of the underlying issue, that is, whether UNC is one state agency (albeit with numerous branches or divisions) or sixteen separate state agencies to which the three laws may be applied only if each independently meets the provisions of the regulations cited above.

The statute and regulations establishing and governing the University of North Carolina contain numerous indicia that UNC is a single agency with 16 branches or divisions. The state law establishing the University of North Carolina and defining its powers and duties, North Carolina General Statutes, Chapter 116, Article I (1983) provides, among other things:

- "The Board of Governors of the University of North Carolina shall be known and distinguished by the name of 'the University of North Carolina' and shall continue as a body politic and corporate. . . ." S 116-3. (None of the constituent institutions nor any of their respective boards of trustees is constituted by the statute as a body politic and corporate. See N.C. Gen.Stat. Chapter 116, Article 1, Part 3.)

- The Board of Governors has the power to receive and dispose of gifts from donors, to sue and be sued in court, and to "do all such things as are usually done by bodies corporate and politic..." 116-3. (None of the constituent nor any of their respective boards of trustees has any of these powers.)

- "The Board of Governors shall...govern the 16 constituent institutions...116-11(1).

- "The Board of Governors shall be responsible for the general determination, control, supervision, management and governance of all affairs of the constituent institutions. For this purpose the Board may adopt such policies and regulations as it may deem wise." S 116-11(2).

[PAGE 3]

- "The Board shall determine the functions, educational activities and academic programs of the constituent institutions" 116-11(3).

- "[T]he Board shall...elect...the Chancellor of each of the constituent institutions..." 116-11(4)
- "The Board of Governors shall...appoint and fix the compensation of all vice-chancellors, senior academic and administrative officers and persons having permanent tenure." 116-11(5)
- "The Board of Governors shall develop, prepare and present to the Governor...and the General Assembly a single, unified recommended budget for all of public senior higher education." 116-11(9)a.
- "The Board may delegate any part of its authority over the affairs of any institution to the board of trustees or, through the President, to the chancellor of the institution in any case where such delegation appears necessary or prudent to enable the institution to function in a proper and expeditious manner. Any delegation of authority may be rescinded by the Board at any time in whole or in part." 116-11(13).
- "The Board shall elect a President of the University of North Carolina. He shall be the chief administrative officer of the University." 116-14(a).

The "Code" of the Board of Governors (in the nature of regulations governing the administration of the University) provides that the President "shall be the chief administrative and executive officer of the University...He shall have complete authority to manage the affairs and execute the policies of the University . . . and its constituent institutions..." Code, 501 A.

The "constituent institutions," on the other hand, are defined as being simply parts of the University of North Carolina. See N.C. Gen. Stat. 116-4 (listing the 16 constituent institutions, including UNC-A and NCSA, of which the University is "composed.") See also N.C. Gen.Stat. 116-65 ("The North Carolina School of the Arts is part of the University of North Carolina..."). The powers of the boards of trustees of the constituent institutions, in contrast to those of the Board of Governors, are limited to "the functions prescribed for [them]"

[PAGE 4]

which are "defined and delegated by the Board of Governors." 116-33. The chancellor of each constituent institution is the "administrative and executive head of the institution [who] exercises complete executive authority...subject to the direction of the President." 116-34(a) (emphasis added).

It is thus apparent that the University of North Carolina is, by definition, one state agency, not sixteen separate, independent agencies. The Code of the Board of Governors describes UNC simply as "a single, multi-campus university..." Code, 102. None of UNC's arguments, discussed below, supports a different conclusion.

UNC argues that Section 202 of Executive Order No. 11,246 (containing the basic equal employment opportunity contract clause), and sections 503 and 402, apply only to the "contractor" or "the party contracting with the United States," respectively. Therefore, the obligations imposed by those laws, UNC argues, only apply to the contractor and those privy to the contract. The branches of UNC which do hold contracts entered into them without review or approval by the Board of Governors or the other institutions. Therefore UNC argues, institutions such as UNC-A and NCSA, which hold no contracts, are not covered.

This argument assumes the issued to be proved here, that UNC-A and NCSA are separate independent agencies and could only be covered if they each had government contracts or were privy to one or more government contracts of the other institutions. But the North Carolina statute and regulations described above make it clear that UNC is a single agency of which UNC-A and NCSA are only parts. It is not necessary, therefore, to make a finding of privity of contract to established coverage.

The fact that the government contracts of some constituent institutions were entered into without review or approval by the Board of Governors or by the other constituent institutions has little bearing on the issue here. The constituent institutions, their chancellors and other officers have delegated power to contract, but that delegation does not make them separate and independent of the University. Just as in any large, geographically dispersed organization, where designated officers and managers may have the power to enter into contracts as agents of the organization, the constituent institutions of UNC act as agents of the University and remain subject to the control of and responsible to the Board of Governors and the President. The constituent institutions are capable of entering into contracts only as agents of UNC because, under state law, only UNC, and not

[PAGE 5]

the constituent institutions, is a corporate body with the power to contract. In this circumstance, UNC's citation from agency law, Restatement (Second) of Agency 1(1) (1958), is inapposite. Brief in Support of Defendant's Exceptions to Recommended Decision and Order (Defendant's Brief) at 16-17. It is only applicable where independent persons mutually consent to enter into an agency relationship. Here, the constituent institutions are not "persons" or corporate bodies independent of UNC. They are only parts of the single corporate body for public senior education recognized in North Carolina law, the University of North Carolina. A more apt citation from agency law, given the complete power of control which the Board of Governors exercises over the constituent institutions and their officers, would be the definition of a "servant":

A servant is an agent employed by a master to perform services in his affairs whose physical conduct in the performance of the service is controlled by or is subject to the right to control by the master. Restatement (Second) of Agency, 2(2) (1958).

Nor is the rationale of the Court's decision in Pennhurst

State School and Hospital v. Halderman, 451 U.S.1 (1981), applicable here. Defendant references, Defendant's Brief at 8-10, the discussion in Pennhurst that a party knowingly consent to the consequence of its contracts, and asserts that only the constituent institutions who accepted Federal contracts should be bound by the contracted obligations. The argument, again, misses the mark. The equal opportunity clause (and by reference all applicable regulations) was presumably included in each contract required to include it. See 41 C.F.R. 60-1.4(a) and 60-1.5(a)(1); 41 C.F.R. SS 60-250.3(a)(1) and 60-250.4; 41 C.F.R. §§ 60-741.3(a)(1) and 60-741.4. If it was not, it would have been incorporated by operation of law. 41 C.F.R. S 60-1.4(e); 41 C.F.R. S 60-250.23; 41 C.F.R. 60-741.23. Thus, there could have been no doubt or lack of knowledge on the part of the contractor, the University of North Carolina, of the terms of the contracts.

Similarly, the exemption in 41 C.F.R. 60-1.5(a)(4) for "any agency, instrumentality or subdivision of [state] government which does not participate in work on or under the contract. . . ." does not exempt UNC-A or NCSA because, as discussed above, they are not separate state agencies. This exemption applies only to agencies constituted as separate and distinct from the agency holding the contract, for example, the North Carolina Department of Human Resources. See N.C. Gen. Stat. Chapter 143B, Art. 3, 143B-136, 143B-137 (1983).

[PAGE 6]

UNC cites a number of state and federal cases which it asserts specifically held that the constituent institutions of UNC are agencies of the State of North Carolina. Even if those cases so hold, I agree with ALJ Clarke that none of those cases decided the specific issue involved here, whether each constituent institution of UNC is a separate, independent state agency.

One case, which UNC does not address, dealt with a related issue and strongly supports the conclusion that UNC and its constituent institutions are a single state agency. The Supreme Court of North Carolina held in Student Bar Association Board of Governors, of the School of Law, University of North Carolina at Chapel Hill v. Byrd, 293 N.C. 594, 239 S.E. 2d 415 (1977) (Student Bar v. Bryd), that the North Carolina Open Meeting Law does not apply to meetings of the faculty of the School of Law of the University of North Carolina at Chapel Hill.

The Open Meeting Law only applies to "bodies politic" which are both "governing" and "governmental" bodies. 293 S.E. 2d at 420. The court went on to define "governing body":

[T]he "governing body" of an institution . . . means the body which has the ultimate power to determine its policies and control its activities. Such body may delegate to an employee or group of employees authority to make, initially, such decisions, but such employee or group of employees is not the "governing body" so long as his or its determinations are subject to review

and reversal by the higher authority, by whose permission such determination is made.

Id. at 421.

The court noted that N.C. Gen. Stat. 116-11(2) vests in the Board of Governors the powers of control, supervision, management and governance of all the affairs of all of the sixteen constituent institutions of UNC, including UNC-CH. Therefore, "[t]he faculty of the School of Law are employees of the Board of Governors, authorized by that Board to make certain determinations with reference to the day-to-day operation of the School of Law, but all such determinations by the faculty are subject to the power of the Board of Governors to modify or reverse them. The fact that such power is rarely used . . . does not abrogate it. Thus, the faculty of the School of Law is not the "governing body" of the School of Law. The "governing body" is the Board of Governors." Id.

[PAGE 7]

It is clear, under the state law and regulations discussed above, that the Chancellor and administrative officers of each constituent institution of UNC are employees of the Board of Governors, just as the faculty are, and subject to its direction and control. Each constituent institution therefore cannot be a separate, independent agency.

The North Carolina Supreme Court also noted in Student Bar v. Byrd that disclosure of information about individual students by opening Law School faculty meetings to the public could well result in the cutoff of federal education grant funds to the entire University, including all its constituent institutions, under the Family Educational Rights and Privacy Act (the Buckley Amendment to the General Education Provisions Act, 20 U.S.C. 12 1232g (b)(1) (1982)). 239 S.E. 2d at 419. That result could follow only if UNC were a single agency, because the Buckley Amendment provides that "[n]o funds shall be made available...to any educational agency or institution which has a policy or practice of permitting the release of educational records . . . of students without the written consent of their parents.." 20 U.S.C. 1232g(b)(1) (emphasis added). If each constituent of UNC were a separate, independent agency, violation of the Buckley Amendment by the School of Law at UNC-CH could lead only to a fund cut-off for UNC-CH, not the entire University.

Finally, Defendant asserts that the provisions of 41 C.F.R. S 60-1.5(a)(4), 41 C.F.R. 60-250.3(a)(4), and 41 C.F.R. 60-741.3(a)(4) which are entitled "Exemptions" or "Waivers", are not exemptions at all, but only explain and define the scope of Executive Order No. 11,246 and Sections 503 and 402, flowing directly from their language. The Secretary does not have the authority, UNC contends, to exempt any person who is a contractor, and also does not have the power to apply the three laws to separate state agencies which are not contractors. But here again, it is circular to assert that the obligations of the contracting state agency (i.e., under UNC's argument, certain

constituent institutions) may not be imposed under the regulations on other state agencies (UNC-A and NCSA), when the issue to be decided is whether UNC-A and NCSA are separate agencies. I hold that under North Carolina General Statutes Chapter 116, Article 1, and Student Bar v. Bryrd, the University of North Carolina at Asheville and the North Carolina School of the Arts are not separate agencies and are not entitled to the exemption in 41 C.F.R. SS 60-1.5(a)(4), 60-250.3(a)(4), and 60-741.3(a)(4). I make this finding based upon full review and consideration of the record pursuant to 41 C.F.R. §§ 60-30.29,

[PAGE 8]
60-30.30.

Accordingly, Defendant's exceptions are denied. I adopt the ALJ's recommended order, slightly modified, as follows:

It is ORDERED that Defendant, its officers, agents, successors and constituent institutions including the North Carolina School of the Arts and the University of North Carolina-Asheville are enjoined and restrained from violation of Executive order No. 11,246, the Rehabilitation Act of 1973, 29 U.S.C. §793 (1982), and the Vietnam Era Veterans Readjustment Assistance Act of 1974, 38 U.S.C. §2012 (1982) (hereinafter E.O. 11,246, Rehabilitation Act, and Vietnam Era Veterans Act respectively) in any of the following manners:

1. The University of North Carolina-Asheville and North Carolina School of the Arts shall not refuse Plaintiff access to their premises, books, records, and accounts for purposes of conducting compliance reviews pursuant to E.O. 11,246, the Rehabilitation Act and Vietnam Era Veterans Act.
2. No facility or constituent institution of Defendant shall unlawfully refuse Plaintiff access to its premises, books, records, and accounts for purposes of conducting compliance reviews pursuant to E.O. 11,246, the Rehabilitation Act and the Vietnam Era Veterans Act.
3. No facility or constituent institution of Defendant shall fail to maintain affirmative action programs which comply with E.O. 11,246, the Rehabilitation Act, and the Vietnam Era Veterans Act and with the regulations promulgated respectively thereto.

IT IS FURTHER ORDERED that, should Defendant fail to comply with the above-stated Order within 90 days of the date of this order, all Federal contracts and subcontracts by Defendant (whether in its own name or in the names of its constituent institutions) shall be cancelled and Defendant, its officers, successors and constituent institutions shall be declared ineligible for the award of any contract or subcontract or the extension or modification of any contract or subcontract funded in whole or in part by the United States until Defendant has

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satisfied the Secretary that Defendant is in compliance with the provisions of E.O. 11,246, the Rehabilitation Act, and the Vietnam Era Veterans Act and all rules, regulations and orders issued respectively thereunder which have been found to have been violated in this case.

SO ORDERED.
Acting Secretary of Labor
Washington, D.C.

[ENDNOTES]

[1]
There is presently a vacancy in the office of Secretary of Labor. The Deputy Secretary is authorized to "perform the duties of the Secretary until a successor is appointed..."
29 U.S.C. § 552 (1982 & Supp. IV 1987).

[2]
The procedural history of this case is set forth in detail in the Secretary's Notice and Order of January 27, 1987.

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