

COMMENTARY

AN UPDATE ON FEDERAL AGENCY RECOGNITION OF GRANTEE DUE PROCESS RIGHTS

TERSHER BOASBERG*
JACQUELINE COVEY LEIFER**

I. INTRODUCTION

We applaud Professor Catz's efforts to delineate a legal justification for according grantees due process rights upon termination of their grants by federal agencies. Such recognition is long overdue.¹ Indeed, the failure of governmental agencies (and the Congress and the courts) to perfect such rights is surprising given the massive amount of federal business conducted through grant actions and the lack of standards for guiding agency discretion in making grant awards.

We suspect that one of the reasons for allowing this broad latitude to remain unchecked is that many governmental authorities still prefer to play politics with grants. Political considerations are difficult to quantify, let alone substantiate, under the rigors of a due process hearing. It is easier to terminate a grant with no questions asked, and still easier just to refuse to re-fund.

Nevertheless, several of the larger federal grantor agencies have made notable progress over the last few years. We should give a pat on the back to the career agency lawyers and professionals for recognizing the existence of the due process wasteland and beginning to chart some clear pathways through it. They have received little help from the politicians and cannot be expected to prosper under the current administration's block grant approach.

* Partner, Boasberg, Klores, Feldesman & Tucker, Washington, D.C. B.A., 1956, Yale University; LL.B., 1959, Harvard University. Member, District of Columbia bar.

** Associate, Boasberg, Klores, Feldesman & Tucker, Washington, D.C. Former attorney-advisor in the Office of General Counsel, Department of Health and Human Services. B.A., 1974, J.D., 1977, Cornell University. Member, District of Columbia bar.

1. See Boasberg & Hewes, *The Washington Beat: Federal Grants and Due Process*, 6 URB. LAW. 399, 399 (1974).

This Comment focuses on two major advances that the larger federal grantor agencies have made toward full recognition of grantees' due process rights. First, these agencies increasingly recognize that there are a variety of grantor determinations in addition to termination (a rarely used sanction) that can adversely affect grantees and should be made appealable at the agency level. Second, despite the fact that a grantee's right to due process protections with respect to nontermination decisions still is being debated in the courts, these larger grantors have designed and implemented relatively sophisticated and protective appeal mechanisms.²

II. THE GROWTH OF PROCEDURAL PROTECTIONS IN NONTERMINATION CONTEXTS

A. *Types of Grant Disputes*

Grant termination, the action upon which Professor Catz primarily focuses, is only one of several types of adverse grantor decisions that grantees may choose to dispute. Termination admittedly is one of the harshest sanctions and therefore provides an easier springboard for constitutional arguments that grantees should be afforded full due process protections. Summarized below are a variety of other types of adverse agency decisions that are more prevalent than termination actions but are less likely to present as easy a case for grantee assertions of due process rights.³

A fundamental distinction is drawn by several agencies between "pre-award" disputes and "post-award" disputes. The term "pre-award" dispute refers to problems arising before a grant has been awarded to a complainant. The term "post-award" dispute refers to problems arising after a grant has been awarded.

2. We have recently completed a detailed study of existing federal grant appeals mechanisms commissioned by the Administrative Conference of the United States. Our study includes an in-depth analysis of all administrative and judicial decisions emanating from these appeals mechanisms and will result in recommendations concerning minimum due process protections to which grantees arguably are entitled.

3. In *Mil-Ka-Ko v. OEO*, 352 F. Supp. 169 (D.D.C. 1972), *aff'd mem.*, 492 F.2d 684 (D.C. Cir. 1974), for example, we were able to obtain a temporary restraining order postponing OEO's termination of the client's grant until we had time to adequately prepare for the statutorily mandated hearing. The agency simply withdrew its termination notice, waited two months until the grant expired, and then blithely failed to renew the client's grant.

1. *Pre-Award Disputes*

Pre-award disputes typically involve applicants who are disappointed with their nonselection or with the level of approved funding. Another type of pre-award dispute that has arisen repeatedly involves nonrenewal of continuation grants.⁴

When no statutory requirement to provide notice and hearing exists, the agencies rarely view the pre-award decisions discussed above as appealable. This works a particular hardship on those grantees who have been funded year after year at relatively the same funding level and who are suddenly confronted by an agency refusal to re-fund—even though there has been no cutback in appropriated dollars or unfavorable evaluation.

2. *Post-Award Disputes*

The following types of post-award disputes recur: (1) voiding of a grant; (2) suspension; (3) termination of a grant in whole or in part; (4) debarment; (5) cost disallowances; (6) denial of requests for approval to incur expenditures; (7) disapproval of indirect cost or other special rates; and (8) cease and desist orders.

In addition, any of the foregoing disputes may arise among a grantor agency, grantee, and subrecipients of a grantee. For example, a non-profit organization may challenge a grantee's decision to deny it a sub-grant award or to delegate an agency contract. A construction company may challenge a grantee's decision to award a construction contract under a grant to another company. Potential beneficiaries, employees, or participants of a funded program may challenge the validity of a grantee's actions. Even those federal agencies that do provide appeal procedures to handle grantor-grantee disputes generally will not consider complaints raised by third parties.

B. *Availability of Grant Appeals Mechanisms to Challenge Adverse Agency Decisions*

1. *The Majority of Grantors*

Most grantor agencies have not been aggressive in developing formal grant appeals procedures. Moreover, those that have initiated formal

4. "Continuation" grants are annual awards made to support a project over a multi-year project period. After the initial year of support, the grantee must apply for successive awards (or "renewal" funding), but is not required to compete with other projects for funding.

procedures allow appeals only insofar as the authorizing statute of a particular program requires the agency to provide notice and an opportunity for a hearing prior to making a specific type of final adverse decision.⁵ Indeed, the grant appeals regulations of the Department of Energy (DOE) specifically require the aggrieved party to demonstrate that a statute, regulation, or the grant agreement authorizes such an appeal.⁶

In the absence of a statutory mandate for procedural protections, several agencies have not developed any formal dispute resolution procedures whatsoever.⁷

2. *The Visible Minority*

A few of the larger grantor agencies, however, have actively pursued the development of formal grant appeals procedures and recognize the need for impartial administrative review of a variety of adverse decisions—not just terminations.

The Department of Health and Human Services (HHS), formerly the Department of Health, Education, and Welfare (HEW), pioneered this area by voluntarily establishing a Departmental Grant Appeals Board in 1972.⁸ HHS has drawn careful distinctions between pre-award and post-award disputes. Until recently, Board review was available for appeals of a variety of post-award determinations: suspension, termination, voiding, indirect cost rate and other special rate disputes, cost disallowances, and denials of written requests to incur expenditures under the grant. Effective September 30, 1981, amendments to the Board's rules further provide that a grantee may appeal the denial of a continuation grant application when the decision is based on prior per-

5. See, e.g., ACTION's grant appeals regulations, 45 C.F.R. §§ 1206.1-1 to .2-5 (1980), issued to implement 42 U.S.C. § 5052 (1976); Department of Justice grant appeals regulations, 28 C.F.R. §§ 18.1 -.80 (1980), issued to implement 42 U.S.C. § 3784 (Supp. III 1979).

6. See 10 C.F.R. § 1024.3(a) (1980).

7. Examples of grantor agencies that have not developed appeals procedures are the Department of Defense, the Federal Emergency Management Agency, the General Services Administration, and the Water Resources Council. The Small Business Administration does not have formal appeals procedures, but it inserts a "Disputes Clause" in each grant award document that permits appeals of post-award decisions to agency review committees or designated agency officials.

8. See 45 C.F.R. §§ 16.1-.91 (1980). Proper respect for those dearly departed, however, should give OEO credit as the first federal agency, both by statute and regulation, to provide grantees rights on suspension, termination, and denial of refunding. Economic Opportunity Act, § 604, 42 U.S.C. § 2944 (1976); 45 C.F.R. §§ 1050.115-1 to -8 (1980).

formance concerns.⁹

The Environmental Protection Agency (EPA) also has voluntarily established a Board of Assistance Appeals.¹⁰ EPA makes the pre-award/post-award distinction, but, unlike HHS, in addition to covering all post-award decisions, EPA has permitted appeals of pre-award disputes in mandatory grant programs.

The Department of Education (ED), which until 1980 was a component of HEW, has followed in footsteps of HHS by providing a formal appeals mechanism to cover a variety of post-award disputes far beyond those required by statute.¹¹ The Education Grant Appeals Board has jurisdiction over cost disallowances, withholding or termination decisions, cease and desist orders, voiding, disapproval of written requests to incur expenditures, cost allocation, and special rate disputes, as well as disapproval of state applications for grants under Title I of the Elementary and Secondary Education Act of 1965.

The Department of Labor (DOL) has expanded upon its statutory mandate to provide the opportunity for formal appeals, particularly to handle pre-award and post-award disputes arising under Comprehensive Employment and Training Act (CETA) grant programs.¹² Virtually every type of adverse decision has been appealed at DOL.

III. LEVEL OF PROTECTION PROVIDED GRANTEEES

A. *What Form May an Appeal Take?*

Grant-related administrative appeal procedures take various forms. The degree of formality of these procedures varies: (1) from agency to agency, (2) from program to program within an agency, and (3) from one type of adverse decision to another. Further, some agencies have developed a combination of formal and informal procedures.

The highest degree of formality is present in those few agencies that permit oral hearings with the full range of procedural protections contained in the Administrative Procedure Act,¹³ DOL's appeal process for the CETA program being the prime example. DOL uses an independent administrative law judge (ALJ) as the arbiter of disputes; permits

9. See 46 Fed. Reg. 43,816 (1981).

10. See 40 C.F.R. §§ 30.100-1150 (1981).

11. See 46 Fed. Reg. 27,304 (1981) (to be codified in 34 C.F.R. §§ 78.1-.86).

12. See 20 C.F.R. §§ 676.81-.93 (1980).

13. 5 U.S.C. §§ 553-706 (1976 & Supp. III 1979).

discovery; gives each side the opportunity to examine and cross-examine witnesses and to introduce written evidence; establishes burdens of proof; and provides generally that, absent an agency rule to the contrary, the Federal Rules of Civil Procedure govern the appeal process.

Several of the larger grantor agencies (HHS, EPA, ED, and DOE) have developed agency-wide grant appeals boards.¹⁴ These boards are governed by detailed rules of procedure that, at a minimum, assure development of a full written record and are staffed with permanent, impartial agency employees.¹⁵ Most of the boards encourage the parties to resolve disputes informally by holding prehearing conferences, and, at HHS, using trained mediators. In addition, HHS and EPA have developed expedited appeals mechanisms to resolve appeals that involve relatively small amounts of money.

Some agencies have developed rather complicated dispute resolution procedures but have not created formal grant appeals boards. At least two of these agencies, ACTION and CSA, differentiate between termination decisions and all other adverse decisions. They provide for relatively formal appeals in the termination context ("full and fair hearings" before the responsible official or an independent hearing examiner), and less formal appeals (through informal "show cause" meetings with the responsible official) in all other cases. The Department of Justice (DOJ), on the other hand, makes no distinction between types of disputes in deciding how formal an appeals proceeding to use. In every case, DOJ seeks to resolve disputes informally, with marked success. If efforts at informal resolution fail, formal hearings are held by either a DOJ official or, at the request of the appellant, an ALJ. The rest of the agencies generally resolve disputes only informally.

B. *Who Decides What Form an Appeal Should Take?*

An appellant has no choice concerning the form an appeal will take except in the few agencies (EPA, HHS, and DOE) that have developed alternative appeals methods.

EPA decides all cases involving less than \$50,000 on the basis of a

14. A few agencies have established grant appeals boards to handle disputes arising in a single program. The Department of Agriculture has created such a forum with respect to the Food Stamp, Child Care, and Summer Youth programs. The Department of Commerce's National Telecommunications and Information Administration (NTIA) has established a board to deal with appeals arising out of the Public Telecommunications Facilities Program.

15. An exception is ED, which staffs the majority of its Board with non-federal members.

written record without a conference or full-scale hearing. For cases over \$50,000, the appellant is entitled to elect a conference or a full-scale evidentiary hearing in addition to the submission of a written record. Neither the Board nor the Agency can override the appellant's election of procedure.

HHS uses an expedited process (written record plus telephone conference call) in cases involving \$25,000 or less unless the Board determines otherwise. If the Board does not permit or the parties do not request expedited review, a written record with briefs is required. In such cases, the Board may decide to hold a conference and, where complex issues or material facts are disputed, a full evidentiary hearing. The appellant may request a conference or hearing but is not entitled to either.¹⁶

DOE has the same three appeals methods, but the threshold amount for expedited appeals is \$10,000. The Board makes final decisions as to which method will be used in any particular case.

IV. PROGNOSIS

While the availability of appeals mechanisms and due process protections afforded grantees varies tremendously from agency to agency, there have been great advances made in recent years. Some agencies now have developed fairly sophisticated and protective procedures for grantees (and sometimes disappointed applicants) to resolve a variety of disputes including, but not limited to, termination actions.

The policies of the current administration and recent legislative changes may, however, curb drastically any future attempts to protect recipients of federal assistance. The administration successfully urged Congress to enact legislation that consolidates a large number of categorical project grant programs into a few block grant programs to be administered by the states.¹⁷ One of the key features of this shift is that former grantees will become subgrantees of a state. As a result, the

16. We recently sought to test this issue. When the Board denied appellant's request for an oral hearing, we filed a complaint in federal district court charging that there was a dispute as to certain material facts in the case and that, therefore, a hearing was warranted. *Community Relations—Social Development Commission of Milwaukee County v. Schweiker*, No. 81-0124 (D.D.C., filed Jan. 19, 1981). Before the court ruled on a motion for injunctive relief, the Board, through counsel, agreed to have the court remand the case to the Board. Recently, the Board agreed to grant a hearing to appellant.

17. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981).

former grantees will have no recourse to most federal agency appeal mechanisms because they are made available only to grantees and not subrecipients or third parties.¹⁸

Accordingly, the prognosis for growth in federal protections afforded to organizations that actually operate federally supported projects is bleak. Moreover, it is doubtful that many states will fill the federal gap because of cost considerations, if for no other reason. This throws the problem back into the laps of the courts, in which we hope Professor Catz's arguments will be persuasive.

18. For example, under HHS's block grant regulations, subrecipients who register complaints that the state has not complied with its assurances to HHS are not permitted to intervene as parties to any hearing conducted by HHS concerning the complaint. *See* 46 Fed. Reg. 48,591 (1981) (to be codified in 45 C.F.R. § 96.64).