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Recommended Appeal in State of Alabama on Behalf of the Department of Pensions and Security v. Gardner, Secretary of the Department of Health, Education and Welfare (N.D. Ala.)

I recommend that the Department take an immediate appeal from the order of February 3, 1967, granting the plaintiff's motion for preliminary injunction in the above case, and that the United States move the Court of Appeals for an expedited hearing.

Issues

There are three principal issues, one of jurisdiction and two on the merits:[1]

1. Whether any or all parts of the order of the Secretary of the Department of Health, Education, and Welfare, terminating welfare assistance funds under Title VI of the Civil Rights Act of 1964, are exclusively reviewable by the Court of Appeals rather than the District Court.

2. Whether the Regulations of the Department of Health, Education, and Welfare requiring the State agency to submit an assurance of compliance is authorized by Section 602 of Title VI providing for the federal agency to adopt uniform rules, regulations, and orders implementing Title VI.

1/ There is a minor subsidiary issue of venue which the Government raised in the alternative and which has not as yet been decided by the District Court.

3. Assuming the regulation is valid, did the purported assurance of compliance submitted by Alabama substantially conform to the regulations of the Department of Health, Education, and Welfare.

Statement

Shortly after the adoption of regulations by the Department of Health, Education, and Welfare implementing Title VI in December 1964, that Agency sought to obtain written assurances of compliance from each state welfare agency in the Country. These written committments under the regulations require the state agency to assure that they are complying with Title VI, and if not, to inventory their operations, identify the areas of discrimination and furnish in the statement of compliance the methods and time table for correction of the discrimination. By August 1965, each state agency, except Alabama, had complied with this requirement. On August 17, 1965, the Commissioner of Welfare sent the State agency a notice of determination that the State agency was in noncompliance and a notice of an opportunity for an administrative hearing. The hearing was held in October, 1965 ~~in Washington, D. C.~~, and in April 1966 the hearing examiner issued a recommended decision, finding the State agency in noncompliance and recommending termination of federal assistance with respect to the programs involved. This decision was approved by the Welfare Commissioner in November 1966 and the final order of the Secretary of Health, Education, and Welfare was issued on January 12, 1967. On January 13, 1967, the State filed this suit. We moved to dismiss on the grounds that under Title VI judicial review could be had only in the Court of Appeals.

On February 3, 1967, the District Court for the Northern District of Alabama took our motion to dismiss under advisement, but nevertheless issued a Temporary and Preliminary Injunction against Secretary Gardner, restraining him from withholding, discontinuing or cutting off financial assistance to the State, including the State Department of Pensions and Security, pursuant to the Secretary's order. The injunction is effective "pending final hearing and final decree, herein, and until modified by further court order." I notice of Appeal designated record motion for

Discussion

1. Jurisdiction

There are five titles in the Social Security Act under which the State of Alabama receives almost one million dollars per year in welfare assistance. These are Titles I (Old Age Assistance), IV (Aid to Families with Dependent Children), V (part 3) (Child Welfare Services), X (Aid to the Blind), and XIV (Aid to the Permanently and Totally Disabled).[2]

Section 603 of Title VI of the Civil Rights Act of 1964 provides for judicial review of administrative action terminating assistance "as may otherwise be provided by law for similar action taken by such department or agency on other grounds." In the event judicial review is not otherwise provided ~~under Section 603~~, review is in accordance with Section 10 of the Administrative Procedures Act which provide for review in a court of competent jurisdiction. 5 U.S.C. 703.

2/ Qualified as 42 U.S.C. 301-306, 601-609, 721-728, 1201-1206, 1351-1355.

The Social Security Act provides specifically for judicial review of administrative action under Titles I, IV, X, and XIV in the Court of Appeals for the circuit in which the state is located. 42 U.S.C. 1316(a), (3). Case law is clear that jurisdiction in the court provided by statute, is exclusive. See e.g., Fletcher v. Atomic Energy Commission, 192 F.2d 29 (C.A. D.C. [illegible] date

The remaining program (Title V (part 3), involves child welfare services and represents only one million of the one hundred million dollars which goes to the State annually. There is no specific provision in the Social Security Act for judicial review of administrative action under this Title, but there is a good argument that review should be in the Court of Appeals in this case.

For these three reasons, the fact that this is a state-wide program, Title V is integrally related to Title IV which provides for review in the Court of Appeals, and Title V represents such an insignificant portion of the total funds involved, review of the entire administrative action including Title V should be in the Court of Appeals. The jurisdiction of the Court of Appeals to review the Secretary's action relating to Title V is predicated on Section 603 of Title VI of the Civil Rights Act of 1964, which provides for judicial review "as may otherwise be provided by law for similar action taken by such department or agency on other grounds." In any event, wherever jurisdiction is proper with respect to Title V, review of action with respect to the other four titles must be in the Court of Appeals. See e.g., Black River Valley Broadcasting v. McNinch, 101 F.2d 235 (C.A. D.C.).

located in building that might be segregated, and that some of the institutions, hospitals, nurses' homes and doctors' offices are segregated. In my view the government's case is fairly weak on proof of actual discrimination and that the Department of Health, Education, and Welfare's regulations, and the Secretary's order made pursuant to those regulations, must stand or fall on the requirement that the State has not given an adequate assurance of compliance rather than the State is actually discriminating. In substance, therefore, the case is cast in terms of the reasonableness of this administrative requirement of an assurance as it relates to the implementation of the nondiscrimination requirements of Title VI.

3. The Assurance Which Alabama Submitted.

Three days after the Commissioner of Welfare at HEW noticed the State agency for administrative hearing, that agency submitted what purported to be an assurance in compliance with Title VI. The State's claim here is that the assurance complies with Title VI. Also implicit is the claim that it is in substantial compliance with the regulations. There can be no doubt that the State assurance is not in compliance with HEW's regulations.

What HEW requires is an inventory of the programs and facilities after which they expect the State agency to assure them that all such programs and facilities used in connection with these programs are operated in compliance with Title VI and the HEW regulations, and if not, what steps the agency is taking to correct the areas of discrimination. The

State agency did not do this. The purported assurance said that the State agency will comply with Title VI but suggests that a number of their county offices are in buildings furnished by local governing bodies and that they have no authority to control the physical arrangements in these buildings and that it would be impossible for them to see that separate facilities were discontinued. The assurance also states that the State agency understands that segregation exists in some of the vendor institutions and that some of these institutions are in compliance, but the State agency would not identify what action it would take to get the institutions that are segregated into compliance. The State's position with respect to doctors' offices expresses the consistent position they have taken with respect to vendor payments; namely, that it is not within the province, nor is it the duty of the State agency, to require such doctors to comply with the Civil Rights Act.

This aspect of the case is essentially factual. If we are right in our argument as to the validity of the regulation there would be little difficulty in sustaining the administrative finding that the State has not in fact complied with the regulation.

Court's Order

The District Court has not ruled on the Government's motion to dismiss, but, rather, took it under advisement. The Judge stated that the issue was complicated and that he had a criminal docket set for Tampa, Florida, but would try to decide the jurisdictional issue as quickly as possible after the two-and-one half week criminal term in Florida. Nevertheless, the Court went on to issue a temporary injunction pending final decree. We would propose to raise in the Court of Appeals both the jurisdictional issue as well as the merits of the case. Our theory would be that the Court had impliedly decided the jurisdictional issue adversely to the Government and has asserted jurisdiction by issuance of a preliminary injunction.

Secretary Gardner's order terminating financial assistance does not become effective until February 28, 1967, one month after the hearing on the motion to dismiss. The clear intention of the Court was to assert jurisdiction for the whole case and to enter an appealable order. At the close of the hearing he expressed publicly from the bench, when he announced that a preliminary injunction would be granted, that the matter will ultimately have to be resolved by the Court of Appeals and that that Court would consider ti as an emergency matter. The Judge added that if it goes to that Court "I [am] hopeful that they could consider the entire matter at that time and I feel like they would." We have also had indications that the plaintiff, if we appeal, is considering filing an alternative petition for review of the administrative decision in the Court of Appeals in the event of an unfavorable ruling on the appeal on the jurisdiction issues. This appeal would be justified even if there were no prospect of winning on the jurisdictional question as it relates to Title V. We feel confident of winning on the jurisdictional issue as it related to the other four programs and once the Court of Appeals assumed jurisdiction over the Secretary's order as it related to those four programs, the District Court would take no further action on Title V until the Court of Appeals determined the validity of the Health, Education and Welfare regulations.

Technically, in order to succeed, the United States must show an abuse of discretion in the District Court. If we are right on the jurisdictional issue or at least on the four titles which should clearly be in that Court, the assertion of jurisdiction and the granting of preliminary injunction one month before the effective date of the termination order, and prior to ruling on the motion to dismiss, would in my view be an abuse of discretion.

On the merits, I think we have a good argument that the failure to substantially comply with the assurance requirements of the regulations warrant, under Title VI, termination of assistance.

The objective of the Government is to get compliance by the State. The State's Attorney has indicated that the State would sign the appropriate assurance if their position is found to be in error in the courts. In my view, there is little likelihood of any reasonably expeditious resolution of the case in the District Court, even on the jurisdictional issue. The Judge has indicated as much. Under these circumstances, an appeal, win or lose, will not likely delay the case. I believe the United States has a responsibility in this case to take every possible legal step to expedite judicial review of Secretary Gardner's decision.

Conclusion

I recommend that we immediately appeal the District Court's order and ask the Court of Appeals for an expedited hearing.