

Accordingly, the following section has been added:

215.3(a)(3) If an application involves a grant to a state administrative agency which will pass through assistance to subrecipients, the Department of Labor will refer and process each subrecipient's respective portion of the project in accordance with this section. If a state administrative agency has previously provided employee protections on behalf of subrecipients, the referral will be based on those terms and conditions. These procedures are not applicable to grants under section 5311.

It was also suggested that the Department should automatically certify section 5309 (formerly section 3) projects for rural providers on the basis of the Special Warranty. Under the guidelines, referrals for rural providers receiving funds under section 5309 will be based upon terms and conditions similar to those of the Special Warranty, unless there are previously certified arrangements which have been applied to the section 5309 projects. However, although the guidelines at § 215.3(b)(3)(iii) indicated that referrals for projects under section 5311 (formerly section 18) will be made on the basis of the Special Warranty, the Department will amend the proposed guidelines to continue to provide for automatic certification of applications pursuant to section 5311 for rural providers.

K. Procedure for Dispute Resolution to Determine Terms and Conditions of Final Certifications, § 215.3(e)(4)

One comment stated that "[t]he regulations explicitly decline to establish the manner of dispute resolution by the Department of Labor." Another indicated that § 215.3(e)(4) appears to give the Department the authority to utilize alternative methods of dispute resolution, noting that the statute does not allow the Department to delegate this authority to a third party. Section 215.3(e)(4) specifically reserves to the Department the sole authority to render the final determination. The statute does not mandate that the Department use a specific dispute resolution procedure.

L. Protections for Employees Not Represented by a Labor Organization

One comment indicated that § 215.4 improperly expands the protections afforded to employees not represented by a labor organization by affording such employees "the same protections" as those afforded to employees represented by a labor organization rather than "substantially the same protections."

The concerns raised by this comment that rights have been expanded have been clarified by amending the language in § 215.4(b) to eliminate any reference to the terms and conditions authorized in § 215.3(b). Instead, § 215.4(b) will provide, as in the prior guidelines, that the protective terms and conditions in the letter of certification will be set forth by the Department. There is no expansion of rights provided in these guidelines.

M. Procedures for Processing Amendatory Grant Applications

One comment suggested that "[t]he special processing exemption for 'amendatory applications' in § 215.3(c) as amplified in § 215.5 should be eliminated in its entirety." It argued that, since all grants are subject to only a 15 day review period for the purpose of filing any objections, and any grant amendment which revises a project in only "immaterial respects" would not give rise to an objection considered sufficient under the new procedures, turnaround is expedited and employee representatives should have the opportunity "to provide their views within the narrow time frame specified to ensure that the agency is fully informed regarding the potential effects of each project."

The automatic certification of amendatory grants is limited to those where changes are immaterial. If there is a change in the scope of a project, amendatory grants should not and will not be processed under this expedited procedure. The revised procedures for processing other grants should not give rise to new procedures for processing of amendatory grants containing immaterial changes which would have the potential for delaying their approval. Thus, the suggested changes to the proposed guidelines are not necessary.

N. Other Comments

1. One comment suggested that the proposed guidelines be withdrawn because they appear to draw substantial content from union proposed reforms. Another comment indicated that the "proposed rule has been undertaken without the input of the transit industry" and that State and local public body transit systems were not involved in the development of the NPRM. Several comments suggested that the regulations be withdrawn and that the rulemaking process be undertaken with greater consideration for the procedures set forth in Executive Order 12866 which "provides that interested parties should be involved prior to issuance of a proposed rule." The Department's decision to provide

30 days rather than 60 days for a comment period was also raised.

The Department developed language based on concepts favored by both unions and transit management. As demonstrated by the numerous comments received from interested parties from across the country, the rulemaking process in this instance has afforded all the interested parties with ample opportunity to provide comments and input on the procedural issues which are the subject of these guidelines.

2. One comment noted that the Department may view these procedures as "guidelines" rather than "rules." The comment further notes that "rules are binding on parties, including Federal agencies, and subject to specific rulemaking procedures; in contrast, "guidelines" are generally considered informal in nature and presumably are not binding on parties." There is no statutory authority to issue regulations under section 5333(b). The guidelines, however, are intended to be binding in administering this employee protection program.

3. Numerous comments addressed administrative processes followed by the Department and raised matters concerning the Administrative Procedures Act. It was suggested that procedural safeguards against what the parties characterize as "ex parte contacts" with labor representatives in pending matters should be addressed in the guidelines. Similarly, comments proposed that the guidelines address how final decisions on disputed issues would be made available under § 215.3(e)(5) and address the matter of the procedural ability to have access to and to rely on matters previously ruled upon by the Department. Finally, comments indicated that the proposed guidelines did not require the Department to "articulate the underlying legal rationale for its decisions" nor did they provide for meaningful judicial review for parties who receive an adverse ruling from the Department.

The Department does not believe that it is appropriate to restrict contacts with individual parties in the processing of certifications of employee protections. In processing FTA grant applications, the Department's role includes providing technical and mediatory assistance to the parties. As contemplated by the legislative history, the efforts of the Department are directed toward facilitating an agreement between the transit authority and the union in order to ensure that the requirements of the statute are satisfied. During mediation the Department's