



In the Matter of:

**FLORIDA DEPARTMENT OF LABOR
AND EMPLOYMENT SECURITY,**

COMPLAINANT,

v.

UNITED STATES DEPARTMENT OF LABOR,

RESPONDENT.

ARB CASE NO. 04-168

ALJ CASE NO. 99-JTP-16

DATE: February 28, 2005

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Carolyn D. Cummings, Esq., Cummings, Hobbs & Wallace, P.A., Tallahassee, Florida

For the Respondent:

Stephen R. Jones, Esq., Harry L. Sheinfeld, Esq., Charles D. Raymond, Esq., U.S. Department of Labor, Washington, D.C.

FINAL DECISION AND ORDER

This case is before the Administrative Review Board (ARB) pursuant to the United States Department of Labor Grant Officer's (Grant Officer) determination under the Job Training Partnership Act of 1982, as amended, (JTPA or Act), 29 U.S.C.A. §§ 1501 *et seq.* (West 1998), that the State of Florida unlawfully spent JTPA grant funds and that such funds were subject to repayment. The evidence and records of Florida are inadequate to show that the JTPA funds at issue were spent lawfully. Thus, the Grant Officer met his burden of production that Florida misspent the JTPA funds. Florida does not prevail because it has not met its burden of persuasion to show that the JTPA funds were nevertheless spent for lawful purposes. We therefore reverse the Administrative

Law Judge's (ALJ) Decision and Order (D. & O.) and affirm the Grant Officer's determination to disallow, and recover, Florida's expenditure of the JTPA grant funds.

BACKGROUND

The JTPA provides federal funding to state governments to finance job training and placement programs for economically disadvantaged individuals.¹ Specifically, JTPA Title II authorizes federal funding for disadvantaged youths, and JTPA Title III authorizes federal funding for dislocated workers. During the period at issue in this case, Florida was allocated federal JTPA Title III funds to retrain dislocated workers. Florida allocated sixty percent (60%) of the federal JTPA funds among several local service delivery areas, known locally as Regional Workforce Development Boards (RWDBs) or Private Industry Councils (PICs).² The RWDBs used the allocated JTPA Title III funds to recruit dislocated workers to enroll in community colleges and school district programs for retraining and to pay for their annual student tuition costs. The Grant Officer has no issue with the local RWDBs' allocation and expenditure of these JTPA Title III funds. The remaining forty percent (40%) of the federal JTPA funds allocated to Florida were held in a discretionary "Governor's Reserve" fund administered at the overall state level.

In 1994, the Florida Department of Labor and Employment Security (FDLES) initiated a Performance Based Incentive Fund (PBIF). The PBIF was funded, in part, by allocating a portion of the 40% of the JTPA funds contained in the "Governor's Reserve" fund, as well as by other federal and state funds (including a portion of community

¹ The Workforce Investment Act has superseded the JTPA. 29 U.S.C.A. § 2911 *et seq.* (West 2001). Pursuant to 1 U.S.C.A. § 109 (West 2001), however, the JTPA is treated as remaining in effect for the purposes of the Grant Officer's action to recover misspent JTPA funds. Section 109 provides:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C.A. § 109.

² Complainant's Exhibit (CX) 22 at 39.

colleges' and school districts' state appropriated funds).³ The purpose of the PBIF was to reward community colleges and school district programs for retraining certain qualified students, including qualified dislocated workers under JTPA Title III.⁴ "Incentive" payments were made from the PBIF to the schools if their eligible students reached certain levels of performance. Schools received payments if eligible students enrolled in school, completed certain qualified vocational courses, and were ultimately placed in higher paying jobs.⁵ The amount of the payments increased for each succeeding level of performance a student achieved and were higher if the student was a qualified JTPA Title III dislocated worker or other qualified student, as opposed to a general student.⁶

Florida asked the United States Department of Labor's (DOL) Employment and Training Administration (ETA) to review the draft PBIF legislation in 1994. In a November 1994 letter, prior to the implementation of the PBIF, DOL Assistant Secretary Doug Ross responded with comments on behalf of the ETA, which cautioned Florida that:

the procurement of any services utilizing federal funds ... must comply with 20 C.F.R. 627.420 of the JTPA regulations as well as Section 164 of the Act. These requirements ensure ... that services purchased with scarce public resources are reasonable and cost effective.... Duplicate payments ... would not be allowable.... Since eligible dislocated workers who receive Title III funded services are by definition participants in JTPA Title III ...,

³ The PBIF consisted, in part, of JTPA Title III dislocated worker funds and Title II disadvantaged youth funds, as well as Florida general revenue and lottery funds. Respondent's Exhibits (RX) 1 at 48; RX 2 at 153, 155; CX 22 at 16; Testimony of Robert O'Leary, Hearing Transcript at 318.

⁴ Community colleges and school districts were eligible to receive payments from the PBIF for retraining students who were dislocated workers under JTPA Title III and disadvantaged youths under Title II, as well as students who were disabled, economically disadvantaged or of limited English proficiency. CX 22 at 23.

⁵ See RX 1 at 40; RX 2 at 151; CX 22 at 15.

⁶ See RX 2 at 79; Testimony of Linda Hartnig, Florida Department of Education, Hearing Transcript (HT) at 463-64; Testimony of Lenny Larson, Florida Department of Education, HT at 562. See also CX 22 at 15 (No PBIF payments were made for a general student's enrollment).

JTPA Title III reporting and record keeping requirements for those individuals will apply.

RX 1 at 9-10.⁷

The relevant Florida statute at the time capped the amount of a student's annual tuition at 10 percent of the prior year's cost for a certificate in a school district program and 25 percent of the prior year's cost for a college preparatory program at a community college. Fla. Stat. Ann. 239.117(4)(a), (5)(a) (West 1995).⁸ Florida would also annually attempt to calculate the amount of funds to appropriate to cover the projected remainder of students' instructional costs. Florida officials testified that the legislature's annual calculation used the previous year's number of full time equivalent (FTE) students and was based on the average instructional cost per FTE student.⁹

Florida set up the PBIF so that "incentive" payments from the fund for qualified student achievements did not exceed the cost of instruction.¹⁰ PBIF payments were not made until the schools' level of performance serving the qualified students matched their level of performance (of student enrollments, course completions and placements) from the base year prior to the implementation of the PBIF and only after the schools had used their annual FTE capped amount of appropriated funds.¹¹

⁷ See also Respondent's Motion for Summary Judgment Exhibit (RMSX) 1; HT at 621. 20 C.F.R. § 627.420(a)(5) (1998) provides in pertinent part:

States ... shall not use funds provided under JTPA to duplicate ... services available in the area (with or without reimbursement) from Federal, State or local sources.

See also 29 U.S.C.A. § 1551(h) (West 1998) (No needless duplication of governmental ... services).

⁸ CX 21.

⁹ See Hartnig, HT at 470, 500-01; Testimony of Edward Sisek, Florida Department of Education, HT at 516-517, 536; Larson, HT at 559, 569, 571.

¹⁰ RX 1 at 10; RX 2 at 79-80; CX 4; Hartnig, HT at 461, 465, 479; Larson, HT at 545.

¹¹ RX 2 at 78; Testimony of Steve Campora, FDLES, HT at 406, 413; Hartnig, HT at 458, 472; Larson, HT at 546.

PROCEDURAL HISTORY

In 1995, the year the PBIF was implemented, complaints were filed with the DOL's ETA contending that the PBIF was not lawfully spending JTPA funds. The complaints alleged that the PBIF was not using the JTPA funds to provide any services to JTPA eligible students that were not already available to a general student and that, instead, the PBIF was using the funds to pay community colleges and school districts for the instructional costs of students that state appropriations already covered.¹² The DOL's ETA began investigating the PBIF in 1995¹³ and ultimately requested that the DOL's Office of Inspector General (OIG) conduct an audit of the PBIF.¹⁴ In a September 1998 audit report, the OIG found that between March 1, 1995, and June 9, 1998, Florida's PBIF misspent over \$11 million of JTPA Title III funds in violation of Sections 141(b) and 164(a)(2)(A), (C) of the JTPA.¹⁵

On January 19, 1999, the Grant Officer issued an Initial Determination based on the OIG's audit, tentatively disallowing the Florida PBIF's unlawful expenditures of \$11,419,499 in JTPA Title III funds. *See* 20 C.F.R. § 627.606(b) (1998). The Grant Officer determined that Florida "did not provide information to refute the [OIG] auditor's position that the uses to which the PBIF program put JTPA funds were disallowable" and that Florida's "documentation is not sufficient to allow the costs." RX 1 at 15-16. After receiving Florida's response to the Initial Determination, the Grant Officer ultimately issued a Final Determination on June 28, 1999, holding that Florida's response, "including documentation," was "not sufficient" to allow Florida's PBIF's \$11,419,499 in expenditures of JTPA Title III funds. RX 1 at 5-10; *see* 20 C.F.R. § 627.606(d) (1998). The Grant Officer specifically noted that to be allowable, Florida "must provide actual documentation of the costs incurred as well as the basis for allocating a portion of those costs to JTPA Title III" funds. RX 1 at 10.

¹² *See* RX 2 at 65-66; RMSX 1, 2(b), (g), (i); Testimony of Eugene Smith, DOL Office of Inspector General, HT at 82.

¹³ RX 2 at 65; RMSX 2(a), (d).

¹⁴ RX 1 at 25.

¹⁵ RX 1 at 22. *See* Section 141(b) of the JTPA, 29 U.S.C.A. § 1551(b) (West 1998); Section 164(a)(2)(A), (C) of the JTPA, 29 U.S.C.A. § 1574(a)(2)(A), (C) (West 1998). Specifically, the OIG found that the PBIF misspent \$10,612,065 in JTPA Title III funds, as well as \$652,913 in surplus JTPA Title III funds which the PBIF allocated to local RWDBs for Title II purposes and \$154,521 in JTPA Title III funds the PBIF spent for administrative costs. RX 1 at 30-35.

On July 21, 1999, Florida requested a hearing before an ALJ on the Grant Officer's Determination. RX 1 at 1-3; 20 C.F.R. §§ 627.800(a), 627.801(a) (1998). The ALJ ultimately held a hearing on the merits of this case on June 18-20, 2002, and thereafter issued the decision that is before us.¹⁶ The ALJ reversed the Grant Officer's determination, holding that the PBIF expenditures at issue were used properly for JTPA Title III purposes, as Florida schools served more Title III students under the PBIF.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to the Administrative Review Board to render final agency decisions under the JTPA and other statutes included in Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). On September 2, 2004, pursuant to Section 166(b) of the JTPA, the Board asserted jurisdiction of Florida's appeal. *See* 29 U.S.C. § 1576(b) (1994). We render our decision in this case pursuant to Section 166(c) of the Act, 29 U.S.C.A. § 1576(c)(West 1999), and, as the Secretary's designee, we review both the ALJ's findings of fact and conclusions of law *de novo*. *See generally Masek v. Cadle Co.*, ARB Case No. 97-069, ALJ Case No. 95-WPC-1, slip op. at 7 and authorities there cited (ARB Apr. 28, 2000) (in case arising under whistleblower statute covered by 29 C.F.R. Part 24, discussing Secretary's plenary authority in reviewing ALJ decisions).

ISSUES

The issue before us is whether Florida has shown by persuasive evidence that it spent federal JTPA Title III funds for lawful purposes under the JTPA. In deciding this issue, we initially consider whether the Grant Officer has met his burden of production that Florida misspent JTPA Title III funds by determining if the evidence is adequate to show:

- A.** Whether the JTPA Title III funds that Florida's PBIF disbursed were used to provide services to Title III eligible students "in addition" to those services already provided to general students with state appropriated funds, as Section 141(b) of the JTPA requires, or
- B.** Whether Florida's PBIF spent JTPA Title III funds lawfully for the costs of instruction of Title III eligible students that were "necessary and reasonable"

¹⁶ The ALJ initially entertained oral argument and briefing from the parties on the Grant Officer's motion for summary judgment and subsequently issued an order denying summary judgment.

because they were costs that state appropriated funds did not cover, as Section 164(a)(2)(A) of the JTPA requires.

Finally, if the evidence is inadequate to show that Florida's PBIF lawfully spent the JTPA Title III funds at issue pursuant to JTPA Sections 141(b) and 164(a)(2)(A), we consider whether Florida nevertheless has met its burden of persuasion to show that the PBIF properly spent federal JTPA Title III funds by other means for expenses that served Title III eligible students in accordance with the purposes of the Act. In deciding this issue, we consider:

- C. Whether Florida's PBIF spent JTPA Title III funds for expenses that served Title III eligible students in accordance with the purposes of the Act or for a "general expense" that served any vocational education student and was therefore Florida's responsibility, in violation of JTPA Section 164(a)(2)(C).

DISCUSSION

Evidentiary Burdens

The ALJ did not address or apply the relevant framework regarding the parties' evidentiary burdens in this case. In determining whether to sustain the Grant Officer's findings that certain expenditures were not allowable under the JTPA, the burden-shifting framework provided at 20 C.F.R. § 627.802(e) (1998) applies. Under that regulatory provision, the burden of production is on a Grant Officer to offer prima facie evidence sufficient for a reasonable person to conclude that a recipient unlawfully spent JTPA funds, i.e., that requirements for Federal funding had not been met. 20 C.F.R. §§ 627.802(e), 636.10(g) (1998); 20 C.F.R. § 629.58(I) (1989-1991); *Texas Dep't of Commerce v. United States. Dep't of Labor*, 137 F.3d 329, 332 (5th Cir. 1998). If the recipient's records are inadequate to show that the recipient spent the JTPA funds lawfully, the Grant Officer meets the burden by establishing the inadequacy of the records. *Texas Dep't of Commerce*, 137 F.3d at 332. In presenting a prima facie case, a Grant Officer should demonstrate an understanding of the statutory and regulatory requirements that are imposed on the recipient. *Massachusetts v. United States. Dep't of Labor*, ARB Nos. 02-011, 02-021, ALJ No. 98-JTP-6, slip op. at 9 n. 7 (ARB June 13, 2002).

If the Grant Officer meets that burden, the burden then shifts to the recipient challenging the Grant Officer's determination, who shall have the "burden of persuasion" to offer persuasive evidence to the contrary. See 20 C.F.R. §§ 627.802(e), 636.10(g) (1998); 20 C.F.R. § 629.58(I) (1989-1991); see also *Florida v. United States Dep't of Labor*, 1992-JTP-17, slip op. at 4-7 (Sec'y Dec. 5, 1994), *aff'd on recon.* (Sec'y Jan. 20, 1995) (addressing the burdens of production and persuasion under predecessor JTPA regulation, 29 C.F.R. § 629.57(i) (1988)), *aff'd*, 83 F.3d 435 (11th Cir. 1996) (table). Overcoming a prima facie case of "misspent" funds requires the grantee to present cogent

evidence and argument regarding how it has either met the specific requirements the JTPA imposes or has compensated for any deficiencies through other means. *Massachusetts*, slip op. at 9 n. 7.¹⁷

Summary

Initially, we discuss whether the evidence is adequate to establish that the JTPA Title III funds that Florida's PBIF disbursed provided services to Title III eligible students "in addition" to those services already provided to general students in accordance with JTPA Section 141(b) or were spent lawfully for the costs of instruction of Title III students that were "necessary and reasonable" because they were not costs that state appropriated funds already covered in accordance with JTPA Section 164(a)(2)(A). Because Florida's records are inadequate to show that JTPA Title III funds were spent lawfully pursuant to Sections 141(b) and 164(a)(2)(A), we conclude that the Grant Officer has met his burden of production of establishing prima facie violations of the JTPA. Further, Florida has not adduced convincing evidence to the contrary. Thus, we hold that Florida misspent the JTPA Title III funds in violation of Sections 141(b) and 164(a)(2)(A).

Finally, notwithstanding Florida's violations of Sections 141(b) and 164(a)(2)(A), we discuss whether Florida still met its burden of persuasion to show that the disallowed costs were nevertheless properly expended for lawful JTPA purposes through other means. Because the record demonstrates that the JTPA Title III funds which Florida's PBIF disbursed were spent to fund costs or a "general expense" that was the responsibility of the State and not for any specific JTPA purpose in violation of JTPA Section 164(a)(2)(C), we ultimately hold that Florida has not met its burden of persuasion to show that the PBIF properly expended JTPA Title III funds for lawful JTPA purposes.

A. SECTION 141(b) OF THE JTPA

Florida's records are inadequate to show that the JTPA Title III funds that Florida's PBIF disbursed provided services to Title III eligible students "in addition" to those services already provided to general students in accordance with Section 141(b).

¹⁷ If the language of the JTPA is plain, we must enforce the unambiguously expressed intent of Congress. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). If the statute is ambiguous, however, we must defer to reasonable interpretations of the statute by the United States Department of Labor, the agency charged with administering the JTPA. *Id.* at 843-44. *See also Texas Dep't of Commerce*, 137 F.3d at 331-32; *Louisiana v. United States Dep't of Labor*, 108 F.3d 615, 617 (5th Cir. 1997).

Grant Officer's Determination

The Grant Officer determined that JTPA Title III funds that Florida's PBIF disbursed did not provide services to Title III eligible students "in addition" to those services already provided to general students with state appropriated funds, in violation of Section 141(b) of the JTPA. RX 1 at 9, 15, 28. Section 141(b) of the JTPA provides:

(b) No duplication of services

Funds provided under this chapter shall only be used for activities which are *in addition* to those which would otherwise be available in the area in the absence of such funds.

29 U.S.C.A. § 1551(b) (West 1998) (emphasis added),¹⁸ as implemented by 20 C.F.R. § 627.220(a), (c) (1998).¹⁹

¹⁸ A House amendment added this language of this JTPA provision to the statute when the statute was originally promulgated in 1982, and it survived after the 1992 amendments to the JTPA. *See* H.R. Conf. Rep. 97-889, at 127, 1982 U.S.C.C.A.N. 2705, 2749 (2nd Sess. 1982).

¹⁹ Section 627.220(a) requires the establishment of "safeguards to ensure that JTPA funds are used *in addition* to funds otherwise available in the area and are coordinated with these funding sources." 20 C.F.R. § 627.220(a) (emphasis added). Section 627.220(c) requires information sharing "[t]o prevent the duplication of funding." 20 C.F.R. § 627.220(c).

Similarly, 20 C.F.R. § 627.420(a)(5) (1998), which Assistant Secretary Ross referenced in his November 1994 letter cautioning Florida regarding the implementation of the PBIF, states:

States ... shall not use funds provided under JTPA to duplicate ... services available in the area ... from Federal, State, or local sources

20 C.F.R. § 627.420(a)(5) (1998). Section 627.420(a)(5) implements JTPA Section 141(h), which provides:

(h) No needless duplication of governmental ... services

Continued . . .

ALJ's Decision

The ALJ believed that the Grant Officer construed Section 141(b) too narrowly. D. & O. at 24. The official comments provided with Section 627.220, which implemented Section 141(b) after the 1992 amendments to the JTPA, state that the purpose of the requirements of Section 141(b) and Section 627.220 are “to preclude duplicate or overlapping payments among Federal, State, and local programs to ... training institutions and to ensure the *best mix* of programs and funds” and that JTPA funds “in *coordination* with other payment programs” are available to the JTPA participant for retraining. 59 Fed. Reg. 45760, 45815 (Sep. 2, 1994) (emphasis added). Relying on the comments, the ALJ held that the PBIF program served the purpose of the JTPA by providing the “best mix” of funds, including JTPA funds, to the JTPA participant for retraining. D. & O. at 25, 29.

Thus, the ALJ concluded, and Florida reasserts on appeal, that the PBIF program itself is an “activity” in addition to those that were otherwise available in Florida, before PBIF was initiated, in accordance with Section 141(b). D. & O. at 31, 35; Complainant’s Brief at 24. Because the PBIF program was designed, in part, to retrain more dislocated workers, the ALJ reasoned that the JTPA funds the PBIF program disbursed through “incentive” payments to schools to provide vocational education and placement services to disadvantaged students, including dislocated workers, benefited Florida’s population of dislocated workers consistent with the purposes of the JTPA.

Inadequacy of Evidence Regarding Whether JTPA Title III Funds were Spent to Provide Services to Title III Students “in addition” to those Services Already Provided to General Students

The PBIF program, however, was not the same as a JTPA program. The PBIF commingled a variety of funds, only a portion of which included JTPA Title III funds,²⁰ and disbursed “incentive” payments to serve a variety of disadvantaged students, only a portion of whom were JTPA Title III dislocated workers.²¹ Yet a review of the record and relevant hearing testimony does not provide any evidence that Florida adequately

Funds provided under this chapter shall not be used to duplicate ... services available in the area ... from Federal, State, or local sources

29 U.S.C.A. § 1551(h) (West 1998).

²⁰ See n.3, *supra*.

²¹ See n.4, *supra*.

documented how the specific JTPA Title III funds the PBIF utilized provided any activities or services to Title III dislocated workers “in addition” to those services already provided to general students.²²

In response to the OIG’s audit, Florida admitted that the “PBIF was never intended to fund special services for any sub-set of its clientele,” such as JTPA Title III eligible dislocated workers. RX 1 at 58. Florida’s witnesses could not provide any evidence or documentation of how the JTPA Title III funds that the PBIF utilized provided any additional services to Title III dislocated workers. Steven Campora, the Director of the PBIF, reiterated that the PBIF “law wasn’t built around” providing any documentation of additional services that the PBIF provided to JTPA Title III dislocated workers and did not know if Florida “quantified” JTPA Title III participation and additional services. HT at 433, 442-443. Lenny Larson, an administrator of the PBIF program, also admitted that Florida “did not try to distinguish in our services to” JTPA Title III dislocated workers from those provided to any other student. HT at 556.

Larson further admitted that he had no knowledge of any effort to quantify the cost of any services the PBIF provided to JTPA Title III dislocated workers. HT at 578-579. Robert O’Leary, who worked for the Governor of Florida in designing the PBIF program, could not cite in his testimony any additional services that arose out of JTPA funding that the PBIF used. HT at 328-337. O’Leary admitted that the local RWDBs or PICs, not the PBIF, used their allocated JTPA Title III funds to recruit dislocated workers to enroll in school for retraining, HT at 347, 356, but the Grant Officer has no issue with the expenditure of these local JTPA funds that the PBIF did not administer. More specifically, Linda Hartnig, who worked on designing the PBIF program, conceded that Florida has “no documentation” that the PBIF provided additional services to JTPA Title III dislocated workers. HT at 481.

Analysis

Merely showing that from a commingled “mix” of funds, the PBIF used JTPA Title III funds in disbursing “incentive” payments to serve a variety of disadvantaged students does not establish how the purpose of JTPA Section 141(b) Title III, to provide additional retraining services to dislocated workers, was served. Whether the purpose of JTPA Section 141(b) was served cannot be determined from the record without documentation or other evidence that distinguishes the JTPA Title III funds from the

²² Examples of the retraining activities or services to be provided to eligible dislocated workers under the JTPA Title III included classroom, occupational skill, on-the-job and entrepreneurial training, out-of-the-area job search, relocation, and basic and remedial education. *See* 29 U.S.C.A. § 1661c(d) (West 1998).

remaining “mix” of funds that the PBIF used and that can trace what additional retraining services were provided to eligible dislocated workers because of those JTPA funds.

While JTPA Title III funds provided an additional source for funding the PBIF, it is not apparent that the PBIF program focused on dislocated workers as service recipients by providing additional retraining services to them that derived specifically from earmarked JTPA Title III funds.²³ We agree with the Grant Officer’s determination that the record is inadequate to establish that the JTPA Title III funds which Florida’s PBIF disbursed provided services to Title III eligible students “in addition” to those services already provided to general students in accordance with Section 141(b). Because Florida’s records are inadequate to show that JTPA Title III funds were spent lawfully pursuant to Section 141(b), the Grant Officer has met his burden of production of establishing a prima facie violation of the JTPA. Since Florida has not met its burden of persuasion by offering persuasive evidence to the contrary, we reverse the ALJ’s holding that the PBIF program served the purpose of Section 141(b) of the JTPA, and conclude that Florida misspent the JTPA Title III funds in violation of Section 141(b). 20 C.F.R. §§ 627.802(e), 636.10(g) (1998); *Texas Dep’t of Commerce*, 137 F.3d at 332.

²³ A review of relevant hearing testimony from witnesses Florida presented indicates that the PBIF program focused on dislocated workers and JTPA Title III funds as a source of additional revenue that could be provided to community colleges and school districts. Steven Campora, the Director of the PBIF, testified that he:

would like to be altruistic and say ... ‘these community colleges and these school districts should serve our people, help them get back to work or help them find a job, get training so they can make a living,’ ... [b]ut you’ve got to realize that those [schools], like any business – and for them, it’s pretty much a business – are driven by money. And you know, they have to have their funds. And if they can find some extra dollars somewhere, or some student earns them extra money, they become pretty aware rather quickly because they are driven by money. It’s unfortunate to say.

HT at 438. He added that “there was a lot of emphasis on [Title III] people because there was a lot of money to be made.” HT at 446. Lenny Larson, an administrator of the PBIF program, testified that schools tried to place students in jobs “to earn as much [PBIF] money as they could.” HT at 572.

B. SECTION 164(a)(2)(A) OF THE JTPA

Florida's records are inadequate to show that the JTPA Title III funds that Florida's PBIF disbursed were spent lawfully for the costs of instruction of Title III students that were "necessary and reasonable" because they were not costs that state appropriated funds already covered in accordance with Section 164(a)(2)(A).

Grant Officer's Determination

The Grant Officer could not determine that JTPA Title III funds that Florida's PBIF disbursed provided any additional services to Title III eligible students pursuant to Section 141(b) distinct from the services already provided to general students with state appropriated funds. Thus, as there was no apparent distinction between JTPA Title III eligible students and general students, the Grant Officer concluded that the JTPA Title III funds were not spent lawfully for the "necessary and reasonable" costs of instruction of Title III eligible students, as Section 164(a)(2)(A) of the JTPA requires. RX 1 at 9, 15, 28-29. Section 164(a)(2)(A) of the JTPA provides:

(2) The Secretary shall prescribe regulations establishing uniform cost principles substantially equivalent to such principles generally applicable to recipients of Federal grants funds. At a minimum, such standards shall provide that, to be allowable, *costs must* —

(A) *be necessary and reasonable* for proper and efficient administration of the program under this chapter

29 U.S.C.A. § 1574(a)(2)(A) (West 1998),²⁴ as implemented by 20 C.F.R. § 627.435(a) (1998).²⁵ *See also Mississippi Dep't of Econ. & Cmty. Dev. v. United States Dep't of*

²⁴ The 1992 amendments to the JTPA added the language of this JTPA provision to the statute. *See* Job Training Reform Amendments of 1992, Pub. L. No. 102-367 (Sep. 7, 1992), 106 Stat. 1021 *et seq.* Section 164(a)(3) of the JTPA provides that "minimum requirements established by the Secretary in regulations" shall "take into consideration relevant aspects of the circulars issued by the Director of the Office of Management and Budget." 29 U.S.C.A. § 1574(a)(3) (West 1998).

The generic cost principles in JTPA Section 164(a)(2)(A) and its implementing regulation at Section 627.435(a) are intended to be substantially the same as the provisions of Attachment A of the Office of Management and Budget (OMB) Circulars. 59 Fed. Reg. 45760, 45782. The allowable cost principles in OMB Circular No. A-87 apply to a state government's use of federal grant funds, such as Florida's use of JTPA funds in this case.

Continued . . .

Labor, 90 F.3d 110, 112 (5th Cir 1996); *Louisiana*, 108 F.3d at 619 n. 17 (both applying Section 164(a)(2)(A) of the JTPA’s predecessor implementing regulation at 20 C.F.R. § 629.37(a) (1983-1986)).

ALJ’s Decision

The ALJ found, and Florida reiterates on appeal, that there is no evidence that Florida community colleges and school district programs earned any profit from PBIF incentive payments disbursed for JTPA Title III eligible students. Specifically, the ALJ noted that the amounts of the PBIF incentive payments were always less than the actual costs of instruction.²⁶ D. & O. at 8, 22, 26, 33; Complainant’s Brief at 13, 15. Moreover, the PBIF incentive payments were not disbursed until after the schools had exhausted their annual amount of state appropriated funds.²⁷ D. & O. at 27-28; Complainant’s Brief at 18, 25. Although Section 239.117 of Florida’s statute at the time capped the amount of a student’s tuition either at 10 or 25 percent of the cost of instruction,²⁸ the ALJ determined that there was no state statutory entitlement that state funds would cover the remaining amount of a student’s instructional costs. In fact, the ALJ agreed with Florida’s assertion that the state’s annual appropriation of funds never covered the

See 20 C.F.R. § 627.435(b) (1998); 29 C.F.R. § 97.22(b) (1998). OMB Circular No. A-87 (C)(1) provides:

To be allowable under Federal awards, costs must meet the following criteria:

(a) Be *necessary and reasonable* for proper and efficient performance and administration of Federal awards.

(Emphasis added). OMB Circular No. A-87 (C)(2) specifies that a “cost is reasonable if ... it does *not exceed* that which would be incurred by a prudent person ... to incur the cost,” (emphasis added).

²⁵ Section 627.435(a) provides that “[t]o be allowable, a *cost shall ... not be a general expense* required to carry out the overall *responsibilities of the Governor*” (emphasis added). 20 C.F.R. § 627.435(a).

²⁶ See n.10, *supra*.

²⁷ See n.11, *supra*.

²⁸ See n.8, *supra*.

remaining amount of instructional costs which tuition did not cover. D. & O. at 28, 32; Complainant's Brief at 26, 28-29.

The ALJ further held that, even assuming the state's appropriations fully funded the remaining amount of a student's instructional costs which tuition did not cover, the PBIF program still met the purpose of the JTPA Title III because Florida schools served more Title III eligible students under the PBIF program than were served before it was initiated. D. & O. at 32-33; Complainant's Brief at 2, 20. Ultimately, the ALJ concluded that the PBIF program provided Florida's community colleges and school district programs the incentive to take on the added costs, which state appropriations did not cover, to serve more JTPA Title III eligible students. D. & O. at 33-34. Consequently, because more dislocated workers were retrained under the PBIF program than had been previously, the ALJ reasoned that the JTPA Title III funds were lawfully spent in accordance with JTPA Section 164(a)(2)(A).

Inadequacy of Evidence Regarding Whether JTPA Title III Funds were Spent for Costs that were Necessary and Reasonable

In annually attempting to calculate the amount of funds to appropriate to compensate for the projected remainder of instructional costs beyond those that student tuition covered, Florida officials testified that the annual calculation considered the previous year's number of full time equivalent (FTE) students to arrive at an average instructional cost per FTE student.²⁹ Linda Hartnig, one of the designers of the PBIF program, conceded that JTPA Title III students and other PBIF eligible disadvantaged students were not excluded from the total number of FTE students considered when determining the annual appropriation. HT at 484; *see also* Testimony of OIG Auditor Eugene Smith, HT at 56, 78, 134.³⁰

Thus, as the record does not establish any apparent distinction between JTPA Title III eligible students and general students in regard to the services they were provided, the Grant Officer asserts that the state would, apparently, already provide for the remaining costs of instruction of Title III students. Therefore, even if the PBIF incentive payments did not exceed the cost of instruction, the Grant Officer contends that

²⁹ *See* n.9, *supra*.

³⁰ In response to being asked whether JTPA Title III students and other disadvantaged students were excluded from the total number of FTE students used when determining the annual appropriation, Robert O'Leary, another of the designers of the PBIF program, replied, "I don't know." HT at 336.

Florida had already appropriated funds to cover the costs of instruction of Title III students.³¹

In response, Florida contends, and the ALJ so found, that the actual costs of instruction that tuition did not cover exceeded the state's annual appropriation because more JTPA Title III eligible students were served due to the PBIF program during the three years at issue than were served prior to the initiation of the PBIF. The evidence Florida provides in support of its contention, however, is not sufficient or adequate to establish how much Title III student enrollment increased during the three-year period. Nor has Florida's evidence established that any increased costs of instruction, over and above the amount of the state's annual appropriation, were specifically caused by an increase in the number of Title III students served because of the PBIF program.

Although the ALJ determined that Section 239.117 of Florida's statute did not entitle students to have state funds cover the remaining costs of their instruction, Robert O'Leary, Edward Sisek of Florida's Department of Education, Linda Hartnig and Lenny Larson all testified that Florida's policy was to cover the remaining 75 or 90 percent of instructional costs that tuition did not cover with state appropriated funds. HT at 360-61; 500-1; 516; 559. If schools served more students in a given year than the amount that their annual appropriations covered, Hartnig and Sisek indicated that schools would cover any increased costs of instruction by charging any additional students the full cost of instruction, but did not do so during the period the PBIF existed. HT at 471, 494, 526, 539. Alternatively, Larson indicated that schools could reduce or shut down programs. HT at 552, 582. Nevertheless, even if there were no statutory requirement that state appropriated funds would pay for the remaining instructional costs, the record is inadequate to show that the PBIF disbursed JTPA Title III funds to cover for increased costs of instruction, beyond the costs for which state appropriations provided, specifically caused by an increased enrollment of Title III students under the PBIF program.

Responding to the OIG's audit, Florida provided tables detailing apparent annual increases, during the three years of the PBIF at issue in this case, in the levels of enrollments, course completions and placements from the base year levels prior to the implementation of the PBIF for overall students, all PBIF eligible disadvantaged students, and JTPA Title III students. *See* RX 1 at 55-56. The tables do not contain, however, the Title III student levels during the base year prior to the implementation of the PBIF. *See* Smith, HT at 220. The DOL OIG audit found that the level of Title III

³¹ Contrary to the ALJ's characterization, D. & O. at 36, the Grant Officer did assert that if Florida already appropriated funds to cover the remaining costs of instruction of JTPA Title III eligible students, whether or not PBIF incentive payments exceeded the cost of instruction is irrelevant because the PBIF incentive payments merely "duplicated" instruction costs for which Florida's appropriated funds already paid. *See* Grant Officer's Reply Brief before the ALJ at 9-10.

student enrollment actually decreased between the first and second year of the PBIF at issue in this case. *See* RX 1 at 39; Smith, HT at 79. The ALJ did not address or resolve the apparent conflict between the figures Florida and the OIG provided. D. & O. at 14. In any event, the record does not verify or support Florida’s assertion, and the ALJ’s finding, that more JTPA Title III eligible students were served during the PBIF program in the three years at issue than were served prior to the initiation of the PBIF.

Florida itself imposed a requirement in a PBIF “Technical Assistance Manual” that the state submitted that it must document “the JTPA funds which have been expended for training JTPA clients.” CX 22 at 33. Florida asserts that the actual costs of instruction that tuition did not cover exceeded the state’s annual appropriations because of increased levels of JTPA Title III eligible students served during the years of the PBIF program at issue. Therefore, Florida must document that the amount that the remaining costs of instruction exceeded the state’s annual appropriations during the three years of the PBIF program at issue were specifically attributable to the Title III students the PBIF served.

In support of its assertion, Florida submitted a table indicating the amount that the actual remaining costs of instruction attributable to “Group 3” students exceeded the annual FTE capped level of state funds appropriated to cover such costs in 1994/1995, 1995/1996 and 1996/1997. *See* CX 19 at 5-7. Linda Hartnig testified, however, that “Group 3” students included all adult vocational education students, not just JTPA Title III eligible students, and that the amount of the remaining costs of instruction not covered by state appropriations could not be specifically attributed to Title III students. HT at 478-79, 484, 486-87, 502. Similarly, Lenny Larson testified that Florida was not able to document or quantify what additional costs were incurred that were attributable to Title III students. HT at 558-559. Robert O’Leary testified that Florida “expected,” “anticipated” and “felt” that there would be additional costs incurred to serve more Title III students under the PBIF, but did not know of any documentation of such additional costs attributable to Title III students. HT at 358-59, 371. Florida’s assertion, and the ALJ’s finding, therefore, that the actual remaining costs of instruction that tuition did not cover exceeded the state’s annual appropriations because of increased levels of JTPA Title III eligible students under the PBIF, is not verified or supported by the available evidence in the record.³² *Texas Dep’t of Commerce*, 137 F.3d at 332.

³² The ALJ stated that the Grant Officer’s disallowance in this case was not based on the success of the PBIF program as measured by costs or the number of JTPA Title III students who participated and enrolled in the program. D. & O. at 36. Contrary to the ALJ’s characterization, both the Grant Officer’s initial and final determinations were based on the fact that Florida’s documentation was not sufficient to determine whether Florida had spent the JTPA Title III funds lawfully. *See* RX 1 at 5-10, 15-16. Specifically, the Grant Officer’s counsel questioned the tables Florida provided indicating the number of JTPA Title III eligible students that were served during the PBIF program, RX 1 at 55-56, and “whether or

Continued . . .

Analysis

Just as the official comments provided with Section 627.220, to which the ALJ referred, state that “JTPA funds cannot be expended on costs that already have been paid by federal Pell Grant Funds,” 59 Fed. Reg. at 45815, JTPA funds also cannot be expended on costs that already have been paid for by state appropriated funds. The necessity of Florida’s PBIF to use federal JTPA Title III funds during the three years at issue in this case is further suspect in light of the fact that the PBIF continues today but is funded solely by state funds.³³ Again, the PBIF program did not necessarily use federal JTPA Title III funds to cover the additional costs attributable to serving more Title III students, but rather as a source of additional revenue that could be provided to community colleges and school districts for the vocational education needs of any student.³⁴

The record in this case parallels other JTPA cases in which the courts have affirmed the disallowance of the expenditure of JTPA funds because of a state’s or its sub-grantee’s failure to provide reliable financial records. See *Louisiana*, 108 F.3d at 617 (“records maintained by [state sub-grantee] were so irregular and unreliable that it was impossible to determine with any certainty whether JTPA grant funds had been allocated lawfully”); *Mississippi Dep’t of Econ. & Cmty. Dev.*, 90 F.3d at 112 (where “DOL auditors were unable to reconstruct how the state agencies had” spent JTPA funds and the state agencies “could not explain” and “were unable to offer coherent testimony or documentation in support” of how they spent JTPA funds, the ALJ was “entitled to

not it represented program success.” HT at 221; RX 1 at 39. In addition, the Grant Officer’s counsel noted that the lack of adequate documentation regarding allowable costs was an issue in this case. HT at 598-99

³³ See O’Leary, HT at 341; Sisek, HT at 528; Larson, HT at 557.

³⁴ Steven Campora, the Director of the PBIF, testified that “the big thing for [schools] was getting to the point where they started getting extra money” from the PBIF, HT at 412-13, and “they could make money” from PBIF incentive payments, HT at 418. He further testified that the “benefit” schools received from PBIF incentive payments “was that they had additional dollars they could earn with these people [JTPA Title III eligible students],” so “[t]hey hustled them” and “became very aware of these people and the ... extra money that they could earn them.” HT at 437, 439. Similarly, Lenny Larson testified that schools “utilized their resources in order to cover the cost” of instruction of Title III students, and PBIF incentive payments were “reimbursement in the sense that they were able to then *reverse* those costs when they were made payment from the performance based fund” (emphasis added). HT at 564.

disallow” the expenditures “as not ‘necessary and reasonable’”). We agree with the Grant Officer’s determination that the record is inadequate to establish that the JTPA Title III funds which Florida’s PBIF disbursed were spent lawfully for the costs of instruction of Title III students that were “necessary and reasonable” because they were not costs which state appropriated funds already covered, in accordance with Section 164(a)(2)(A).

Accordingly, because Florida’s records are inadequate to show that JTPA Title III funds were spent lawfully pursuant to Section 164(a)(2)(A), we hold that the Grant Officer has again met his burden of production of establishing a prima facie violation of the JTPA. Since Florida has not met its burden of persuasion by offering persuasive evidence to the contrary, we reverse the ALJ’s holding that the PBIF program served the purpose of Section 164(a)(2)(A) of the JTPA, and conclude that Florida misspent the JTPA Title III funds in violation of Section 164(a)(2)(A). 20 C.F.R. §§ 627.802(e), 636.10(g) (1998); *Texas Dep’t of Commerce*, 137 F.3d at 332.³⁵

C. SECTION 164(a)(2)(C) OF THE JTPA

Finally, the record demonstrates that the JTPA Title III funds that Florida’s PBIF disbursed were spent to fund costs or a “general expense” that was the state’s responsibility and not for any specific JTPA purpose in violation of Section 164(a)(2)(C).

Even though we have held that the Grant Officer has met his burden of production by establishing prima facie violations of Sections 141(b) and 164(a)(2)(A) of the JTPA, we consider whether Florida may still meet its burden of persuasion to show that, notwithstanding its failure to comply with the above-cited provisions, the disallowed costs were nevertheless properly expended for lawful JTPA purposes through other means. *See Massachusetts*, slip op. at 9 n. 7. Even if state appropriations provided for the remaining costs of instruction that tuition did not cover for JTPA Title III eligible

³⁵ Although the ALJ stated that Florida does not bear the initial burden of justifying its expenditures of the JTPA Title III funds, D. & O. at 35, if Florida’s records are inadequate to show that the JTPA Title III funds were spent lawfully, the Grant Officer meets his initial burden of production by establishing the inadequacy of the records. *Texas Dep’t of Commerce*, 137 F.3d at 332. In addition, although the ALJ properly noted that documentation of Florida’s costs, expenses and expenditures that can be traced to specific, identified individuals is not required, *see Texas Dep’t of Commerce, supra*, the record in this case is nevertheless inadequate to establish that the JTPA Title III funds which Florida’s PBIF disbursed were spent lawfully for the overall costs of instruction of JTPA Title III eligible students in general, as opposed to all of the eligible students for which the PBIF made payments.

students, the JTPA Title III funds the PBIF provided to the schools could be allowed if they were spent for lawful JTPA purposes.

Grant Officer's Determination

The Grant Officer determined that JTPA Title III funds that Florida's PBIF disbursed ultimately funded general expenses or costs of improvements in vocational and technical education programs and equipment at Florida community colleges and school districts. He concluded that these funds were available to and benefited all students, not just JTPA Title III eligible students, and therefore were costs that were the responsibility of the state, in violation of JTPA Section 164(a)(2)(C). RX 1 at 9, 15, 29-30. Section 164(a)(2)(C) of the JTPA provides:

(2) The Secretary shall prescribe regulations establishing uniform cost principles substantially equivalent to such principles generally applicable to recipients of Federal grants funds. At a minimum, such standards shall provide that, to be allowable, *costs must* —

(C) *not be a general expense* required to carry out the overall *responsibilities of State* ... governments

29 U.S.C.A. § 1574(a)(2)(C) (West 1998), as implemented by 20 C.F.R. § 627.435(a) (1998) (“[t]o be allowable, a *cost shall* ... *not be a general expense* required to carry out the overall *responsibilities of the Governor*”) (emphasis added).

ALJ's Decision

The ALJ held, and Florida argues on appeal, that the record failed to demonstrate that PBIF incentive payments supplanted Florida state funding obligations in violation of Section 164(a)(2)(C). D. & O. at 28; Complainant's Brief at 25. The ALJ noted, however, that PBIF incentive payments of JTPA Title III funds were disbursed on an after-the-fact basis; only after certain levels of student achievement had been reached were payments generated, often after the student responsible for generating the payment had left the school. D. & O. at 14. The schools receiving the payments could then spend the funds, the ALJ noted, “on needed services or equipment, such as, for example, mannequins, cars, or ammunition which were not necessarily used by the JTPA participants who generated the payments.” *Id.*³⁶

³⁶ Eugene Smith, an OIG auditor, testified that Florida community colleges and school districts spent JTPA Title III funds the PBIF paid out on administrative secretaries and office supplies, instructors, security guards, janitors, guns and bullets, kitchen equipment and a mannequin costing in excess of \$100,000 itself. HT at 91-92.

Florida's Concession that JTPA Title III Funds were Spent for Any Vocational Education Purpose

But Florida officials concede the schools could use the JTPA Title III funds for any vocational education purpose, whether it served a JTPA Title III eligible student or any other student enrolled in vocational education, including a general student or any other PBIF eligible student. In response to the DOL ETA's 1994 review of the PBIF program and its use of federal JTPA Title III funds, Florida argued that "there should be no restrictions" on the use of PBIF incentive payments. DX 2 at 174. The PBIF "Technical Assistance Manual" that Florida submitted advises that PBIF incentive payments that school districts or community colleges received be used "for the improvement of vocational programs." CX 22 at 19, 33. A response to the OIG's audit of the PBIF program from Indian River Community College notes that PBIF incentive payments were used to provide services to "all interested students, including those eligible for JTPA assistance." RMSX 5(a).

Eugene Smith, an OIG auditor, testified that Florida schools "purchased equipment and services which they couldn't directly relate to JTPA with the proceeds from PBIF which was substantially funded by JTPA" and "couldn't relate [their purchases] to a JTPA necessary cost." HT at 167. In that regard, Steven Campora, the Director of the PBIF, testified that schools could spend the JTPA Title III funds "anywhere in vocational education." HT at 414, 422. Lenny Larson testified that schools could use JTPA Title III funds "in whatever fashion they wanted to, for equipment," so long as it was used in "vocational education programs," but conceded that there was no effort to quantify how the funds were spent. HT at 564-65, 579-80.

Analysis

Consequently, we reverse the ALJ's finding and agree with the Grant Officer's determination because the record demonstrates that JTPA Title III funds that Florida's PBIF disbursed were spent to fund costs or a "general expense" that was the responsibility of the State and not for any specific JTPA purpose in violation of JTPA Section 164(a)(2)(C). Accordingly, we hold that Florida has not met its burden of persuasion to show that the PBIF properly expended JTPA Title III funds for lawful JTPA purposes. *See* 20 C.F.R. §§627.802(e), 636.10(g) (1998); *see also Florida, supra; Massachusetts, supra.*

REPAYMENT AMOUNTS

Florida has not provided any persuasive challenge to the Grant Officer's calculations that the PBIF misspent \$10,612,065 in JTPA Title III funds, as well as misspent \$652,913 in surplus JTPA Title III funds which the PBIF allocated to local RWDBs to provide services to JTPA Title II eligible students that were not "in addition" to those services already provided to general students in accordance with Section 141(b) of the JTPA, and \$154,521 in JTPA Title III funds the PBIF spent for administrative

costs. RX 1 at 30-35; *see also* D. & O. at 22 n. 1. We affirm the Grant Officer's disallowance, therefore, of \$11,419,499 in JTPA Title III expenditures between March 1, 1995 and June 9, 1998. Thus, FDLES is liable to repay the misspent JTPA Title III funds in the amount of \$11,419,499. *See* 29 U.S.C.A. § 1574(e)(1) (West 1998); 1 U.S.C.A. § 109.

CONCLUSION AND ORDER

Because the Grant Officer has met his burden of production that Florida's records are inadequate to show that JTPA funds were spent lawfully and Florida has not met its burden of persuasion to show that the JTPA funds were nevertheless spent for lawful purposes, the ALJ's D. & O. is **REVERSED** and the Grant Officer's determination to disallow JTPA costs is **AFFIRMED**. Accordingly, it is **ORDERED** that the FDLES shall repay from non-federal funds the sum of \$11,419,499 to the United States Department of Labor pursuant to 29 U.S.C.A. § 1574(e)(1) and 1 U.S.C.A. § 109.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge