



IN THE MATTER OF

ARIZONA DEPARTMENT OF
ECONOMIC SECURITY,

COMPLAINANT,

v.

U. S. DEPARTMENT OF LABOR,

RESPONDENT.

CASE NO. 94-JTP-18

DATE: June 6, 1996

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

FINAL DECISION AND ORDER

This case arises under the Job Training Partnership Act (JTPA or Act), 29 U.S.C. §§ 1501-1791 (1988), and the regulations issued thereunder at 20 C.F.R Parts 626-638 (1994). For the reasons set forth below, the Administrative Law Judge's (ALJ) November 9, 1995, Decision and Order Reversing Imposition of Sanctions (D. and O.) is reversed, and a Final Decision on the merits of this case is issued.

BACKGROUND

The State of Arizona, a JTPA grantee, through the Arizona Department of Economic Security (ADES), entered into a subgrantee agreement with the City of Phoenix Service Delivery Area (SDA). The SDA in turn, contracted with the Western Economic Development Corporation (WEDCO), to develop and place JTPA eligible participants into training and employment positions. An investigation by an SDA coordinator in July 1991, lead to criminal indictments against two WEDCO employees who had fraudulently schemed to claim the

^{1/} On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute and these regulations to the newly created Administrative Review Board (ARB). 61 Fed. Reg. 19978 (May 3, 1996)(copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. A copy of the final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization is also attached.

placement of 34 ineligible persons into JTPA funded positions.^{2/} The fraud consequently resulted in the wrongful payment of \$80,664 in costs charged to the JTPA agreement. (This amount was subsequently adjusted to \$77,016, after certain funds due WEDCO were deducted from the amount determined to have been misexpended). Administrative File (AF) at 31-39. The parties do not dispute the facts concerning the crime or the misexpenditure of the funds. D. and O. at 3.

In January 1992, the State JTPA Administrator received a proposed payback plan from the SDA whereby WEDCO would provide in-kind services to the JTPA program, that is, provide various services in support of the program at no cost to the program, in lieu of repayment of the misexpended funds. A.F. at 51. WEDCO's plan was to run from January 1992 through September 1992. *Id.* at 54.

In June 1992 and October 1992, an SDA accountant reviewed WEDCO's repayment plan, presumably underway in June and completed by October, and reported that the payback program was seriously flawed, with no means of verifying the purported expenditures. In addition, although the purported payback was to have been completed in September, even the unverifiable claims of in-kind expenditures in October were approximately half of the amount of the disallowance. The reviewer concluded that WEDCO was merely allocating part of its administrative cost to the payback program, and had not verifiably fulfilled its obligations under the plan. *Id.* at 61-67.

On January 13, 1993, the ADES Deputy Director sent a letter to the U. S. Department of Labor (USDOL) Regional Administrator (RA), requesting that WEDCO's repayment plan be approved. A.F. at 50. We note that the tone of the letter is as if the repayment plan was to be performed in the future: "The . . . [SDA] has submitted an in-kind services plan that *will* repay the debt. The plan provides for [WEDCO] to provide \$79,458^{3/} worth of additional services . . . at no cost to the SDA" (Emphasis supplied). *Id.*

As the record indicates, the plan had been undertaken, albeit, without USDOL approval and unsatisfactorily, during the previous year. The Regional Administrator responded to the January 13th letter within two weeks. On January 25, 1993, the RA sent a letter to the ADES Director advising him that pursuant to USDOL policy, repayment of misexpenditures which arose from an incident of fraud must be remitted in cash from non-Federal sources. The letter further advised the Director that the repayment agreement entered into between the SDA and its subrecipient did not relieve the state, as the grant recipient, from its obligation to repay the misexpenditures to the Federal government. A.F. at 69.

The Grant Officer's Initial Determination was issued on December 7, 1993, and the Final Determination was issued on February 8, 1994. A.F. at 15-17 and 9-11. The state timely

^{2/} One of the employees subsequently plead guilty to the charges, the other apparently remains a fugitive.

^{3/} The additional funds to be repaid pertain to other matters.

requested an administrative hearing. In October 1995, the parties agreed to forego a hearing, and further agreed that the ALJ's decision would be made upon the record, including affidavits by the investigating police detective and the president of WEDCO. D. and O. at 2.

The ALJ determined that the USDOL had failed to carry its initial burden of production, in that the record did not contain any evidence that the Complainant or WEDCO engaged in activities that required the recovery of misexpended funds under JTPA, pursuant to § 164(e)(1), which was the only JTPA section referenced in the Grant Officer's Final Determination. The ALJ opined that a *prima facie* case might arguably have been presented had the Grant Officer referenced § 164(d). The Grant Officer timely excepted to the ALJ's decision and the Secretary asserted jurisdiction on December 13, 1995.

DISCUSSION

The ALJ misapprehends the meaning of the pertinent sections of the Act. The first sentence of § 164(d) establishes the general rule governing recipient liability. It provides that amounts not expended in accordance with JTPA are subject to repayment. It imposes on a recipient the financial liability to repay any amount not properly expended. There is no dispute that program monies were fraudulently misexpended, and therefore, pursuant to § 164(d), these monies are to be recovered.

The second sentence of § 164(d) permits the Secretary, at his discretion, to offset amounts due against other funds to which the recipient is or may become entitled. That section does not require or otherwise mandate the Secretary to offset the disallowed costs, but provides him with the discretion to do so. The Secretary's discretion is, however, limited and may not be exercised in those situations where the Secretary finds the aggravating factors set forth in § 164(e)(1) to be present. Subsection (e)(1) does not establish an independent basis for liability, but only sets forth those conditions under which the Secretary is precluded from exercising the discretion provided for in subsection (d).^{4/}

^{4/} (d) Every recipient shall repay to the United states amounts found not to have been expended in accordance with this Act. The Secretary may offset such amounts against any other amount to which the recipient is or may be entitled under this Act unless he determines that such recipient should be held liable pursuant to subsection (e). No such action shall be taken except after notice and opportunity for a hearing have been given to the recipient.

(e)(1) Each recipient shall be liable to repay such amounts, from funds other than funds received under this Act, upon a determination that the misexpenditure of funds was due to willful disregard of the requirements of this Act, gross negligence, or failure to observe accepted standards of administration. No such finding shall be made except after notice and opportunity for a fair hearing.

The ALJ misreads the statute in suggesting that a recipient must be separately notified of its liability under both § 164(d) and § 164(e)(1). By notifying a recipient that USDOL is seeking repayment and including a reference to § 164(e)(1), the Grant Officer is putting the recipient on notice first, of its underlying liability under § 164(d) and second, that no offset under § 164(e)(1) is available. A notification that references § 164(e)(1) implicitly and necessarily incorporates a finding of liability under § 164(d).

Nor does unfairness flow from the Grant Officer's failure to specifically notify the Complainant of its liability under § 164(d). No factual issues are introduced that would not need to be litigated to establish liability under § 164(e)(1). There is no defense that Complainant could avail itself of under § 164(d) that is not available to it under § 164(e)(1). The basic error that the ALJ makes is to presume that § 164(d) and § 164(e)(1) rely on different theories of liability. However, as explained above, liability under § 164(e)(1) is premised on a finding under § 164(d) that funds were not expended in accordance with the JTPA.

The ALJ did not consider the relevance of § 164(d) because it was not specifically cited in the Grant Officer's Final Determination, although he appears to concede that had the Grant Officer referenced § 164(d), a *prima facie* case warranting the repayment of the misexpended funds may have been made. The ALJ concluded, however, that the Grant Officer's failure to do so barred the Government from recovering the fraudulently converted public funds. D. and O. at 7.

This interpretation literally turns the meaning of the two subsections read in context on its head. Rather than effectuating the recovery of misspent public funds, the ALJ's interpretation requires the Grant Officer to prove that the grantee had extraordinarily maladministered the program before the wrongful expenditures could be recouped. We find this interpretation to be contrary to the plain meaning of the Act.

The ALJ's proffered rationale for finding that the Grant Officer failed to make a *prima facie* case was the reference to § 164(e)(1) rather than § 164(d) in the Final Determination, but he did not determine that the Grant Officer's sole citation of § 164(e)(1) in any way misled, surprised or otherwise denied the Complainant due process with regard to the Government's legal theory. The ALJ simply found that the mere failure to cite subsection (d), was fatal to the Government's case. *Id.* We do not agree. *Yellow Freight v. Martin*, 954 F.2d 353, 358 (6th Cir. 1992)(where the relevant issues of a matter are fully tried, they should not be obscured by legal technicalities).

We carefully reviewed the case record. The Administrative File fully documents the fraudulent activities of WEDCO's employees, even if it does not implicate either the Complainant or WEDCO in their wrongdoing. The Grant Officer properly determined that the fraudulently misexpended Federal grant funds should be recovered, and the Complainant is not exempt from the Act's provisions requiring such recovery.

The facts of this case are uncontroverted. Fraudulent wrongdoing by WEDCO's employees occurred, and the adjusted amount of the misexpended funds is \$77,016. The Act is

unambiguous, requiring that: “[e]very recipient *shall* repay to the United States amounts found not to have been expended in accordance with this Act.” (Emphasis provided). *Supra*, fn. 4. It is clearly within the Secretary’s authority to require cash repayments in those instances where the misexpenditure is the result of fraud. This policy is set forth in the JTPA Training and Guidance Letter 2-87, issued August 31, 1988, which was in effect during the time of WEDCO’s agreement with the SDA, and during its employees’ fraudulent activities.

In addition, even when we consider § 164(e)(1), we determine that the Complainant is liable for the repayment of the misexpended funds. It is evident from the record that WEDCO’s administrative personnel failed to conduct rudimentary oversight of the documents from which they authorized the payment of JTPA funds. The investigating detective reported that WEDCO’s president stated that “a cursory review of the signatures within the participant files” allowed him to determine that the signatures looked a lot like his malfeasant employee’s signature, and that the participants’ and the employers’ signatures were forged.^{5/} Although the forgeries were apparently obvious to the president’s casual review, they had not been challenged by WEDCO’s supervisory personnel.

Nor does the record indicate that the Complainant attempted to recover the misexpended funds from WEDCO, apart from a demand letter, or from the participating employers who apparently benefitted from the wrongful enrollment of the ineligible employees. These employers were partially identified in an incomplete attachment to the SDA’s demand letter to WEDCO to repay the disallowed costs. A.F. at 37-39. The attachment reveals that substantial sums of money went to WEDCO and a variety of employers. The record indicates that the indicted employees cashed checks amounting to a total of \$8,395.48, but there is no further reconciliation of the approximately \$72,000 balance of the misexpended monies. On the facts of the record before us, we conclude that the Complainant did not observe accepted standards of administration, and therefore is liable for the cash repayment of the misexpended funds.

^{5/} Complainant’s Supplemental Brief to Cross Motion for Summary Judgment, Exhibit C, Attachment 4.

ORDER

The ALJ's November 9, 1995 decision IS REVERSED.

We find that the Grant Officer properly disallowed the adjusted amount of \$77,016 of misexpended JTPA funds. The State of Arizona Department of Economic Security IS ORDERED to pay such amount to the U.S. Department of Labor in non-Federal funds.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member