



In the Matter of:

CENTRAL VALLEY OPPORTUNITY CENTER,
COMPLAINANT,

ARB CASE NO.: 98-046

ALJ CASE NO.: 95-JTP-9

DATE: June 22, 1998

v.

UNITED STATES DEPARTMENT OF LABOR,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the Migrant and Seasonal Farmworkers Programs of the Job Training Partnership Act (JTPA), Title IV, Section 402, 29 U.S.C. § 1672, and the pertinent regulations at 20 C.F.R. Part 633 (1991).^{1/} On November 17, 1997, the presiding Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. and O.) reversing the Grant Officer's Final Determination (F.D.) disallowing \$33,008 in claimed costs by the Complainant, Central Valley Opportunity Center (CVOC), under its JTPA grant award. The Grant Officer filed a statement of exceptions with the Board to preserve the right of review while concurrently filing a motion for reconsideration with the ALJ.

Unfortunately, the presiding ALJ died during the pendency of the Grant Officer's motion. On February 6, 1998, the Chief ALJ declined to designate another ALJ for the purpose of reconsidering the Grant Officer's motion, in favor of allowing the case to be decided before the Board. The parties submitted briefs to the Board pursuant to the Board's Order of May 4, 1998. The ALJ's Recommended Decision is reversed for the reasons stated below.

^{1/} The JTPA regulations were revised in 1992. The revisions and renumbering were reflected in the 1993 edition Code of Federal Regulations. The regulatory citations in this decision are consistent with the regulations in effect at the time of the program operations and audit.

BACKGROUND

CVOC was awarded a JTPA Section 402 grant to provide training and employment services to migrant and seasonal farm workers for Program Year (PY) 1991,^{2/} pursuant to a U. S. Department of Labor (DOL) Solicitation for Grant Applications (SGA) published at 55 Fed. Reg. 49,648 (1990). An audit of CVOC's program and financial operations for PYs 1991 and 1992 revealed that the organization overexpended its PY 1991 grant award by \$33,008, and impermissibly carried over these expenditures into PY 1992. The total amount of CVOC's expenditures, however, did not exceed the total of the combined grant awards for the two Program Years.

CVOC's controller failed to obtain permission from DOL to carry the PY 1991 operating deficit over to the following year's funding award. In the absence of such approval, the Grant Officer determined that CVOC was in violation of OMB Circular A-122, which sets forth cost principles for nonprofit organizations that receive federal grants.^{3/} Grant Officer's F.D., Finding I: Overexpenditure of Costs at 7; Administrative File (A.F.) at 15. JTPA program regulations require Section 402 grantees to adhere to OMB cost principles. 20 C.F.R. §633.301(a). Because the Grant Officer regarded the unauthorized carry-over of PY 1991 program costs as improper, the Grant Officer disallowed the PY 1991 overexpenditures.

The ALJ reversed the Grant Officer's disallowance of the costs, finding "nothing in the language of the OMB Circular which expressly prohibits shifting costs from one program year to another in the same grant." R. D. and O. at 5. The ALJ determined that although the cost principles prohibit shifts between "awards," that prohibition did not bar shifting costs between program year fund allocations within a multi-year grant, reasoning that in the case of the CVOC grant the "award" was the two-year grant itself. *Id.*

On review before this Board, the Grant Officer disputes the ALJ's analysis, arguing that CVOC's grant "award" pursuant to the Solicitation for Grant Applications was for the specific performance period July 1, 1991 through June 30, 1992 (PY 1991), notwithstanding the fact that grantees would not have to recompile for funding in PY 1992 (July 1, 1992 through June 30, 1993)

^{2/} Program Year 1991 began July 1, 1991 and ended June 30, 1992. Program Year 1992 began July 1, 1992 and ended June 30, 1993.

^{3/} OMB Circular A-122, Attachment A, § A(4)(b), "Cost Principles for Nonprofit Organizations" provides:

Any cost allocable to a particular award or cost objective under these principles may not be shifted to other Federal awards to overcome funding deficiencies, or to avoid restrictions imposed by law or by the terms of the award.

45 Fed. Reg. 46,022, 46,024 (1980).

if they met certain requirements.^{4/} Therefore, while the second year's funding by DOL was probable, it was not automatic or guaranteed.

DISCUSSION

The ALJ determined that the Grant Officer failed to specify a causal link between the disallowance of claimed costs and the cited authorities (OMB Circular A-122 and the regulations at 41 C.F.R. § 29-70.207-2(b) (which requires grantees to maintain adequate records)). We disagree.

In this case, CVOC incurred costs in PY 1991 that exceeded the amount of the award for that award period. CVOC shifted these excess costs to PY 1992, to be paid by funds awarded for costs incurred for that second program operations period.

The relevant cost principle does not allow costs allocable to one award period to be shifted to another award period, absent the approval of the grant agency. Although the language of the cost principle uses various contractual terms of art whose technical significance might not be immediately apparent to the lay public, the meaning of this terminology is well established and should be familiar to experienced federal grantees. CVOC stated in its Grant Application that its experience with Migrant and Seasonal Farmworker programs extended back to January, 1978, and that at the time of the grant application involved in this dispute, CVOC had managed fourteen DOL farmworker grants totaling over \$15 million. A.F. at 123, 155. CVOC further listed 37 different employment and training contracts it was awarded from three federal agencies, a state agency and three Private Industry Councils in the two year period preceding the instant grant application, totaling in excess of \$5 million. Id. at 124-25.

The ALJ differentiates between "a single program year fund allocation within a multi-year grant" and the term "award," but this differentiation is in error. R. D. and O. at 5. Under applicable cost principles, each "program year funding allocation" is a separate award, with different amounts to be expended during different program periods. This principle is evidenced by the Grant Officer's use of a Notice of Obligation (NOO) (Complainant's Opening Brief before the OALJ, Attachment

^{4/} Job Training Partnership Act: Migrant and Seasonal Farmworker Programs; . . . Solicitation for Grant Application, Part III, Notification of Selection (a), provides in part:

. . . Grants will be awarded for the performance period July 1, 1991 through June 30, 1992. Applicants selected will not have to recompute for funding for PY 1992 (July 1, 1992 through June 30, 1993) if applicable regulatory and other requirements are met, an acceptable training plan is submitted, and funds are available.

1), which advised CVOC of its second year operational grant award, and which specifically indicated the separate allocations for PY 1991 and PY 1992. Nothing in the NOO permits a commingling of the funds for the extended operational period.^{5/}

CVOC similarly argues that OMB Circular A-122's prohibition on shifting costs from one award to another Federal award does not preclude shifting costs from one program year to another program year within the same award. Brief at 5. This reasoning patently misconstrues the cost principles governing federal grants. Further, we note that if CVOC is arguing that it viewed the provisions of the DOL grant documents as being ambiguous, it was incumbent on CVOC to raise an inquiry with the Grant Officer as to the meaning and intent of the regulation, at least in the manner of enforcement. See, *Triax Pacific Inc. v. West*, 130 F.3d 1469, 1474 (Fed. Cir. 1997)(existence of a patent ambiguity of a contract term imposes a duty to inquire on a government contractor of the contracting official as to the meaning of the term).

The ALJ's effort to distinguish the facts in this case from situations found in the two cases cited by the Grant Officer (*ORO Development Corp. v. USDOL*, Case No. 86-JTP-6, Sec'y Final Dec. and Order, Feb. 18. 1988, *aff'd*, *ORO Development Corp. v. USDOL*, No.88-1363, Per Curium (Slip opinion) Order and Judgment (10th Cir. 1990); and *Milwaukee County, WI v. Donovan*, 771 F.2d 983(7th Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986)) is to no avail. Regardless of the differing fact patterns, the opinions in both cited cases enunciate the basic principle that costs cannot be shifted from one award period to another.

CVOC's plea that we not consider the language of the Solicitation for Grant Applications (SGA), because the Grant Officer did not mention it prior to the Motion for Reconsideration before the ALJ, is not persuasive. The SGA was the basis of CVOC's application for its § 402 grant, and it specifies the award's period of operation. Although better communication between CVOC's administrative staff and the Grant Officer might have obviated the issue before us, the fact that DOL did not initiate the liaison is not fatal to the Grant Officer's disallowance of the claimed costs. The Administrative File reasonably supports the Grant Officer's determination disallowing CVOC's PY 1991 overexpenditures. The Grant Officer's comment that CVOC claimed that it had made a written request to DOL to approve the transfer, but did not provide any supporting documentation to that effect, indicates that CVOC was aware of the need for DOL approval if the payment of PY 1991 costs with PY 1992 funds was to be allowed. A.F. at 13, footnote 6, below.

The Grant Officer's noting the SGA's operational period in the Exceptions before us does not rise to the threshold of surprise. The SGA merely provides a documentary reference for the disallowance of claimed costs. It is not a novel or new argument offered to support the Grant Officer's disallowance of the excess PY 1991 costs. We therefore reverse the ALJ's Recommended Decision and Order.

^{5/} Although the regulation at 20 C.F.R. § 633.205(a) states: “[f]unds may be awarded for two program years[.]”, this regulation merely gave the Grant Officer the authority to issue a single grant award covering a two-year funding period. Two-year funding is not mandated by the regulation, and this authorization was not exercised by the Grant Officer in this instance.

There is a troublesome aspect to this case, however. The Grant Officer's decision to disallow the shifted costs was based on CVOC's controller's failure to contact the Department of Labor and request permission to shift the costs from PY 1991 to PY 1992.^{6/} This gives rise to an assumption that there are circumstances where the Grant Officer would approve a cost carry-over to a subsequent program year. We do not know if CVOC's request to shift costs would have been approved had it been timely made, but it is our view that CVOC should be given an opportunity to present qualifying documentation requesting authority for such a shift in costs even at this late date. Otherwise, the result is to subject the non-profit organization to a significant financial penalty for what might be merely a ministerial error on the part of the controller. We do not impose our judgment as to what circumstances would allow funds to be shifted, however, we note that CVOC alleges that the PY 1991 overexpenditure:

was spent to maintain training and education programs for migrant farm workers who began their courses of study during fiscal year 1991, but did not complete them until fiscal year 1992.^{7/} If these monies had not been expended when they were expended those students['] courses of study would have been interrupted to the detriment of the students and contrary to the intent of the program.

Complainant's Brief before the ARB at 2.

^{6/} Grant Officer's Final Determination - Finding III states in part:

The auditors found that the Grantee over expended fund 122 by \$33,008 during fiscal year 1991-92. That fund, they noted, was closed as of June 1992, and the operating deficit carried forward to fund 222, which started on July 1, 1992. The decision was to be cleared by the controller with the U. S. Department of Labor according to a memorandum furnished by the Grantee, but the controller indicated in an interview that she did not contact the Department. The auditors noted that although funds 122 and 222 involve the same grant they are for different periods and dollar amounts and *that operating losses should not be carried forward to other grant periods unless explicitly permitted by the Agency. . . .* The Grantee additionally indicated that a written request has been made to DOL for approval of the transfer. Thus far no documentation supporting that request has been furnished to this office. (Emphasis supplied).

A.F. at 12-13.

^{7/} There is an obvious typographical error in paragraph 4 at page 2 of CVOC's brief before the Board, with the statement that participants' courses of study were not completed until fiscal year 1991, when clearly 1992 was intended.

The substance of CVOC's statement is not refuted by the Grant Officer. The Grant Officer contends that CVOC should have been able to budget and plan the enrollment of its participants to avoid mid-grant interruptions. Grant Officer's Reply Brief at 2. While this advice may be theoretically possible, the exigencies of enrolling unemployed or underemployed farm workers in various courses of study might not lend itself to the neat, predictable beginnings and endings of award cycles. Therefore, in the practical world of program administration it is possible that such carry-over expenditures might be approved, had the request been timely.

Based on the record before this Board, it appears that the overall amount of funds expended by CVOC during the two-year period of the grant did not exceed the combined total of the two JTPA program year awards. Further, the record does not suggest that program funds were spent for improper purposes. The central cause of the dispute is the failure of CVOC's controller to make a timely request for authority to utilize PY 1992 funds to pay for excess costs incurred during PY 1991. Although such negligent behavior by a grantee cannot be condoned, under the facts before us we see little advantage to the Department or to the public in imposing on a non-profit agency the substantial sanction advanced by the Grant Officer in this instance, *if* such shifting of costs ordinarily would have been authorized by the Grant Officer in response to a timely request by a grantee.

Although in this decision we reverse the ALJ's Recommended Decision, as part of our Order in this case we therefore also direct the Grant Officer to review *de novo* any request from Complainant to authorize the use or shifting of PY 1992 funds to pay for the excess expenditures incurred during PY 1991, along with whatever additional documentary evidence may be provided by Complainant. To the extent any such shifting of costs might have been approvable if timely requested, the Grant Officer is directed to reduce the monies assessed against CVOC accordingly.

ORDER

The ALJ's Recommended Decision and Order **IS REVERSED**. The Central Valley Opportunity Center **IS ORDERED** to repay to the U.S. Department of Labor \$33,008 in non-Federal funds.

The Grant Officer **IS ORDERED** to review such documentary evidence as provided by the Complainant to determine what amount of the \$33,008 might have been permissibly shifted to PY 1992 funds, had the request to do so been timely made, and to credit such amount to the outstanding debt.

SO ORDERED.

KARL J. SANDSTROM

Chair

PAUL GREENBERG

Member

CYNTHIA L. ATTWOOD

Acting Member