U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center
Pittsburgh, Pennsylvania 15220

In the Matter of

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF LABOR & INDUSTRY

DATE ISSUED: Nov. 26, 1985

Case Nos. 82-WPA-02
82-WPA-35
82-WPA-36
82-WPA-37

Appearances:

James D. Pagliaro, Esq.
For the Regional Solicitor,
U.S. Department of Labor

Richard C. Lengler, Esq.
For the Commonwealth of
Pennsylvania, Department
of Labor & Industry

Before: THOMAS M. BURKE
Administrative Law Judge

DECISION AND ORDER

This is a proceeding under the Wagner-Peyser Act of 1933, as amended, 29 U.S.C. § 49 et seq. ("WPA") and the regulations issued thereunder (20 C.F.R. Part 658).

The parties to this proceeding are the Pennsylvania Department of Labor & Industry and the Employment and Training Administration ("ETA") of the U.S. Department of Labor ("DOL").

This matter involves four consolidated appeals by the Commonwealth of Pennsylvania, Bureau of Employment Security ("BES"), from disallowances of grant expenditures by the ETA.

Two of the appeals involve $1,269,522.39 in disallowed expenditures for salaries and benefits paid to employees by BES during fiscal years 1969-1972 (82-WPA-35) and fiscal year 1973 (82-WPA-37). The personnel expenditures were disallowed for non-civil service employees who were employed beyond a provisional period permitted under state and federal law. The issues to be considered in these two appeals were limited by this Court's Opinion and Order Sur Motion for Summary Judgment, issued on November 9, 1984, as discussed infra at page 7.

The remaining two appeals involve disallowed transfers of administrative expenses betweeen fund ledgers representing the obligational authority applicable to various federally-funded programs. The disallowances resulted from ETA fiscal audits of BES for the fiscal years 1974-1976 (82-WPA-36) and 1977-1979 (82-WPA-02). An additional issue involving disputed building costs totalling $1,028,727.94 in 82-WPA-02, was disposed of by Order of Partial Remand dated September 28, 1984. The remaining amount of disputed disallowances in these two appeals totals $1,996,553.81. Thus the total remaining disputed amount involved in the four consolidated cases is $3,266,076.20.

A hearing was held in this matter in Harrisburg, Pennsylvania, on November 26-27, 1984, at which time the parties were afforded an opportunity to present relevant evidence, and to examine and cross-examine witnesses. The parties were given leave to file post-hearing briefs, to be due by January 18, 1985, or 30 days after receipt of the hearing transcript, whichever was later. Both parties submitted timely briefs, and they are considered.

Based upon the entire record, I enter the following:

Findings of Fact and Conclusions of Law

I. Burden of Proof

The first issue to be decided is the proper allocation of the burden of proof. The general provision regarding the burden of proof in administrative hearings is found in the Administrative Procedure Act, 5 U.S.C. § 556(d), which provides that the burden of proof is on "the proponent of a rule or order." This statutory language, however, has been interpreted as referring only to the initial burden of production, and thus does not resolve the question of which party has the ultimate burden of persuasion in Wagner-Peyser Act cases. See, e.g., State of Maine v. U.S. Department of Labor, 669 F.2d 827, 928 (1st Cir. 1982); Environmental Defense Fund, Inc., v. Environmental Protection Agency, 548 F.2d 998 (D.C. Cir. 1976).

In State of Maine, supra, a case under the Comprehensive Employment and Training Act ("CETA"), the court recognized that the burden of production rested with the U.S. Department of Labor pursuant to the Administrative Procedure Act, but held that the ultimate burden of persuasion under CETA was on the party who

requested the hearing. This holding was based in large part upon the CETA regulations, which specifically provide that "[t]he party requesting the hearing shall have the burden of establishing the facts and the entitlement to the relief requested." 20 C.F.R. § 676.90(b). The regulations governing Wagner-Peyser Act cases, on the other hand, do not specifically assign the burden of proof. The Commonwealth argues that the regulations implementing the Wagner-Peyser Act reflect an intention that the DOL retain the burden of proof, as the regulations set up a procedure in which the Regional Administrator of the ETA bears the responsibility for monitoring the enforcing state agency compliance with Job Service regulations. DOL argues, however, that the regulations implementing the Wagner-Peyser Act establish an investigatory and pre-hearing procedure analogous to that used in CETA audit cases, and thus the burden of proof at hearing should be similarly assigned. In fact, the audit and pre-hearing procedures are similar under the two Acts. See Alameda County Training & Employment Board v. Donovan, ___ F.2d ___, No. 83-7253 (9th Cir. 1984), a CETA case in which the DOL issued various grants to the Alameda County Training & Employment Board, a local agency acting as a CETA prime sponsor. Under the grants, the local agency agreed to comply with the provisions of CETA and DOL's implementing regulations in expending the grant money. DOL, pursuant to its responsibility for monitoring local agency compliance with the applicable regulations, disallowed certain expenditures after having an audit performed, and the local agency requested a hearing. On appeal, the court held that DOL:

> . . . met its burden of production through the introduction of its administrative file. The file contained exhaustive records of the audit, the initial findings of the grant officer and the grant officer's final determination. Once the Agency [DOL] met its burden of production, it was incumbent on ACTEB to establish that its expenditures were allowable under CETA.

Slip Op. at p. 3.

Although the burden of proof in the Alameda case was allocated on the basis of the specific CETA regulation, the opinion makes it clear that the procedural posture of a CETA audit case is analogous to that of a Wagner-Peyser Act audit case like the present one. In both types of cases, DOL's audit file

contains a complete record of the investigative and pre-hearing procedures, up to and including the grant officer's final determination. After the final determination is issued, it is up to the state agency contesting any disallowances to request a hearing. 20 C.F.R. § 658.707. As the precise allocation of the burden of proof in Wagner-Peyser Act cases is unresolved, it is rational to assign the burden as it has been assigned in analogous types of cases, in which the policy considerations are similar.

In this case, as in Alameda County, supra, the DOL conducted a compliance audit and determined that the documentation produced by the Commonwealth was insufficient to justify certain expenditures. To determine whether the disallowances were proper it must be decided, first, whether the information contained in the audit file prima facie supports disallowance. At that point, consideration of further testimony and documentation may be necessary to determine whether the challenged expenditures can be justified or explained. As it is the Commonwealth which possesses the documents and witnesses necessary to explain its own fiscal system and expenditures, it is appropriate that it bear the ultimate burden of proving that the challenged expenditures were justified. See Old Ben Coal Co. v. Interior Board of Mine Operation Appeals, 523 F.2d 25 (7th Cir. 1975), in which the court noted that, where one party is in a better position to prove specific facts within his control, he should bear the ultimate burden of persuasion.

This allocation of the burden of proof is consistent with the approach taken by Administrative Law Judge William H. Dapper in West Virginia Department of Employment Security v. U.S. Department of Labor, 82-WPA-30 (1983), a Wagner-Peyser Act case similar to this one. Although Judge Dapper did not specifically discuss the burden of proof issue, his analysis of the disallowed fiscal transactions focuses on whether the state agency, which requested the hearing, was able to produce evidence explaining, documenting, or otherwise justifying the disallowed expenditures. The implication is that, as in CETA cases, the audit file was admitted as the initial evidence regarding the disallowances, but that Judge Dapper assigned to the state agency the ultimate burden of justifying the challenged expenditures, based on facts which they were in the better position to know. I find that such an allocation of the burden of proof is appropriate in the present case, as well. The DOL, by introducing its administrative file into evidence, satisfies its initial burden of production, but the Commonwealth must bear the ultimate burden of proof.

II. Provisional Employees

A. Background

The two appeals in this portion of the case involve disallowed expenditures for salaries and benefits paid by the Commonwealth during fiscal years 1969-1972 (82-WPA-35) and fiscal year 1973 (82-WPA-37). The personnel expenditures were disallowed for non-civil service employees who were employed beyond a provisional period permitted under state and federal law.

An explanation of the federal requirements regarding the provisional employees requires an understanding of the relationship between the Wagner-Peyser Act and state civil service laws. The Wagner-Peyser Act established the system of public employment offices in the United States. It provided for a cooperative federal/state system whereby the state operates the public employment offices under state law and the ETA of the DOL takes the responsibility for insuring that the state's operation conforms to federal law. The state offices are funded by federal grants in aid. In order to obtain the available financial assistance, the state must submit detailed plans for carrying out the provisions of the Wagner-Peyser Act. If the plans conform to the provisions of the Act, and underlying regulations, they are approved by the ETA. The state program must follow its approved plan and federal regulations to continue to be funded. The Regional Administrator of the ETA is required, under the Act, to review or "audit" the individual state programs to assure continued compliance.

20 C.F.R. § 602.15 requires that each state plan must include a merit system of personnel administration that complies with Federal Civil Service Commission regulations. The Pennsylvania Civil Service Act, 71 P.S. § 741.1, et seq., and implementing regulations, have been approved by the ETA as a satisfactory merit-based personnel system. The Pennsylvania Civil Service Act requires that all employment under a federal grant be in "classified," or civil service positions. Therefore, employees of the Commonwealth's Bureau of Employment Security ("BES") must be "classified." The Pennsylvania Civil Service Commission ("CSC") administers a civil service test for each particular type of position, and those who pass the tests are placed on a register of persons eligible for appointment to classified positions such as those with the BES. The CSC has at times been unable to maintain sufficient names on the testing certifications to supply BES with enough qualified employees. In such instances, the Civil

Service Act contemplates the appointment of temporary, or "provisional" employees to maintain services. The length of the provisional appointments is limited to a maximum of six months. Section 604 of the Civil Service Act of 1941, as amended, 71 P.S. § 741.604, states that:

> A provisional appointment shall continue only until an appropriate eligible list can be established and certification made therefrom, but in no event for more than six months in any twelve-month period.

Here, the audits of 1969-1973 reveal that BES carried a significant number of non-classified employees beyond the six-month provisional period. The auditors determined that $1,269,522.39 in salaries and personnel benefits were paid with federal funding to provisional employees after they were on the state's payroll for more than six months. ($421,349.39 during fiscal years 1969-1972 and $848,173.00 during fiscal year 1973). The Regional Administrator of the ETA found that the spending of these funds was unauthorized and consequently ordered the Commonwealth to refund $1,269,523.39. The Commonwealth does not contest the facts supporting the audit report. The names of the employees, their length of service, the amount of money disallowed per employee, and the status of the employees--provisional or classified--is not disputed. Rather, the Commonwealth offers the following reasons why the disallowance of the grant expenditures should be overturned as invalid:

1. The ETA did not specify the regulation violated when it issued the Final Notice of Noncompliance, disallowing Wagner-Peyser Act expenditures.

2. The ETA should be estopped from disallowing the costs for provisional employees because its officials advised state officials "not to terminate" the employees.

3. GAL-1210, a policy statement relied on by the ETA in its determination, allows a state to retain provisional employees in compelling extenuating circumstances, and such circumstances existed here.

The issues relating to the provisional employees were limited by this Court's Opinion and Order Sur Motion for Summary Judgment, issued on November 9, 1984. This Order limited the hearing on the provisional employees to the issue of whether the Commonwealth could demonstrate "compelling extenuating circumstances" to justify its retention of these employees beyond six months. The estoppel issue raised by the Commonwealth arises from the same sequence of events relevant to the existence of compelling extenuating circumstances, and will be discussed, infra. This Court's Order of November 9, 1984 determined that the Commonwealth received adequate notice of the nature of the alleged violations and the material facts supporting the disallowances regarding the provisional employees. Thus, this issue has been disposed of as it relates to this portion of the case.

B. Compelling Extenuating Circumstances

The phrase "compelling extenuating circumstances" is derived from GAL-1210 (General Administrative Letter No. 1210), which was issued on June 12, 1968 as a policy guideline of the ETA relative to provisional appointments. GAL-1210 was issued as part of the ETA's activities in monitoring and reviewing state program operations for compliance with federal laws and regulations. As discussed above, Section 604 of the Pennsylvania Civil Service Act, which is enforced by the ETA in the federally-funded programs it monitors pursuant to 20 C.F.R. § 602.15, contains a strict six-month limitation on provisional appointments. GAL-1210, on the other hand, both tempered this strict limitation somewhat, and elaborated on the specific rules and procedures that ETA-monitored state agencies would be expected to follow in regard to provisional employees. GAL-1210 was issued by ETA to inform the states of its policies regarding provisional appointments, and it thus became the document that the parties worked under on this issue. Therefore, it is GAL-1210 that contains the relevant provisions for determining whether BES complied with federal regulations regarding its provisional employees.

GAL-1210 informed the states that federal policy provides for audit exceptions to salaries of provisional employees whose appointments are extended beyond the period provided in state plans. The letter also provided an exception to the refusal to fund salaries beyond the provisional limitation period. The letter stated that funding could continue for "compelling extenuating circumstances." Examples of compelling extenuating circumstances were listed in an attachment to the letter, and include the following, which are relevant in the circumstances of this case:

...C. Impracticability of holding an examination for a class of personnel in extremely short supply, or for the special purpose of supplementing an existing list in the hope of obtaining available eligibles for a small number of localities for which eligibles on the existing list are available. The impracticability of such an examination may be due to considerations of economy of funds, examination material, and staff time, as weighed against probable results.

D. Impracticability of holding all needed examinations due to an abnormally heavy load of examinations which cannot be handled even with emergency staffing. (It is assumed that the State will adequately staff the merit system agency so that provisional appointments will not be extended for this reason unless the heavy workload is unforeseeable and highly abnormal.)

E. Necessary delay in holding examinations pending completion of major position classification work, such as that growing out of agency reorganization. . . .

GAL-1210 goes on to describe the remedial efforts and documentation required of a state agency to assure that audit exceptions are not taken when provisional appointments are extended due to compelling extenuating circumstances. These provisions, and the question of BES' compliance with them, will be discussed, infra. The threshold issue, however, is whether BES can demonstrate the existence of compelling extenuating circumstances explaining its extended retention of provisional employees.

The sequence of events that caused BES to retain large numbers of provisional appointees was described by several of the Commonwealth's witnesses. Wendell Pass, currently the Director of

the Bureau of Benefits and Allowances, Office of Employment Security ("OES"),[1] testified that he served as BES Personnel Director from 1969 to 1971. He opined that the problem involving the extended retention of provisional employees was caused by several factors. First, the "War on Poverty" in the late 1960's resulted in an expansion of programs designed to aid poor and minority citizens. These changes resulted in new job classifications being developed within BES, in an effort to recruit individuals with community backgrounds beneficial in relating to poor and minority clientele. In addition, a change in Pennsylvania law in 1971 created a 100 percent increase in unemployment insurance claims workload, greatly increasing unemployment insurance staffing needs. Mr. Pass stated that the Pennsylvania Civil Service Commission did not have adequate lists or examination programs in place to provide the needed applicants. Further, there was a shortage of applicants because the BES' salary ranges were low, and the increased staffing needs came during a period of nearly full employment in Pennsylvania.

David B. Roach, currently ETA Validation Coordinator for BES, served as BES' Personnel Director from 1971 to 1979, succeeding Mr. Pass. Mr. Roach testified that his department requested that the CSC develop and conduct civil service tests for BES' new and increased staffing needs. He stated that progress was slow in developing tests for the new positions, and in administering tests and recruiting for additional personnel even in more traditional job classifications. Part of the problem, according to Mr. Roach, was that the CSC was understaffed and found it difficult to handle the increasing need for testing. It was also difficult to recruit applicants, even when tests had already been developed, because unemployment was low. With the increased workload caused by an influx of new federal programs administered by BES, it was difficult to obtain the number of clerical and professional employees needed.

Finally, John E. Millett, Executive Director of the Pensylvania Civil Service Commission, testified on behalf of the Commonwealth. He stated that he served the CSC's Deputy Director

---

1 The Bureau of Employment Security (BES), as it was called during the fiscal years in question, is now named the Office of Employment Security (OES). It remains the same entity, and will be referred to throughout as the BES, for purposes of clarity.

from 1969 to 1977, which included the fiscal years here in question. Mr. Millett explained that, at that time, the CSC was having a problem developing needed examinations. There were large numbers of new job classes within BES and in other state agencies, for which to develop exams; in fact, there were 4,500 job classifications in the state during this period, as opposed to 2,500 today. To develop the tests, the CSC had to perform job analysis and check the validity of the exam contents vis-a-vis anti-discrimination laws. Also, at that time, written tests were required for nearly all classes. Mr. Millett explained that it took time to develop the new tests, especially because the Commission itself was understaffed at the time. Finally, according to Mr. Millett, the CSC was required to follow some rules of its own in developing examinations; emphasis was placed on developing tests for larger job classes. BES had a need for some exams for non-professional classifications, including some jobs that did not require civil service status in any state agency except BES. These small job classes were given lower priority in developing and giving tests than were the job classifications where larger numbers of positions were involved.

The testimony of the Commonwealth's witnesses is sufficient to establish that the problem with BES provisional employees was caused by compelling extenuating circumstances. The problems testified to include some of the situations contemplated by GAL-1210 as exemplifying such circumstances. Wendell Pass' testimony regarding a shortage of applicants for certain specialized BES positions during the fiscal years in question, and Mr. Millett's explanation of the lower priority given to testing for extremely small job classifications, are persuasive evidence of the impracticability of holding some examinations as described in Subsection C of GAL-1210's Attachment 1. This subsection states that one example of "compelling extenuating circumstances" is the impracticability of holding exams for a class of personnel in extremely short supply, or to obtain eligibles for a small number of locations for which the existing lists are inadequate. Another example of compelling extenuating circumstances is described in Subsection D of the same attachment: holding all needed exams may be impracticable because of an abnormally heavy workload. Mr. Millett testified that one of the reasons for the CSC's difficulty in scheduling all the needed examinations was that new federal programs had created an unexpectedly heavy load of new exams to be

developed, and the CSC was too understaffed to keep up with the increase.[2]

Finally, Subsection E of the attachment to GAL-1210 contemplates that a delay in holding examinations pending completion of major position reclassification work may constitute compelling extenuating circumstances. In this regard, both Mr. Pass and Mr. Roach explained that the implementation of new federal programs in the late 1960's, as well as changes in state unemployment laws in the early 1970's, resulted in a need for a number of new job classifications for which tests were not unavailable, but also difficult to develop.

The testimony of the Commonwealth's witnesses is creditable and reveals a number of circumstances in the late 1960's and early 1970's that happened to coincide, and created serious problems in filling BES' staffing needs with eligible, civil service employees. This problem was clearly critical enough to explain, at least initially, how the provisional employees came to be retained in such large numbers. Whether the Commonwealth made, and documented, appropriate efforts to resolve the problems in a timely fashion in a separate issue under GAL-1210. As a threshold matter, however, I find that the Commonwealth has demonstrated that compelling extenuating circumstances existed to explain its retention of provisional employees beyond the six-month limit.

C. Response to the Problem

The next issue is whether, in light of these extenuating circumstances, the Commonwealth met federal requirements for alleviating the problem that caused the retention of the

---

2 Subsection D of the GAL-1210 attachment cautions that, in cases of an abnormally heavy workload, it is assumed that the state merit system agency will be adequately staffed so that only an "unforeseeable" and "highly abnormal" increase in workload will cause delays in testing and certifying provisional employees. Mr. Millett's testimony is sufficient to establish that the CSC's increased workload in the late 1960's was sudden and unpredictable, as it was caused by an unexpected increase in the numbers of new job classes as a result of the influx of new federal programs. The question whether the CSC took adequate steps to deal with the increased workload and solve the problem in a timely fashion is discussed, infra, at pages 18-21.

provisional employees. Two questions are involved here: (1) whether the DOL should be estopped from disallowing the costs for provisional employees because of its manner of handling the situation during the fiscal years in question; and (2) whether the Commonwealth took the necessary steps to solve the provisional employee problem which were required under GAL-1210 in order to avoid audit exceptions.

(1) Estoppel

BES asserts that the DOL should be estopped from disallowing the costs for provisional employees because its officials advised state officials "not to terminate" the employees. This argument is predicated on a memorandum of William A. Roskey, Financial Manager of ETA's Regional Office.[3] In this memorandum, Mr. Roskey stated that, during discussions between ETA and BES personnel regarding the provisional appointment problem, ETA officials told BES not to terminate the employees until further notice. Mr. Roskey went on to note that BES provided the Regional Office with monthly lists of provisionals; he opined that "[i]f the Regional Office, the Office of Personnel Management and the State Civil Service had the information all of these years and failed to act, I am not sure we should now disallow the costs."

It is undisputed that the ETA never directed BES to terminate the provisional employees. Clayton Johnson, Chief of the ETA's State Personnel Management Division, testified that a deadline was never imposed on BES for removal of the provisionals, and that, in fact, under the merit system of personnel administration, no federal official would be authorized to dictate the firing of any state employee. Thus, the question is whether the ETA's acquiescence in the retention of these employees estops it from disallowing the related costs.

As a threshold matter, it is possible for the federal government to be estopped under certain circumstances. E.g., Walsonavich v. U.S., 335 F.2d 96 (3d Cir. 1964); U.S. v. Georgia Pacific Co., 421 F.2d 92 (9th Cir. 1970). However, estoppel against the government is limited, and normally the government is not estopped by statements or representations made by officials not authorized to make them. See Goldberg v. Weinberger, 546 F.2d 477 (2d Cir. 1976), cert. denied 431 U.S. 937 (1977), in which the court reasoned:

---

3 Administrative Law Judge Exhibit 2, Tab I.

> The government could scarcely function if it were bound by its employees' unauthorized representations. Where a party claims entitlement to benefits under federal statutes and lawfully promulgated regulations, that party must satisfy the requirements imposed by Congress. Even detrimental reliance on misinformation obtained from a seemingly authorized government agent will not excuse a failure to qualify for the benefits under the relevant statutes and regulations.

546 F.2d at 481.

The Commonwealth argues that, because GAL-1210 permits retention of provisional employees beyond six months in certain circumstances, it constitutes a waiver of federal requirements, and thus ETA employees did have the authority to permit BES to retain these employees. Therefore, according to the Commonwealth, this is not a situation where estoppel is inapplicable because reliance was upon unauthorized statements or misinformation from federal officials. It is true that GAL-1210 provides relief from audit exceptions for extended provisional employees in certain situations. However, the letter neither states nor implies that the continued retention of these employees, even in compelling extenuating circumstances, is condoned or permitted for anything other than a limited period, during which state officials are required to take specific steps to develop a remedial plan of action.

Thus, although federal officials in this case did acquiesce in the retention of the provisional employees, the acquiescence was qualified. BES was justified in relying upon the statements of ETA officials that they need not immediately terminate the provisional employees; indeed, the evidence of record indicates that ETA could not properly have advised BES to fire them. However, the question is not whether BES was justified in retaining the provisionals; rather, the issue is whether BES could properly retain them, and continue to receive federal funding for their salaries and benefits, without complying with the requirements imposed by GAL-1210 to solve the problem. Indeed, the clear implication to be drawn from GAL-1210 is that, since it provided a narrow exception to a strict prohibition against extended retention of provisional employees, the federal officials enforcing the letter were <u>not</u> authorized to tell BES that it could escape audit disallowances for these employees other than by strict compliance with the terms of the exception. Nor does it appear that ETA personnel did so.

The evidence indicates that the ETA, while not suggesting wholesale firing of the provisional employees, nevertheless increased its insistence that BES take steps to implement a remedial plan, in order to avoid audit exceptions. A February 26, 1970 letter from ETA to BES[4] expressly states that, as BES had agreed during meetings held as early as late 1969, the "final disposition of the questioned items would be held in abeyance" long enough to allow BES to implement specific practices to solve the problem. The letter continued:

> When it is evident to the Manpower Administration that you have adopted and implemented the suggested practices and are making satisfactory progress in improving your basic staffing processes and eliminating extended provisional employees on your rolls, consideration would then be given to waiver and withdrawal of the questioned amounts for all of these items.

Thus, the evidence fails to support the conclusion that BES officials were led to believe that the costs relating to the provisional employees would be allowed, unless BES implemented the type of specific remedial plans described in GAL-1210 and the February 26, 1970 letter. For this reason, I conclude that the ETA's advising BES not to terminate the provisional employees is an insufficient basis for estopping the ETA from disallowing the questioned costs. The remaining question is whether ETA was nevertheless justified in disallowing these costs, in light of the existence of compelling extenuating circumstances and the efforts BES made to solve the problem.

(2) BES' Efforts to Eliminate the Provisional Employee Problem

The ETA argues that BES did little or nothing to resolve the problem with the provisional employees, and proceeded for at least six more years to retain provisional employees beyond the six-month time period. The ETA also argues that the Commonwealth cannot take advantage of the compelling extenuating circumstances

---

[4] Federal Government Exhibit 8.

exception provided for in GAL-1210, as the Commonwealth never documented the extenuating circumstances. GAL-1210 set forth guidelines for states that wished to have their compelling extenuating circumstances exception approved by the Regional Administrator of ETA. However, as discussed in this Court's Order of November 9, 1984, GAL-1210 suggested certain types of contemporaneous documentation, but did not specifically state that audit exceptions would be taken if the specified advance documentation of extenuating circumstances was not submitted.

Additional documentation requirements were imposed upon BES by the ETA by letter dated February 26, 1970.[5] In this letter, ETA referred to the results of discussions between ETA and BES personnel, in which it was agreed that the question of audit exceptions would be held in abeyance while BES was given a chance to solve the provisional employee problem. The letter mentioned several steps that BES had agreed to take to solve the problem, and instructed BES that it was to obtain prior clearance before retaining provisional employees beyond six months, provide the ETA with documentation of extenuating circumstances, and submit a monthly report to ETA "detailing efforts and the progress made for the preceding calendar month."

Wendell Pass and David B. Roach of the Commonwealth both testified that they felt they had complied with the ETA's requirements by filing monthly reports regarding the provisional employees. According to Mr. Pass, he believed that the purpose of the reports was to give the ETA documentation as a basis for deciding whether any of these employees should be terminated. Mr. Roach also recalled that a monthly report was submitted to ETA; he described the report as containing information on "what we were doing to try to get that provisional off the payroll or Civil Service-wise."[6] Mr. Roach further testified that the Regional Office did not request any additional documentation besides the monthly reports.

---

5 Federal Government Exhibit 8.

6 Notes of Hearing Transcript, at p. 356.

Clayton Johnson of the ETA testified that BES did submit monthly reports to the Regional Office regarding the provisional employees, but that the reports were simply lists of employees and their job titles, not narrative reports. Mr. Johnson's testimony is corroborated by a May 27, 1981 memorandum from William A. Roskey, ETA Financial Manager[7] indicating that "[m]onthly lists of provisionals by name, title, and date of accession were received in the Regional Office."

The testimony of the Commonwealth's witnesses regarding the monthly reports was vague, and the Commonwealth was unable to produce a copy of any of the reports. In light of the conflicting testimony on this issue, I find that the Commonwealth has not established that it complied with the February 26, 1970 letter's requirements for detailed documentation of extenuating circumstances and specific remedial efforts. However, it is also clear that the ETA never specifically informed BES that its monthly reports were inadequate, or that more extensive documentation was required to comply with the letter. Both Mr. Pass and Mr. Roach testified that they believed the monthly reports they submitted were sufficient to satisfy ETA's requirements, and Mr. Johnson's testimony does not establish that the ETA ever advised BES that its monthly reports were inadequate.[8] In light of the ETA's apparent acquiescence regarding the documentation submitted by BES, it would be inappropriate to uphold the disallowances solely on the basis of BES' failure to provide documentation of its efforts to resolve the provisional employee problem.

BES' failure to provide before-the-fact documentation of its response to the problem of the provisional employees is not the crucial issue in determining whether it was justified in retaining those employees during the fiscal years in question. Apart from any documentation reqirements, GAL-1210 clearly contemplates that the Commonwealth should have taken specific measures to end the continued retention of its provisional employees. As discussed previously, GAL-1210 provides an exception to an otherwise absolute prohibition against retaining

---

7 Administrative Law Judge Exhibit 4, Tab I.

8 Notes of Hearing Transcript, at pp. 442-443.

provisional employees beyond six months. The letter's express purpose was "[t]o describe actions needed to prevent extended provisional appointments and avoid fiscal audit exceptions."[9] Thus, although much of the language of GAL-1210 is directory in nature, the document as a whole clearly indicates that there were certain remedial actions that a state agency was required to undertake in order to avoid the disallowance of the costs here at issue. The type of remedial action contemplated is specified in the letter:

> Plans for corrective action, established to eliminate extended provisional appointments and to avoid audit exceptions, should be jointly developed and concurred in by employment security and merit system agencies to insure their feasibility and appropriateness. They should indicate specific action to be taken: e.g., the projected date that needed examinations will be scheduled for announcement, that eligible lists will be established, and that a certificate will be issued for positions occupied by providsionals. They should enumerate proposed steps, such as expanded recruiting efforts and increases in salary ranges, through which the State anticipates positive results. The plans should clearly establish that a further extension of provisional appointments in the class will be unnecessary.

GAL-1210 further noted that "[c]onsultation and joint planning and efforts by merit system and employment security agencies are required for an effective personnel selection process," which in turn will "limit the necessity for provisional appointments." Attachment 2 to GAL-1210 provided a list of suggested responsibilities for both the state employment security agency and its civil service agency. Among the recommended steps to be taken were the following:

---

[9] Administrative Law Judge Exhibit 4, Tab G.

1. The merit system agency should develop examinations on a timely basis, using the assistance of the employment security agency and the federal government.

2. The employment security agency should:

   a. Share in the responsibility for recruiting applicants for employment, using its local offices;

   b. Aid the merit system agency in examination planning; and

   c. Provide space so that on-site examinations can be conducted in the employment security offices.

The ETA's February 26, 1970 letter to BES was also quite specific in its insistence that BES and CSC personnel should coordinate their efforts, develop specific plans, and make measurable progress in eliminating the retention of provisional appointees in order to avoid audit exceptions.

The testimony of the Commmonwealth's witnesses reveals that BES and CSC initially had difficulty in coordinating their efforts to implement the specific remedial plans envisioned by GAL-1210. However, the requirements of the letter were eventually followed and the problem of the provisional employees solved.

Wendell Pass testified that, during his tenure as BES Personnel Director, he made numerous attempts to follow ETA's suggestions to solve the provisional employee problem. He stated that he regularly communicated with the CSC, prodding them to help in alleviating the problem. Mr. Pass testified that, in 1969 or 1970, his office requested that the CSC set up a special unit to handle BES problems, and allow BES to help test applicants themselves. Attempts were also made to increase recruiting through BES local offices. Although Mr. Pass admitted that progress was slow, he explained that CSC eventually concurred in re-allocating some of its priorities to allow for same-day testing, on-site testing by BES, decentralization of CSC functions, and so on. These were some of the specific, innovative practices suggested by GAL-1210 and mandated by ETA's February 26, 1970 letter. Mr. Pass stated that these new plans for cooperative action between BES and CSC were finally implemented, and helped to solve the problem of the provisional employees. He testified, for example, that CSC permitted on-site testing beginning in about 1973.

David B. Roach, Mr. Pass' successor as BES Personnel Director, testified that he also asked the CSC for decentralized testing, and in fact this practice was later implemented for clerical employees. He stated that eventually, the BES even lent the CSC some of its staff to help deal with the problem. Once again, these are the type of steps suggested by GAL-1210. Mr. Roach stated that the BES did reduce the number of its extended provisional employees between 1971 and 1979, when he was Personnel Director. Although the problem continued, and even increased up to 1973, Mr. Roach testified that the remedial steps suggested by GAL-1210 were finally implemented and were successful in solving this problem.

John E. Millett, Executive Director of the CSC, testified regarding the CSC's attempts to solve the problem. Mr. Millett was Deputy Director of the CSC from 1969 to 1977. He made it clear that, during the fiscal years in question, BES and CSC were very concerned about getting the provisional employees tested. CSC, however, initially had problems in implementing some of the remedial steps requested by ETA. Mr. Millett explained that the CSC was understaffed and had to give priority to developing and giving tests for the larger classes of employees needed in the Commonwealth as a whole; job classes that included only small numbers of employees, as some of BES' classifications did, were put "on the back burner" because of critical staffing problems.[10]

Mr. Millett also explained that CSC's response to the provisional employees was hampered by a lack of funding and also by rigid internal policy guidelines that the Civil Service Commissioners were reluctant to change. For example, he noted that, in 1969 or 1970, BES requested that CSC establish a separate division for Grant-in-Aid programs. CSC made a budget request for extra staff to do this, but did not receive the funds. They were later successful and the provisional employee problem was eventually resolved. According to Mr. Millett, CSC officials developed proposed legislation to create a work-test program for provisional employees, and also attempted to implement BES' request that some of its staff be trained to develop exams. Unfortunately, the Commissioners of the CSC initially turned these proposals down, concentrating instead on seeking additional state funds for staffing so that CSC could deal with the problem internally.

---

10 Transcript, at p. 380.

By the mid-1970's, CSC was finally able to implement some innovative programs to solve the provisional employee crisis, including some of the steps mentioned above, that were suggested by GAL-1210. After these steps were taken, the problem was solved.

The testimony of record indicates that BES made repeated efforts, during the fiscal years in question, to resolve the problem here at issue. Several of the innovative practices suggested by GAL-1210 were proposed by BES; BES continually prodded the CSC to make new efforts to develop and administer examinations, and offered to help in these efforts. CSC, on its part, also recognized the problem and attempted to solve it. The evidence suggests that CSC had difficulty, at first, in changing its traditional policies to accomodate the new, remedial plans suggested by BES. Initially, it concentrated on seeking additional funding and staffing so that it could take care of the problem itself, using the testing methods and priorities it had relied on in the past. Apparently, part of the problem was that the problem mushroomed so quickly during the fiscal years in question, that CSC had difficulty reacting quickly enough in implementing the entirely new administrative approach suggested by ETA. By 1973, however, the CSC had begun changing its policies to use some of the new approaches suggested by GAL-1210, including increased cooperation between the CSC and BES. Once specific plans of this nature were put into action, the provisional employee situation was rectified.

The testimony discussed above reveals that, during fiscal years 1969-1973, BES officials made good faith efforts to solve the problem, by attempting to coordinate their efforts with CSC to adopt a remedial plan based on the requirements of GAL-1210. Progress in implementing the plans was slow, largely because of CSC's difficulty with changing its administrative policies quickly enough to accomodate BES' suggestions and requests. Although CSC's inability to act as quickly as BES and ETA desired was, perhaps, caused in part by poor managerial judgment, it is nevertheless clear that CSC also made good faith attempts at finding a solution. The two agencies were eventually able to take the specific, suggested remedial steps, and did reduce the number of extended provisionals on the payroll.

In light of the extenuating circumstances that existed, as well as BES' good faith efforts and eventual success in implementing the remedial plans required by ETA, I find that BES complied substantially with the requirements of GAL-1210. The disallowances in this category, amounting to a total of $1,269,522.39 in fiscal years 1969-1973, are therefore reversed.

III. Transfer of Funds

A. Background

The two appeals in this portion of the case stem from a determination made by the Regional Administrator of ETA that the Commonwealth had not adequately documented its use of and had improperly transferred certain grant monies for the fiscal years, pursuant to the Wagner-Peyser Act's requirement that the ETA review state agencies' federally funded programs to enforce compliance with federal regulations governing the expenditure of grant funds.

1. 82-WPA-36 (FY's 1974-1976)

Batch No.	Date of Transfer	Transfer From	Transfer To	Disallowed
851	6/30/74	Unemployment Insurance.	Employment Security.	$ 578,824.00
851	6/30/74	Unemployment Insurance.	Computer Job Placement.	198,262.00
847	6/30/74	Auditors' estimate of amount that should have been included in year-end payroll-clearing adjustment for Unemployment Insurance.		175,318.00
847	6/30/74	Various service contracts.	Employment Security.	24,566.00
808	9/30/76	Food Stamps.	Employment Security.	
			TOTAL DISALLOWED:	$1,190,924.00

2. 82-WPA-02 (FY's 1977-1979)

Batch No.	Date of Transfer	Transfer from Fund Ledger Code No.	Transfer to Fund Ledger Code No.	Disallowed
754	8/77	96040 (CETA/ Public Service Employees).	92050 (Employment Security).	$ 10,363.58
812	9/77	90877 (Veterans Assistance Centers).	90997 (Disabled Veterans Programs).	5,696.86
812	9/77	92057 (Employment Security).	92127 (Food Stamps).	65,987.12
812	9/77	91707 (Trade Readjustment Act).	92107 (Unemployment Insurance).	202,056.59
812	9/77	92367 (Disaster Unemployment Assistance).	92107 (Unemployment Insurance).	14,570.04
812	9/77	92387 (Disaster Unemployment Assistance).	92107 (Unemployment Insurance).	451,642.76
770	7/79	92057 (Employment Security).	92058 (Employment Security).	55,312.86
			TOTAL DISALLOWED:	$805,629.81

Initially, some explanation of the disputed transactions is necessary. As discussed, supra, the Wagner-Peyser Act provides for federal funding for the operation of state public employment offices such as BES. Under the Wagner-Peyser Act and its implementing regulations, the ETA of the DOL takes responsibility for monitoring the states' expenditure of the granted funds. Various amounts of money, appropriated by Congress, are earmarked for specific programs administered by the state employment security offices. The funding is channeled through the DOL to BES, in the form of specific dollar amounts of "obligational authority" for each program funded through DOL. Some of the programs, such as employment security and unemployment insurance,

are funded by "Grants-to-States" appropriations pursuant to the Wagner-Peyser Act and the Federal Unemployment Tax Act, 42 U.S.C. § 503 et seq. BES, however, also administers other programs funded through the DOL, but pursuant to different funding sources such as the Disaster Unemployment Assistance Act, the Trade Readjustment Act, the Food Stamp program, the Veterans Benefits Act, and so forth.

All of the funds in question here were administrative; i.e., these were monies that were used for BES' expenses in operating the various benefit programs, rather than the monies used to pay benefits to claimants under the programs. The expenses included salaries and personnel benefits paid to the BES employees who worked in administering the various programs, as well as travel costs, equipment expenses, and so forth.

ETA monitors BES' expenditure of the funds granted through the various appropriations mentioned above. To assure that the money is spent in accordance with applicable federal regulations, ETA requires BES to use a federally-mandated cost accounting system to account for monies granted through DOL-funded activities. Under this cost accounting system, BES has set up a number of "fund ledgers" to account separately for administrative expenditures applicable to each separately-funded program. Thus, when Congress appropriates funds for operation of the unemployment insurance program, for example, DOL issues an "obligational authority" to BES in the amount of the grant to that particular program for the fiscal year. The obligational authority represents the amount of federal funds available for use in administering this program during the fiscal year. When expenses are incurred that are applicable to this program, an accounting entry is made to the program's fund ledger code, indicating that the costs are expended from the amount of the obligational authority. Thus, the accounting entry for an expenditure results in a reduction in the remaining amount of available obligational authority for that program.

The general basis for the ETA's audit disallowances in these two appeals is the contention that BES made accounting adjustments to various fund ledgers, in which costs that should have been applied against the obligational authority for a particular program were transferred and applied against the obligational authority for another federally-funded program.

The Regional Administrator of ETA determined that BES had failed to provide documentation by which ETA could assure itself that expendes were not being improperly shifted among various federal funding sources.

B. Applicable Regulations

The Commonwealth argues, as a threshold matter, that the disallowances relating to the fund transfers were improper, because the ETA failed to specify which regulations were violated, as is required under 20 C.F.R. § 658.702(f)(2). The DOL asserts that the disallowances were based on various federal laws and regulations, including the Employment Security regulations applicable under the Wagner-Peyser Act during the time period in question.

These regulations contained a provision at 20 C.F.R. § 602.16, which required each state employment security agency to ". . . comply with the ETA Fiscal Standards, set forth in Part IV of the Employment Security Manual." The relevant portions of the Manual were made part of the record as Federal Government Exhibits 3 and 4. The pertinent provisions include Sections 0740-0743,[11] which limit expenditures of funds to those included in each state's obligational authority and no more. Sections 1080-1084 contain additional criteria, including the requirement that allowable costs under ETA-monitored programs may "[n]ot be allocable to or included as a cost of any other federally financed program in either the current or a prior period."[12]

---

11 Federal Government Exhibit 3.

12 Federal Government Exhibit 4, Section 1081(G).

John Getek of the U.S. Department of Labor Regional Audit Office testified that the impact of this provision is that, if a cost belongs in a specific funding source or a specific fiscal year, it must stay in that funding source or in that year (Transcript, at p. 71).

Section 1081(d) of the Employment Security Manual further provides that expenditures are allowable under ETA-funded programs only if they "[c]onform to all limitations or exclusions set forth in OMB Circular A-87, Federal laws, or other limitations as to types of amounts of cost items." The OMB circular was later replaced, with no substantive changes, by Federal Management Circular 74-4, which contains the following provisions especially relevant to the transactions at issue here:

> . . . 2. Allocable costs.
>
> a. . . .
>
> b. Any cost allocable to a particular grant or cost objective under the principles provided for in this circular may not be shifted to other Federal Grant programs to overcome fund deficiencies, avoid restrictions imposed by law or grant agreements, or for other reasons.

Section C(2)(b) of Federal Management Circular 74-4.[13]

Clearly, BES is chargeable with notice of the provisions of the Employment Security Manual, and Federal Management Circular 74-4, as the manual was specifically referenced in the applicable regulations implementing the Wagner-Peyser Act, and the circular is incorporated by reference in the Manual itself.

ETA further asserts that ETA Handbook No. 362, Chapter 2, Section 2-6,[14] provides authority for the disallowances. This section by its terms "contains additional financial and internal control provisions which are to be implemented by SESA [State Employment Security Administration] staff to ensure a comprehensive and sound fiscal program." This Section of the Handbook requires documentation for all financial transactions in the BES accounting system:

---

[13] Federal Government Exhibit 4.

[14] Federal Government Exhibit 2.

> Documentation
> A document that will affect the balance of any asset, liability, proprietary, budgetary, income or cost account will be recorded in the accounts in the same monthly reporting period that the transaction occurred to insure that such accounts reflect the current status. The system requires that all transactions be adequately documented and identified when recorded in the accounting records to enable the tracing of each transaction to the source document and to accounting reports.

It is evident that the relevant provisions of the ETA Handbook regarding documentation of accounting transactions were known to BES at the time of the alleged violations. John Getek of the DOL Regional Audit Office testified that the Handbook, generally known as the Cost Accounting Manual or State Employment Security Accounting Manual, contains the guidelines for everyone who used the federally-mandated cost accounting system used by BES. He stated that copies of the manual, and its predcessor, had been made available to all the various state employment security agencies using the system.

A final document pertinent to the transfer issue is OMB Circular No. A-102, Attachment K,[15] which requires federal grantees to request prior approval from grantor agencies for any budget revisions. Attachment K, Section 4, further provides:

> For nonconstruction grants the Federal agency may also, at its option, restrict transfers of funds among direct cost categories for awards in which the Federal share exceeds $100,000 when the cumulative amount of such transfers exceeds or is expected to exceed five percent of the total budget. The same criteria shall apply to the cumulative amount of transfers among programs, functions and activities when budgeted separately for an award, except that the Federal agency shall permit no transfer that would cause any Federal appropriation, or part thereof, to be used for purposes other than those intended.

---

15 Federal Government Exhibit 5.

Attachment K of Circular A-102 was also evidently known to BES, as a copy of a portion of the document was attached to a letter from Wendell Pass of the BES to ETA's Regional Administrator. Mr. Pass referred to the Circular as providing justification for BES' transfer of costs between appropriations and projects.[16] John Getek of the ETA, however, suggested a different interpretation of this provision when he testified at the hearing. Mr. Getek's understanding was that the Circular does not permit transfers of costs between entirely different grants or appropriations, but merely allows transfers of different types of administrative expenses, such as personnel, travel, equipment, or supplies, within the "account structure" of a single appropriation. Mr. Getek's interpretation is consistent with the language of the Circular, which refers to permissible transfers "among programs, functions and activities, when budgeted separately for an award." (Emphasis added.) The Circular goes on to caution that transfers "that would cause any Federal appropriation, or part thereof, to be used for purposes other than those intended" is strictly prohibited. Mr. Pass did not include this portion of the Circular's language with his letter to the ETA. When the provision is read as a whole, Mr. Getek's interpretation appears the more rational one, and thus the Circular in fact lends support to the ETA's argument that transfers between appropriations are strictly prohibited.

The regulations and other documents discussed above were known to BES personnel. When considered together, the various provisions indicate that, under the federally-mandated cost-accounting system governing BES expenditures, transfers of costs between grant programs are prohibited, and all transactions entered on the system must be traceable to source documents sufficient to identify and explain them.

Section 5 of the Administrative Procedure Act provides that a party to an administrative proceeding is entitled to receive notice specifying the matters of fact and law asserted. Notice under Section 5 has been held to be sufficient so long as a party is reasonably apprised of the issues in controversy and is not misled. Savina Home Industries v. Secretary of Labor, 594 F.2d 1358 (10th Cir. 1979); Golden Grain Macaroni Co. v. FTC, 472 F.2d 882 (9th Cir. 1972); and Intercontinental Industries, Inc. v. American Stock Exchange, 452 F.2d 935 (5th Cir. 1971). Here,

---

16 Administrative Law Judge Exhibit 1, Tab C.

the Regional Administrator, in his initial and final determinations, described the disallowances in terms of the prohibitions described above. As I have found that BES was aware, or chargeable with knowledge of the relevant provisions, I conclude that the Regional Administrator's determinations provided sufficient notice to apprise BES of the nature of the alleged violations, and served the purpose of 20 C.F.R. § 658.702(f)(2).

I find that BES received sufficient notice of the nature of the alleged violations here at issue. Further, the regulations and policy documents discussed above support the ETA's argument that transfers of costs between funding sources are prohibited, and even transfers within a single appropriation must be documented sufficiently to establish that they are allowable. Thus, the remaining question is whether the testimony and documentation provided by BES is sufficient to justify or excuse the transfers that were made, despite the applicable regulations prohibiting transfers among funding sources. The actual figures, dates and amounts of the transactions at issue are not disputed. (See testimony of the Commonwealth's witness, Wilbert Evert.[17]) The Commonwealth argues that the transactions should have been allowed, or any violations excused, for various reasons peculiar to each type of transaction. Thus, the circumstances underlying each disputed set of transactions must be discussed separately, and in detail, before a determination can be made whether the disallowances were proper.

C. Discussion of Individual Transfers

1. Disaster Unemployment Assistance/ Unemployment Insurance Transfers

The DUA/UI transactions in Batch 812, Case No. 82-WPA-02, involve costs transferred from BES fund ledger numbers 92387 and 92367, which were the ledgers applicable to costs under the Disaster Unemployment Assistance appropriation. The costs were transferred and charged against the obligational authority applicable to the Unemployment Insurance program, a Grants-to-States appropriation identified by BES fund ledger code number 92107. The amounts disallowed were $14,570.04 and $451,642.76, for a total of $466,212.80.

---

17 Transcript at p. 258.

Wilbert A. Evert, who served as BES' Fiscal Director and Assistant Controller during the fiscal years in question, testified for the Commonwealth regarding the nature of the Batch 812, DUA/UI transfers. He explained that these transactions involved transfers of costs from the Disaster Unemployment Assistance ("DUA") ledger to the Unemployment Insurance Grant ("UI") ledger. Mr. Evert stated that the DUA funds are appropriated to pay for administering unemployment claims when the reason for the claimant's unemployment is a natural disaster. The funds are released by the federal government after an official disaster situation is declared. According to Mr. Evert, in fiscal year 1977 the costs of taking special DUA claims resulting from the Johnstown flood exceeded the obligational authority appropriated for this disaster through DUA. The DOL later made supplemental DUA funds available, but they were insufficient to cover the expenditures. Mr. Evert explained that, when the DUA obligational authority ran out, his office could not simply turn away claimants filing for unemployment because of the flood. Instead, the claims were processed by BES employees, who charged their time and expenses to the regular UI fund ledger. He opined that the only real difference between a regular UI claim and a DUA claim is the reason for the unemployment; both are unemployment claims and the function of taking the claims is similar. The administrative costs are simply assigned to one fund ledger or another based on the information provided by the claimant as to the cause of his unemployment.

The Commonwealth argues that the transfers between DUA and UI fund ledgers involve similar costs and should be allowed according to the same rationale as another Batch 812 transfer between CETA-Labor Market Information ("CETA-LMI") and Employment Security ("ES") fund ledgers, which was approved by the Regional Administrator after having been questioned in the original audit report. The CETA/LMI-ES transfer was approved on the basis of a January 15, 1980 letter to BES' Executive Director from Martin Weinles, ETA Associate Regional Administrator.[18] The letter permitted the transfer of costs between these two "project codes" because they were determined to involve "similar type costs." William Haltigan, Regional Administrator of the ETA, testified as to why this transfer was allowed. He explained that BES is funded for labor market information work through its ES Grants. Later, when CETA was passed, there were additional funds made available for the same labor market information program. According to Mr. Haltigan:

---

18 Administrative Law Judge Exhibit 1, Tab G.

> The work was precisely the same. And it was my judgment that had the state, in the very first instance, charged the work to the job service [ES] account there would have been no issue. Therefore, it would be appropriate to charge the work that was, you know, at a later date because the function was exactly the same.[19]

I find that the Commonwealth's argument on this issue is creditable. There appears to be no dispute that the costs involved were legitimate expenses related to the function of processing unemployment claims. The testimony offered by ETA indicates that a transfer of costs between two different funding sources cannot be authorized, unless (as in the case of the CETA-LMI/ES transfer) the expenses could properly have been originally charged to either of the appropriations, because the type of function involved is covered under both funding sources. While DUA and UI were clearly two separate funding sources, Mr. Evert's testimony establishes that the transferred DUA costs were similar to regular UI costs. The testimony indicates that the expenses of processing DUA claims could originally have been charged to regular UI, as all unemployment claims would have been charged to this ledger if DUA funds had not been appropriated at all. I find the Commonwealth's reasoning regarding this transfer persuasive; the disallowance, in the amount of $466,212.80, is reversed.

2. Trade Readjustment Act/ Unemployment Insurance Transfers

The TRA/UI transactions in Batch 812, Case No. 82-WA-02, involve costs transferred from BES' fund ledger code number 91707, which was the ledger applicable to Trade Readjustment Act costs, to the Unemployment Insurance program, a Grants-to-States appropriation identified by BES' fund ledger code number 92107. The amount disallowed was $202,056.59.

---

19 Notes of Hearing Transcript, at pp. 182-183.

The Commonwealth argues that this transaction should have been approved because it resulted from a series of errors by both BES and ETA. Wilbert Evert of BES testified that BES requested supplemental funds under the Trade Readjustment Act appropriation in 1977. The original amount requested was $254,356.00; the request was made by Supplemental Budget Request number 4A, which requested the additional funds for fund ledger code number 91707 (TRA). The request was made to provide funding for "E.S. Trade Act activities."[20] On February 1, 1977, Samuel K. Thomas of ETA informed BES that additional funds in the amount of $190,050.00 were approved to cover the costs of "ES Trade Act administrative activities." The Supplemental Budget Request was approved as revised for the lower amount, which was adjusted to reflect 9-months requirements. However, BES was informed that fund ledger code number 92057 (Grants ES) was the one that would receive the supplemental funds; i.e., the additional Trade Act expenses should be charged to this code.[21]

In the meantime, BES had continued to perform the TRA work and charged the expenses to the TRA ledger. Therefore, when the supplemental funds were approved for the ES fund ledger, an adjustment was needed to move the costs to that ledger also. According to Mr. Evert, BES should have transferred the costs to fund ledger code number 92507 (ES), as instructed by ETA. However, by mistake, the costs were transferred and the adjustment made to fund ledger code number 92107 (the UI ledger), instead. Mr. Evert stated that the mistake had no effect because both ES and UI ran deficits that year and had to be adjusted by cancelling contracts for purchases, and so forth, that had been made contingent on the availability of federal funding.

In fact, due to the mistaken adjustment, these expenses remained listed improperly as UI costs. Even though the transfer may have had no effect on the actual expenditure of money appropriated under UI, the improper transfer would still have had an impact, according to ETA witnesses. William Haltigan of the ETA testified that UI budget estimates are based on receiving accurate cost information by keeping careful records of the time and costs involved in performing various UI functions. Any distortions could adversely affect the accuracy of future appropriations. BES admits this transfer should not have occurred, and I conclude that the disallowance was proper.

---

20 Commonwealth of PA Exhibit 3.

21 Commonwealth of PA Exhibit 3.

3. CETA-Public Service Employees Transfer

The CETA-PSE transaction in Batch 754, Case No. 82-WPA-02, involves costs transferred from BES' fund ledger code number 96040, which is the applicable ledger for salaries and personnel benefits paid to CETA employees. The costs, totalling $10,363.58, were transferred to fund ledger code number 92050 (Employment Security, or ES Grants).

The Commonwealth contends that this transaction is not an actual transfer of funds between appropriations, prohibited by the rules discussed above. Instead, the Commonwealth argues that this transfer merely represents an accounting entry to remove retirement benefits automatically charged for CETA-PSE employees under the cost-accounting system, and which were not permitted to be paid at the time. Wilbert Evert of BES testified that the CETA-PSE employees were public service employees hired under CETA programs, and that retirement was not an allowable fringe benefit for these employees under CETA regulations.[22] However, under the federally-mandated cost accounting system, retirement benefits were automatically entered as costs for every BES employee, no matter what fund ledger his salary and benefits were allocated to. Thus, retirement benefits were charged on the CETA-PSE fund ledger, but no actual payment of these benefits occurred.

Mr. Evert explained that retirement benefits, Social Security and similar items are entered onto the various ledgers as "accrual" or "accounts payable" entries as soon as the employees' time sheets are submitted. Then, when quarterly payments of these benefits are actually made, a debit to cash is made to match the accrual. In this case, Mr. Evert testified, the automatic accrual entry was made to the CETA-PSE ledger when the CETA employees turned in their time sheets. When the time came for quarterly payment of benefits, these retirement costs were not actually paid, because they were unallowable. However, under the system there had to be a debit made to balance against the automatic accrual. Therefore, an adjustment was made transferring the cost to the ES fund ledger, because CETA-PSE employees were performing employment security-type functions, and an adjustment had to be made under the system to a ledger where these costs were allowable.

---

22 Administrative Law Judge Exhibit 1, Tab C, Attachment 1.

However, Mr. Evert explained that, because the retirement benefits were never actually paid, when the time came for year-end payroll-clearing adjustments the $10,363.58 in debits to ES would have shown up as debits that were never actually paid out in cash. At that time, an accounting entry would be made to adjust between the debit made and the actual charge. A credit would therefore have been revealed, and would have gone "back to the federal pot somewhere."[23] Because the year-end payroll-clearing credit would include all the adjustments made where accounts payable accruals were higher than the actual corresponding payments during the year, the individual $10,363.58 adjustment is not traceable back to ES to offset the specific disputed entry.

BES did, however, submit documentation to show that the adjusting entry between the CETA-PSE fund ledger and the ES ledger was made in the way Mr. Evert explained it.[24] The ETA Regional Administrator's final determination[25] allowed a similar transfer in Batch 754 that had originally been questioned. The allowance was based on similar documentation (i.e., a transaction input sheet for reclassification entries) to that submitted by BES to explain the transfer in question here. I find that this documentation is sufficient to explain the transfer, as supplemented by Mr. Evert's corroborative testimony and his explanation why further documentation of the payroll-clearing entry is unavailable. The $10,363.58 disallowance is reversed.

4. Employment Security/Unemployment Insurance Transfers, Unemployment Insurance/Computer Placements Transfers, and Disputed Unemployment Insurance Payroll-Clearing Adjustment

This category of transactions are part of Case No. 82-WPA-36, and involve disallowed transfers in Batch 851: (1) from the Unemployment Insurance Grants (UI) fund ledger to the Employment Security (ES) fund ledger ($578,824.00); and (2) from the UI fund ledger to the Computer Job Placements ledger ($198,262.00). An additional $175,318.00 was disallowed in Batch 847, because ETA contends that BES failed to include the UI Grants

---

23 Transcript at pp. 285-286.

24 Administrative Law Judge Exhibit 1, Tab E, Attachment 1.

25 Administrative Law Judge Exhibit 1, Tab D, p. 2.

appropriation in a year-end payroll-clearing adjustment which should have allocated additional personnel costs for the fiscal year to all appropriations active during the year. The theory of the disallowance is that, by excluding the UI ledger from this adjustment, BES in effect "transferred" the UI share of this adjustment (estimated by the auditors at $175,318.00) to other appropriations, which bore more than their share of the additional costs.

ETA argues that the only portion of these transactions that could possibly have been approved under the applicable fiscal regulations was the $578,824.00 transfer of obligations from UI to ES in Batch 851, as UI and ES are within the same funding source. Even this transfer, according to ETA, was properly disallowed because BES could not document it sufficiently to assure that it was a proper accounting transaction. BES contends that all three of these transactions are related, and are justified because of instructions received from ETA during the fiscal year, permitting certain diversions of personnel from one function to another.

Wilbert Evert of BES testified that there was a shortage of funds in the Unemployment Insurance program during fiscal year 1974. Additional contingency funds were requested but were not immediately forthcoming, but in the meantime BES had to continue administering the UI program. He testified that, because of this problem, the ETA gave permission for BES to divert employees who normally worked on Employment Security activities to performance of UI functions. Commonwealth Exhibit 1, a copy of a telegram sent from the ETA Regional Office to BES on December 14, 1973, indicates that ETA was aware of, and acquiesced in this diverson of staff from ES and other programs to UI. The telegram requested that lists of total number of employees, total employee time, and costs diverted to UI be submitted to ETA monthly. An immediate reply by telephone was requested.

Mr. Evert further testified that, near the end of fiscal year 1974, there was an overobligation in UI because of the diversion of ES and other staff to UI functions. At this point, contingency funds were made available for UI, but ETA instructed BES not to use the supplemental funds until any surpluses remaining in the ledgers applicable to ES Trust, ES General, and Computerized Job Placements were used to cover the costs of these diverted employees. Once again, Mr. Evert's testimony is confirmed by a telegram from ETA including the instructions he referred to.[26]

---

26 Commonwealth of PA Exhibit 2.

Thus, it seems clear that BES was justified in diverting personnel--and the related personnel expenses--from ES to UI functions, and was also justified in transferring additional UI costs to be paid out of the surplus in ES and Computer Placements, as instructed. The problem is whether BES documented these diversions and transfers sufficiently so that ETA could be assured, at audit time, that the transactions accurately represented the diversions that were authorized. The question of documentation involves the method BES used, under the federally-mandated cost-accounting system, to charge various programs for the time spent by BES employees working on those programs.

John Getek of the ETA testified that, as documentation of the transfers at issue here, he would expect to see time sheets (monthly "time distribution reports") from the diverted employees to show that the additional time each employee charged to UI because of the diversion, in fact added up to the total amount of personnel costs transferred in the books.

Mr. Evert testified, however, that the kind of information sought by the ETA could not have been discovered from the time distribution reports. He explained that, even if BES had been aware from the beginning that they would be required to give a detailed list of the man-hours diverted to UI, identified by individual employee, the nature of the system would have made it impossible to do so. The problem, according to Mr. Evert, was that many BES employees normally work on a number of different activities and charge their time to several different funding sources every week. These employees worked on different projects as the need arose, and kept track of the time spent on each activity on their time sheets. As their workload normally differed depending on needs, it would be extremely difficult to pinpoint what they "normally" charged to ES and UI, as compared to what they charged because of the "diversion" due to the extra needs in UI. Mr. Evert opined that the only accurate way to tell how much time was "diverted" to UI was by comparing total man-hours actually charged to the total man-hours allocated. Thus, if 500 man-hours had originally been allocated to UI functions, and 600 man-hours worth of charges showed up on the time sheets, this would indicate that "somewhere along the line," there was a diversion of 100 man-hours. In effect, Mr. Evert explained that the end-of-year overobligation in UI corresponded to a surplus in ES and Computer Placements, and that it was assumed that this was caused by the diversion of staff to UI activities. This is why the accounting entries made, pursuant to the ETA's June 24, 1974 telegram, simply transferred the overobligation in UI and charged it against the surplus in ES and Computer Placements.

The ETA argues that BES arrived at the amount of the transferred costs on the basis of an undocumented assumption that they were caused by the diversion of staff to UI. However, I find that Mr. Evert's testimony as to the impossibility of obtaining the sort of precise documentation requested by ETA, is creditable. The transfers were made pursuant to ETA's instructions, and there is no evidence that BES failed to supply ETA, at the time, with the information requested in the December 17, 1973 telegram.[27] I find that the transfers in Batch 851, Case No. 82-WPA-36, were proper, and the disallowances in the amount of $578,824.00 and $198,262.00 are reversed.

As to the $175,318.00 disallowed on the basis of improper year-end payroll-clearing transactions, Mr. Evert testified that, as BES had already transferred the deficit from UI to ES, any required payroll-clearing charge that should have been made to UI would have ended up in ES anyway. Therefore, he opined that the method of accounting for year-end payroll-clearing was immaterial. Although this contention possesses a certain common-sense attractiveness, the fact remains that BES offered no source documentation at all to explain how the year-end payroll clearing transactions were calculated. Mr. Evert's testimony is insufficient to support the conclusion that the payroll-clearing entries were impossible to document, as were the other transfers in this category. The Commonwealth simply argues that "[i]t seems . . . that this estimate is directly related to the ES/UI transfers and should be approved along with that transaction."[28] The evidence is insufficient to substantiate this contention and the $175,318.00 disallowance in Batch 847 is affirmed.

---

[27] Commonwealth of PA Exhibit 1.

Mr. Evert testified that he believes the December 17, 1973 telegram implied that the requested information was to be phoned in to the ETA. He explained that the information would have had to be developed on the basis of estimated--and later, actual--numbers of man-hours to be diverted to UI. In any case, there is no evidence to suggest that ETA ever informed BES that the information it provided regarding the diversion was inadequate.

[28] BES's Post-hearing Brief, at p. 18.

5. Cost-Accounting Adjustments

This category of transactions include the following disallowed adjustments between fund ledgers:

Case No.	Date	Batch	Transferred From	Transferred To	Amount of Transfer Disallowed
82-WPA-2	9/77	812	FLC No. 90877 (Veterans Assistance Centers).	FLC No. 90997 (Disabled Veterans Programs).	$ 5,696.86
82-WPA-2	9/77	812	FLC No. 92057 (Employment Security).	FLC No. 92127 (Food Stamps program).	65,987.12
82-WPA-36	6/30/74	847	Service Contracts.	Employment Security.	213,954.00
82-WPA-36	9/30/76	808	Food Stamps program.	Employment Security.	24,566.00
				TOTAL	$310,203.98

In regard to these transactions, ETA argues that they represent transfers of costs, or obligations, between different appropriations, and as such are absolutely prohibited. The Commonwealth contends that these transactions represent cost-accounting adjustments made to correct charges that were erroneous in the first place, due to inaccuracies in the time-distribution system. Thus, according to the Commonwealth, the rules against transfers between appropriations are inapplicable here.

Mr. Evert of BES testified as to the Commonwealth's theory regarding these transactions. He explained that the BES negotiated contracts with other state agencies or outside entities, whereby BES would perform work for which the other agency would pay a certain amount of money. The contract amounts were based on BES' estimate of the man-hours and the classes of personnel required to perform the services. The projected cost of performing the work was based on BES' knowledge of the average salaries and benefits paid to the employees who performed the service contract work. Similarly, with regard to such programs as Veterans Assistance, Disabled Veterans, and Food Stamps, BES set up its budget and hired personnel to administer these programs based on expected man-hours and corresponding personnel costs.

Mr. Evert explained that, under the federally-mandated cost accounting system, BES employees charged the time they spent working on each contract or program by quarter-hour increments, and turned in their time sheets monthly. Then the time sheet were processed through a computerized system that allocated costs chargeable to each program or project code based on the time charged to each code on the time sheets. When, at the end of the fiscal year, the final reports showed that the time charged had exceeded the contract amount or the program budget amount, Mr. Evert opined that it was clear that errors in employee time charging accounted for the discrepancy. Therefore, adjustments were made transferring some of the costs out of the contracts or programs to which they had originally been charged.

Mr. Evert testified that it was not possible to document individual time-charging errors that added up to the total adjustments. First, he explained that a very small error--i.e., a few minutes--by each employee could add up to a large year-end discrepancy. He argued that, with so many employees involved, it would be very difficult to go back and identify so many small errors, even if the employees could recall the mistakes and certify to corrected time sheets.

The Commonwealth appears to contend that the adjustments in this category present a problem similar to the UI/ES transfers discussed above, in that it is impossible to obtain the documentation sought by ETA. In fact, however, the issue is not the same. The assumption underlying Mr. Evert's testimony is that the projected budget amounts for the contracts and programs were correct; if the amounts were exceeded, the cause must have been erroneous time charging. It is just as likely, however, that the work simply took more time than estimated, and such an overage would not legitimately be chargeable to an error and transferred to another fund ledger. The testimony on behalf of the Commonwealth is insufficient to justify the conclusion that the amounts of overages in the various contracts and programs were, in fact, attributable to time-charging errors. Without some substantiation to support BES' assumption as to the cause of the overages, the transfers cannot be justified. Under these circumstances, I conclude that ETA was correct in finding that these transfers between appropriations were neither supported by adequate documentation, nor adequately explained. These disallowances, totalling $310,203.98, were proper and are affirmed.

6. Computer Equipment Rental Costs

The last transaction at issue, Batch 770 of Case No. 82-WPA-2, concerns the BES' use of fiscal year 1978 funds to pay charges for computer equipment rentals largely incurred in fiscal year 1977. The costs were originally charged to fund ledger number 92057 (Employment Security for fiscal year 1977), and were later transferred and paid out of fund ledger number 92058 (Employment Security for fiscal year 1978). The total amount of the transfer was $55,312.86, and clearly represent legitimate costs for computer equipment rental. BES submitted invoices to justify the expenses, as well as corresponding transaction input sheets showing the accounting entries charging the invoiced amount to fund ledgers on November 10, 1977 and December 16, 1977.

These equipment rental expenses were largely incurred in fiscal year 1977, and were originally charged to the ES fund ledger for that fiscal year. John R. Nolen of the Pennsylvania Office of the Budget, Comptroller Operations, testified that all but $191.00 of these charges were actually incurred in fiscal year 1977. When BES received the invoices, they would have been sent to the Comptroller's Office for approval. The Comptroller's Office approved their payment in November of 1977. However, according to Mr. Nolen, by the time these invoices were approved for payment, BES found that they had paid out the fiscal year 1977 funds remaining in fund ledger code number 90257 on other expenses, and had insufficient obligational authority left in that fiscal year to pay the equipment rental invoices. Therefore, the cost was "adjusted" to fund ledger code number 90258, to be paid out of fiscal year 1978 funds.

BES argues that it was through an error that sufficient resources from fiscal year 1977 were not maintained to pay these bills, and asserts that the costs were legitimate and should be approved. No excuse or explanation of the error is offered. I find that, under the rules discussed above, prohibiting transfers of costs between different fiscal year appropriations, ETA's disallowance of $55,121.86 was proper and is affirmed. $191.00 of the disallowance is reversed, based on Mr. Nolen's testimony that this cost was incurred in fiscal year 1978 and therefore was properly chargeable to that fiscal year.

IV. Conclusion

Based upon the foregoing Findings of Fact and Conclusions of Law, it is determined that $742,700.43 of the costs disallowed by the Regional Administrator of the ETA were properly disallowed. These disallowances are affirmed. The remaining $2,523,375.77 of disallowed costs should have been allowed, and this portion of the Regional Administrator's final audit determination is reversed.

ORDER

IT IS THEREFORE ORDERED that the decision of the Regional Administrator is affirmed as regards $742,700.43 of disallowances and reversed as to $2,523,375.77 of disallowances. The Commonwealth of Pennsylvania, Department of Labor & Industry is hereby directed to reimburse $742,700.43 to the U.S. Department of Labor.

IT IS FURTHER ORDERED that the payment of this judgment shall not involve the use of federal funds.

Thomas M Burke

THOMAS M. BURKE
Administrative Law Judge

TMB/maa

SERVICE SHEET

CASE NAME: COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR & INDUSTRY

Case Nos. 82-WPA-02
83-WPA-35
83-WPA-36
83-WPA-37

Title of Document: Decision and Order

A copy of the above document was mailed to the following:

REGULAR MAIL

Kenneth L. Stein, Esq.
Deputy Regional Solicitor
U.S. Department of Labor
14880 Gateway Bldg.
3535 Market St.
Philadelphia, PA 19104

Richard C. Lengler, Esq.
Assistant Chief Counsel
Commonwealth of Pennsylvania
Department of Labor & Industry
1633 Labor & Industry Bldg.
7th and Forster Sts.
Harrisburg, PA 17120

Earl Brown
Assistant Deputy Secretary
Department of Labor & Industry
Office of Employment Security
Labor & Industry Bldg.
7th and Forester Sts.
Harrisburg, PA 17120

REGULAR MAIL

William J. Haltigan
Regional Administrator
U.S. Department of Labor
Employment and Training
Administration
13306 Gateway Bldg.
3535 Market St.
Philadelphia, PA 19104

William DuRoss, Esq.
Associate Solicitor
U.S. Department of Labor
Employment and Training
Legal Services, Room N-2101
200 Constitution Ave., N.W.
Washington, D.C. 20210

Carol Ready, Chief Clerk
Docket Section
U.S. Dept. of Labor
1111 20th St., N.W.
Washington, D.C. 20036

Lorraine R. Allen
LARAINE R. ALLEN
Attorney-Advisor