U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	
U. S. Department of Labor	
v.	
Florida Department of Labor and Employment Security	

10 MAY 1985

83-WPA-6

DECISION AND ORDER

Preliminary Statement

This proceeding arises under the Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49, et seq., ("the Act"), which established a national system of public employment offices. The Florida Department of Labor and Employment Security ("Florida") operated the employment system in the State of Florida with federal funding through the Employment and Training Administration, U. S. Department of Labor ("ETA"). Florida's operation for the period of 1973 through 1978 was audited by the Office of Inspector General, U. S. Department of Labor (" Auditors"). Based on that audit, Audit Report No. 04-01-0769-L-0201-G-0001 was issued on November 19, 1981, which recommended grant expenditures charged by Florida in the amount of $5,626,144.45 be disallowed.

At the outset, it must be explained that the largest item of disallowance in this case, $2.3 million, represents monies that Florida incorrectly thought it had spent during 1971-1972. This error was the result of problems with a new accounting method. After a 1974 audit, however, Florida realized that the monies remained in its cash accounts; its accounting ledger showed that it had a cash balance of $2.3 million in excess of what the other ledgers showed. This issue, therefore, presents the anomalus

situation where Florida had $2.3 million leftover - ie. unreconcilable - and spent it, it claims, under appropriate ETA authorization in the following years. This issue is not a case where it can be shown that the state overspent its budget in the years in question, but arguably either underspent federal funds allocated to them, or used non-federal funds for federal purposes. Nonetheless, at worst, the State can not explain how the money remained unspent. The dispute concerns whether Florida had the right to expend $2.3 million of the so called "leftover" funds or was required to return that money to the ETA.

After a review of the audit findings and several meetings between ETA and Florida, the parties resolved $1,197,253.48 in questioned costs. On May 26, 1982, ETA issued a Final Determination identifying the remaining costs totalling $4,427,880.60 as disallowed and subject to debt collection. Florida proposed to repay $4,375,211.00 of the total through an in-kind payment. This amount represented the purchase price of a new computer which Florida proposed to purchase with State funds and which would have been used primarily in administering the employment security programs. The proposal was rejected by the Regional Administrator by way of letter dated August 30, 1982.

On September 3, 1982, Florida gave notice of its appeal of the Final Findings and Determination of the Regional Administrator. A hearing was held on November 16 and 17, 1983.

Issues

I. Several matters collateral to the final determination, which is the basis for this appeal, were raised by Florida. These matters are set forth as follows:

a. Whether a Motion to Dismiss in favor of Florida should be granted?

b. Which party has the burden of proof?

c. Whether the Motion to Strike the testimony of James T. Latham, Jr., because it is hearsay and because it interjects issues not raised by the audit, should be granted?

II. The issue raised on appeal is whether the Regional Administrator improperly disallowed costs totalling $4,428,890.97, as set forth in the final determination, under Item Nos. 2, 5, 8, 10, 11, 12, 13, 14, 15, 16 and 17.

Discussion

I. A. Motion to Dismiss.

Florida filed a motion requesting that the case be dismissed because the sanction of disallowance of costs is unenforceable in this matter. It asserts that the recommendations of the audit report and the determinations within the final determination were made pursuant to substantive requirements and conditions contained in the Employment Security Manual ("ESM"), and that at the time of the audit the ESM had not been promulgated as a rule by the Department of Labor as required by the Administrative Procedure Act. (APA) Florida contends, therefore, that the ESM does not have the force and effect of law. (Florida Pre-hearing Brief 13-17.) ETA responds that the federal government has a common law right, independent of statute, to recoup misspent monies, and that the government can enforce its common law right of recoupment through reasonable means.

The federal government's common law right of recoupment is well established. This right to recover federal funds from one who has no right to retain them is generally not barred unless Congress "clearly manifests its intention to raise a statutory barrier." U. S. v. Wirtz, 303 U.S. 414 (1938). The absence of express recoupment authority in a grant statute is not however, an equivocal expression of Congressional intent to deny the agency the right of recoupment. It may be inferred that the lack of express authority in a grant statute reflects Congress' view that it is unnecessary to confirm the federal government's well settled power of recoupment. 1/

1/ See, e.g., Bell v. New Jersey, 103 S. Ct. 2187 (1983). In that case the Supreme Court acknowledges that although the pre-1978 version of the Elementary and Secondary Education Act of 1965 did not explicitly authorize the government to recoup mispent funds (as does the 1978 amendments), the right of recovery of misspent funds by the Secretary is an inherent power. Justice O'Connor, writing for the Court, stated that "it is worth noting that commentators on the pre-1978 version of ESEA assumed without discussion that the Department possessed the power to recoup refunds ..." at 2195.

Moreover, the common law right of recoupment is codified in the Federal Claims Collection Act of 1966, 31 U.S.C. 951 et seq. and the implementing regulations at 4 C.F.R. Parts 101-105. The implementing regulations of the Federal Claims Collection Act provide in pertinent part that:

> The head of any agency or his designee shall take aggressive action, on a timely basis with effective follow up, to collect all claims of the United States for money or property arising out of the activities of, or referred to, his agency in accordance with the standards set forth in this chapter....

4 C.F.R 102.1. This act clearly empowers the government to recoup monies even though the specific governing statue may not address the right of recoupment.

More specifically, the regulations implementing the Wagner-Peyser Act contain authority for recoupment of misspent funds. The applicable section provides that:

> If the violation involves the misspending of grant funds, the Regional Administrator may order in the Final Notice of Noncompliance a disallowance of the expenditure and may either demand repayment or withhold future funds in the amount in question. If the Regional Administrator disallows costs, the Regional Administrator shall give the reasons for the disallowance, inform the State agency that the disallowance is effective immediately and that no more funds may be spent in the unallowed manner, and offer the State agency the opportunity to request a hearing pursuant to §658.707....

20 C.F.R 658.702(g). In sum, ETA's authority to recover mis - spent funds is well within the ambit of the common law and the relevant statutory authority.

Florida's assertions, while not persuasive, require comment. It argues that during the period of the audit in question, use of the procedural rules and guidelines set forth in the unpublished EMS is invalid and that therefore the final determination is unenforceable. However, there is no denial of record of Florida's lack of awareness of the existence of the procedures set forth in the ESM; nor is any prejudice to it displayed.

Accordingly, Florida's motion must be denied.

I B. Burden of Proof

It is the contention of Florida that as the proponent of an order to relieve it of the assessed liability, Florida merely has the burden of going forward, or the burden of production. Florida argues that the ultimate burden of persuasion rests with ETA, the party who is challenging its proposed order; that ETA must prove the reliability and accuracy of the audit. Florida contends that ETA's introducing the Administrative File into evidence, erroneously allowed ETA to assume only the burden of going forward. Florida concludes that because it was required to meet both prongs of the burden of proof at the hearing, it was subjected to a stricter burden and thereby prejudiced. ETA, on the other hand, contends that the posture which was maintained at the hearing, i.e., that of requiring Florida to carry the burden of production and persuasion, is in accordance with the APA and with the decisions rendered in other audit cases which have considered the allocation of the "burden of proof."

Title 20 C.F.R. §658.709(a) provides that hearings conducted under the Wagner-Peyser Act be conducted in accordance with §§5-8 of the APA, 5 U.S.C. §§553.557. Section 7 of the APA provides in part that:

> except as otherwise provided by statute the proponent of a rule or order has the burden of proof.

5. U.S.C. §556(d). The allocation of the ultimate burden of persuasion is governed by the applicable statute and its implementing regulations. See Environmental Defense Fund, Inc., v. EPA, 548 F.2d 998 (D.C. Cir. 1976); Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2ed 25, 39 (7th Cir. 1975) (opinion on Motion for rehearing).

The Wagner-Peyser Act, the applicable statute in the case at bar, does not address the issue of "burden of proof" beyond its reference to the above-cited APA provision. However, in cases decided under the WPA in which the issue of the allocation of the burden of proof was raised, it was held that the party requesting the hearing and proposing the order must sustain

not only the burden of production but also the burden of persuasion. See In the Matter of Kentucky Department of Human Resources, 79-WPA-1 (September 29, 1981); In the Matter of Kentucky, Department of Human Resources, Frankfort, Kentucky, 82-WPA-28 (September 8, 1983). Furthermore, in analogous audit cases under the Comprehensive Employment and Training Act (CETA), the implementing CETA regulations provide that the party requesting the hearing shall have the burden of establishing the facts and its entitlement to the relief requested. Thus, the burden of production and persuasion rests with the proponent of the order.

Florida initiated this proceeding when it appealed the Regional Administrator's final determination which disallowed certain expenditures. Florida is seeking an order allowing its expenditure of the federal funds. Before the order will issue however, Florida must demonstrate its entitlement to and proper use of the funds. As a matter of evidentiary law, Florida is in a better position to show that it properly spent the federal funds than is the Department to show that the federal funds were improperly spent.

Additionally, Florida's objection to the admission of the Administrative File fails to show prejudice. Florida was able to present documents and witnesses on its behalf and it had the opportunity to cross-examine its opponent's witnesses. To require Florida to go forward with the burden of production and persuasion is proper.

I. C. Motion to Strike

After the hearing and the submission of post-hearing briefs, counsel for Florida filed a Motion to Strike certain testimony of James T. Latham, who was the administrative officer of ETA during the audit. Mr. Latham was first called by Florida as an adverse witness, and was later called as a witness for ETA. Florida asserts that Mr. Latham's testimony regarding the audit is inadmissable hearsay because it is not the reliable, probative and substantial evidence, required by the APA, 5 U.S.C. 6, 556 (d) and, thus, the determination in this case can not be based on Mr. Latham's hearsay testimony alone. The witness' testimony is allegedly inadmissible hearsay because he did not conduct or supervise the audit nor review the audit work papers. Although he did not have direct knowledge of the audit, Mr. Latham indicated that he had familiarized himself with the audit report and the accounting procedures. (TR 44-48.)

Mr. Latham had more than a pedestrian knowledge of the ETA's audit procedure. He was knowledgeable about this audit and ETA's role. Thus, his testimomny is not inadmissable hearsay.

Florida also seeks to strike Latham's testimony (pages 277-279 and page 298) as an interjection - i.e. raising issues not previously noticed. Florida maintains that the federal purpose of expenditures under final determination Items No. 3 and No. 4 and the existence of a cash balance under Item No. 2 were not raised in the audit and the final determination.

A review of the record indicates that the matters of federal purpose of expenditures under Items No. 13 and No. 4 and the existence of a cash balance under Item No. 2 were not raised. Latham's statements therefore, are beyond the scope of ETA's final determination and are not appropriate for consideration.

II. Disallowed Costs

Item No. 2

The Regional Administrator disallowed $1,756,473 as unreconciled cash in the Cash Accounting System ("CAS") General Fund and $586,982 as unreconciled benefit cash, for a total amount of $2,342,455. This determination is bottomed on a finding by the Regional Administrator that: (i) the CAS records remained unauditable for fiscal years 1971 through 1974 because certain records were not reconcilable with the Florida State Comptroller's records under CAS and (ii) Florida was unable to establish accountability for federal funds.

Florida was unable, until 1974, to reconcile its federal grant expenditures and revenue CAS ledgers with corresponding ledgers maintained by the Florida State Comptroller. (AF Tab L 21-31.) The situation is analagous to that of an individual's inability to balance his checkbook with his bank's statement. As a result of Florida's problems with its accounting procedures under CAS, Florida's end balance for the period of 1971-1972 overstated its actual expenditures by approximately $2.3 million. In 1974, Florida became aware of its unspent funds and adjusted its books to reflect the money it actually had. Florida then spent the funds allocated for 1971 and 1972 in subsequent years.

In 1974 Florida created a State Task Force to reconstruct and reconcile Florida's accounting records for fiscal year 1971-1972. Many of the 1971-1972 CAS records chosen for review by the State Task Force were not located. The OIG Auditors therefore considered them unauditable and the $2.3 million balance was considered unreconcilable. (AF Tab L 21-31; TR 120, 124, 284, 286.) ETA argues that CAS was the mandated accounting system during the time in question and that, therefore, Florida had a contractual obligation to properly use and maintain CAS. (TR 35). ETA acknowledged, however, that if Florida could demonstrate that a cost accounting method was used which did, in fact, reconcile the cash balance, the disallowances would be changed. (TR 40).

Florida asserts that the cash balance in question was reconciled with the State Comptroller through the use of the Florida Departmental Accounting System ("DAS") but that the reconciliation was given no weight by the Auditors. In fact, the financial manager of ETA, indicated that he was unaware that the DAS reconciled the cash balance. (TR 281.) He further stated that ETA no longer mandates that CAS be used for programs operated by Florida. (TR 59-61.)

Florida asserts that it used CAS but that it was a new system, instituted in 1971, and that Florida continued to use its "old" system to "parallel" CAS until CAS was proven to be effective. The Auditors found that the use of the two accounting systems strained Florida's effective use of CAS. (AF Tab L 25,26.) Attorney for Florida argued that major problems developed with CAS almost immediately. Tapes were lost or erased, and the Department changed the system several times which made it difficult to reconcile the balances. (TR 11, 29.) Florida stated that many of the 1971 and 1972 CAS records were lost as a result of moving the documents to approximately five different locations and of their being handled on approximately 8 to 9 different occassions by auditors. (TR 72-75.) Florida further argued that while 44% of 1971 and 48% of 1972 source documents are missing, the existing records for this period are auditable. The present DOL policy is that there exists no unauditable condition unless there is a total absence of records. (TR 287; Ex. 2.)

Mr. Harrison Guess, Florida's comptroller, conceded that there is no way to reconcile the State Comptroller records with the CAS records. He testified that there is "no way you can trace the $2.3 million back to any document...[because] the documents were lost, which broke the audit trail." (TR 100.)

Mr. Charles Stoephel, who was directly in charge of the Task Force's reconstruction project, acknowledged that while some of the CAS records are missing and thus could not be reconciled with the State Comptroller's records, his staff was nonetheless able to reconcile books with those of the State Comptroller's through the use of DAS. (TR 115-119.) Mr. Stoephel, Ms. Jana Walling, a CPA from the Florida State Comptroller's Office, and Mr. Richard Law, an expert in accounting and auditing, found the use of the existing voucher schedules and payroll registrations to be reliable documentation for input into the DAS for reconciliation with the State Comptroller's records. Mr. Stoephel stated that he had discussed this method of reconstruction and reconciliation with a member of OIG and that the approach was not disapproved. (TR 120.)

It is Mr. Guess' opinion that the first auditor in 1977 found the project "unauditable" because he conducted his review in a cursory manner in an effort to move on to another job. (TR 77-80.) Furthermore, Mr. Guess asserted that in 1979 a member of the OIG Audit Team stated that the audit of the reconstruction of the 1971 and 1972 records could have been "wrapped up" to a "favorable decision if the Regional Administrator's Office had allowed the auditors to extend their contract for an additional two weeks. 2/ (TR 79.)

Expert Richard Law stated that there are other methods, aside from those which were used, which could have determined if the undocumented transactions were in fact unauditable. He stated, for example, that while 44% of 1971 and 48% of 1972 records are missing, the remaining 56% and 52% of the respective documents should have been audited. (TR 141.)

Mr. Stoephel stated that the reconstruction project maintained the coding integrity of the vouchers such that the expenditures were identified according to the individual Federal programs and that the DAS has mechanisms which he used to separate the accounting of State and Federal funds. (TR 115-118.) Mr. Guess explained that each voucher had a project code "designating what federal source that document's to be charge

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2/ Spending the cash balance of $2.3 million in fiscal years other than those for which they were allocated is considered an unauthorized expenditure. However, the Department acknowledged that this expenditure did not result in Florida exceeding its obligational authority. (TR 295-6.)

to," which enabled the ledgers to be reconciled. (TR 152.) Ms. Walling stated that the vouchers with which she is familiar do not specify the federal or state program from which an expenditure was made. She further stated that while she does not know the practice for the period in question, state and federal funds generally are not co-mingled, that federal money is put into a general revenue fund. (TR 168-280.) She asserted that Florida could not have disbursed federal funds inappropriately because each expenditure request was reviewed by the State Comptroller pursuant to pre-audit procedures. Only if the State Comptroller determined that such expenditure requests were proper and legal could Florida have spent the funds in question. (TR 103-111.) Richard Law stated that prior audit reports point out some weakness in the State's internal controls system for maintaining and paying vouchers, but stated that the audit reports' recommendations for curing the weaknesses were not detailed, that the number of weaknesses were small, and pertained primarily to miscellaneous cash receipts. Mr. Law concluded that on the whole the degree of reliability for the internal control system was very good. (TR 143-44.)

CAS was the system mandated by DOL for the period in question. Florida met its contractual obligation by implementing CAS into its program. The implementation was not altogether successful and the use of CAS and DAS strained Florida's effective use of CAS. The CAS records for 1971-1972 are missing and it is therefore impossible to reconcile the CAS records with the State Comptroller's records. Reconciliation with the State Comptroller was, however, achieved through the use of DAS. Nonetheless, due to the failure to reconcile with the federally mandated system, the OIG determined that the records for 1971-1972 were unauditable, and therefore the Regional Administrator disallowed $2.3 million in expenditures.

The ETA was in error in failing to audit the existing documents. Expert Richard Law testified that 56% of the 1971 documents, and 52% of the 1972 documents should have been audited. ETA's failure to audit the documents precluded Florida from meeting its burden of proof. Disallowance of the total amount on that basis, however, can not be countenanced. Florida produced 54% of the documents for the two years in question. Florida's internal audit controls indicate that an audit of those documents would have established accountability. However, ETA neglected to audit the documents. No evidence was produced to demonstrate the dollar amount that this 54% of the documents represents. Thus, 54% of the $2,342,455 disallowed, $1,264,925.70, will be allowed.

ITEM No. 5

The final determination states that Florida exceeded its obligational authority for fiscal years 1974 through 1978. Approximately $380 million was appropriated to Florida during this time period. The expenditure of $1,663,407.67 by Florida was not supported by proper authorizing documentation. ("MAZ-134"s.) Supporting documentation for expenditures for FY 1978 were later located, reducing the total undocumented expenditures which were disallowed under Item No. 5, to $982,014.67. Thus, the amount in question represents approximately 1/4 of 1% of the total budget for the period between 1974 and 1978.

The yearly amount of funds budgeted to Florida -- it's obligational authority -- is usually disbursed to Florida in quarterly increments. The obligational authority is often increased through an agency-initiated supplemental budget request or through a DOL-initiated regional office amendment. CAS Report 61s' outline the obligational authority for a particular federal program, the expenditures thereunder and state the balance. Report 61's are made on a monthly basis by Florida and are sent to the regional and national offices. Testimony proferred by both sides indicates that there is frequent communication between the regional office and Florida in an attempt to keep Florida's expenditures in line with its obligational authority. (TR 154; 262-263.)

It is Florida's position that when additional funding authority was necessary at the end of a period, it would receive verbal authorization from the regional office allowing an increase in its obligational authority. Written confirmation of the authorization, from MAZ-134's, would then be sent by the regional office. Often Florida's Report 61s did not reflect the actual verbal authority because the MAZ-134's had not been received at the time the report was required to be transmitted to the regional and national offices. This delay in transmittal resulted in the appearance of an overexpenditure of obligational authority for the period in which such authority was actually granted, but for which the confirming documentaion was not received. Florida contends that the Report 61 for the subsequent period would correct this apparent overexpenditure, through an off-set or an "under-expenditure in a different region." (TR 151-168.)

Mr. Guess stated that both he and his assistant received verbal authorization from two persons in the regional office. It was not an uncommon practice to receive verbal authorizations at the end of the fiscal year when the parties "were under the gun," and that these year end approvals were frequently not followed up by a written authorization. (TR 159.) Mr. Guess' position was that although the disallowance under Item No. 5 represents expenditures for which no documentation can be found, the amount was nonetheless properly spent because it was authorized by verbal communications from the regional office. The amount disallowed represents expenditures in which either no subsequent written confirmations were sent, or such documents were sent, but they were lost. (TR 151-168.) Mr. Guess stated that verbal authorization was generally granted in $50,000 to $100,000 increments. (TR 161.) Florida's position is that ETA is estopped from disallowing expenditures which it previously approved. (Florida's Pre-hearing Statement.)

Mr. Latham, ETA's witness, admitted that while verbal approvals were possible, it is "highly unlikely" that they would not be followed-up by MAX-134 authorization documents. ETA's policy is to always follow verbal approvals with written authorization. (TR 302.) He further stated that verbal authorizations would only be made for small sums, and considered the amount in question, $982,014.67, not a small amount and would not have been authorized over the telephone. (TR 263.) Mr. Latham testified that all of the MAZ-134's for 1974-1978 were found and that none are missing. (TR 301.) While acknowledging that the OIG conducted a study of ETA's record keeping and issued a report criticizing ETA for not "keeping up with its obligational authority the way it should have, in this instance he stated that the regional office did not make errors concerning Florida's obligational authority. (TR 302-303.)

No documentation has been located for $982,014.67 of the approximate $380 million of funds budgeted to Florida during fiscal years 1974-1978. The Regional Administrator, therefore, characterized the undocumented expenditures as an over-expenditure of Florida's obligational authority granted for these years and disallowed the amount in full. It is clear from a reveiw of the record that adjustments of the obligational authority were generally given verbally on a monthly basis, and, as a general practice, were supported by subsequent written confirmation. However, verbal approvals for increases in the obligational authority at the end of fiscal years generally were not followed by written confirmation. Verbal approvals were given only for request of small amounts.

Although Mr. Latham did not consider $982,014.67 to be a small amount that would be verbally approved, Mr. Guess testified that the requests which would generally be authorized as a result of telephone communications each could be for $50,000 to $100,000 increments. It is unclear whether Mr. Guess meant that these request were for monthly or for yearly increases. It is also unclear how the $982,014.67 of undocumented expenditures, which Florida claims were verbally approved, were allocated in the years in question. Nonetheless, $982,014.67 represents only approximately 1/4 of 1% of the total budget (in excess of 5 billion) for the period in question. This amount is small in comparison with the overall grant for the period in question, and the increments requested, which this total sum represents, are small. Therefore, the evidence shows that these increments were verbally authorized, as Florida's recitation of the events is credible. It is found that authorizing documentation were either sent by the regional office and were lost by Florida or, in end of the year situations, the authorizing documentation were not sent although verbal authorizations were given.

This conclusion is bolstered by ETA's acknowledgement that it had been criticized by the OIG for its inadequate supervision of its grantee's use of obligational authority.

ITEM No. 8

The Regional Administrator disallowed $103,743.98 in rent payments which were made by Florida to another Florida state agency. Florida rented office space from a private corporation for $7,593.33 per month pursuant to a valid lease. Subsequently, on January 21, 1976, the private corporation transfered title to the building to the State of Florida. Thus, the Florida Department of General Services ("DGS") began collecting the monthly rent. After this transfer, the rent schedule remained the same and Florida continued to pay the monthly rent. The Department of Labor's policy, however, does not permit one state agency to pay rent for occupancy of space to another state agency. (OPM Circular 81-02; TR 271.) Mr. Latham testified that Florida could have nonetheless continued its occupancy in compliance with federal policy if it had recharacterized its rental payment as a use and maintenance fee. (TR 271.)

Soon after the transfer in ownership, Florida searched for different office space to rent. The audit report acknowledges that extenuating circumstances existed which caused a delay in Florida's vacating the premises. However, the amount due under a use and maintenance fee format was not offset against what was actually paid in rent. Mr. Latham confirmed that the disallowance as it now stands does not reflect an offset for a use and maintenance fee, and that such amount should be reflected. He stated that had a use and maintenance fee been computed,

Florida's pay-out would have been reduced by at least 50%. (TR 272-273.) The audit report states that this refusal to offset was based on Florida's failure to fulfill its obligation to compute a use and maintenance fee for its occupancy of office space in the state-owned building. (AF Tab L, 56-57.) At the hearing, counsel for Florida was granted additional time to submit an adjusted fee schedule. According to correspondence filed after the hearing, counsel was having difficulty compiling the necessary information. To date, no use and maintenance fee schedule has been filed.

The evidence indicates that Florida made a good faith effort to relocate subsequent to the transfer in ownership and encountered problems in its attempts. Although no fee schedule was submitted, Florida did, in fact, continue to make rent payments which were acceptable prior to the transfer, and which only became unacceptable after the change in ownership. There is no argument that the amount paid as rent was not in keeping with current market price. Indeed, had Florida changed its method of pay-out to the State, its pay-out would have been remitted by a least 50%. Florida's technical error in not following DOL policy concerning the mechanics of payment for occupany of space in state-owned buildings resulted in the disallowance of the entire amount. The Regional Administrator's disallowance of the full amount paid out fails to acknowledge that the payment was for necessary office space, and that some of the dispute is over technical language in the circular. The program should be allowed to charge for rent on a quantum meruit basis.

Florida shall be credited with the amount which represents what it should have paid pursuant to a use and maintenance fee schedule, as stated by Mr. Latham in discussing appropriate offsets. Mr. Latham submits that payments pursuant to such a format would have reduced what Florida was paying by at least 50%. Thus, the $103.743.98 which Florida paid in the form of rent, is reduced by 50% to $51,871.99. The remaining $51,871.99 represents the amount of federal funds which should not have been paid out as rent, and is thus appropriately disallowed.

Item No. 10

The Regional Administrator disallowed $112,021.27 in interest paid to IMB from July 24, 1973 to May 31, 1976 for the purchase of computer equipment. The Regional Administrator and Florida

engaged in ongoing communications and negotiations concerning various purchase option plans for the IBM computer equipment. The Regional Administrator ultimately approved a plan requiring a 5% down payment spread over a 60 month period, with a 4-1/2 interest rate. (Ex 5, TR 184-185.) The Regional Administrator informed Florida that the acquisition of the equipment "would have to be accomplished with no additional funds being allocated during fiscal 1974 to Agency [Florida] for this purpose" (Ex 5). ETA eventually approved "the 5% down payment purchase option" plan. It was acknowledged at the hearing that any plan entailing a down payment with remaining payments spread over a period of months at a set interest rate, would produce savings over that which could be realized pursuant to an outright cash purchase, with no interest payments, regardless of whether the State or Federal budget absorbed the interest payments. (TR 310.)

Mr. Latham testified that the approval given by the Regional Administrator was only for the procurement of the equipment and such approval did not encompass the interest payments and that Federal Management Circular 74 prohibits the use of federal funds for interest payments. (TR 273, 308.) Unless legislation allows for making interest payments with federal funds, Mr. Latham testified that no official can waive this prohibition except a representative of the Office of Management and Budget. ("OMB"). Although OMB did not, upon request, modify the policy for a purchase of other ADP equipment in 1975, it did modify the restrictions concerning interest payments on buildings. (TR 273 - 274.) However, a waiver of the policy was not requested from OMB regarding the purchase of the IBM equipment. id.

Florida argues that ETA is estopped from claiming that while it approved the procurement of the equipment, it did not approve the payment of interest. It asserts that approval of the use of federal funds for interest payments was implicit in the letters authorizing the purchase, and that it relied upon this correspondence with the Regional Administrator in its purchase of the equiment. Furthermore, Florida asserts that it had no knowledge of the prohibition concerning such use of federal funds. (TR 181-189, Florida Prehearing Statement.) The audit report acknowledges that the "[a]gency [Florida] apparently did not know that interest payments were explicitly unallowable." (AF Tab L 63.)

The documentation submitted makes it clear that Florida was in error in making interest payments with federal funds. FMC 74-4 explicitly disallows such expenditures. Florida's witnesses testified that they had no actual notice of this prohibition. Florida is charged to know and follow ETA's rules which specifically prohibit these interest charges.

There were several purchase option plans under consideration that delineated three factors; (1) the down payment, (2) the number of months over which the remaining balance would be paid,

and (3) the interest rate. Florida interpreted ETA's approval of "the 5% down payment purchase option" plan, as approval of all three factors of the plan. The plan specified a 5% down-payment, with the remaining payment spread over 66 months at a 4-1/2% interest rate. Although ETA is in a better position than Florida to know the regulations, ETA specifically warned that the purchase could not be accomplished if additional federal funding was required. While this suggests ETA's knowledge of Florida's intention to use federal funds for the authorized option plan, Florida's use of federal funds to make interest payments cannot be sanctioned or approved despite ETA's failure to specifically to warn Florida that interest payments were not allowable.

Accordingly, the Regional Administrator's disallowance of $11,021.27 representing interest paid on the purchase of equipment will be affirmed.

ITEM No. 11

The Regional Administrator held that Florida entered into personal service contracts with seven individuals and one organization, without prior ETA approval.[3/] Contracts for work performed by three of the individuals are missing. The Regional Administrator found that no prior approval was granted, and therefore disallowed $94,505.04, the amount expended by Florida pursuant to these personal service contracts.

FMC 74-4 provides that personal services "are allowable subject to such prior authorization as may be required by the grantor agency" (FMC 74-4, §C). At the time the service contracts were entered into, Mr. Guess was aware of ETA's requirement of prior approval for personal service contracts. (TR 197.) The existing contracts do not reflect whether Florida received prior ETA approval. Mr. Guess stated that it is ETA's policy for the personal service contracts to not incorporate an acknowledgment of the prior approval by ETA. Such authorization, if given, would be contained in correspondence between ETA, Florida, and the State of Florida. (TR 197.)

The audit report found that Florida's failure to seek approval for five of the contractors was due to its "attempt to circumvent Federal regulations and merit system standards, as the five contractors were former Florida employees. The Auditors considered in some detail the possibility that one contract was

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3/ The audit report briefly mentions a prior audit in which personal service contracts were similarly found to have lacked prior approval. (AF Tab L, 68.)

not "an arm's length transaction." They stated that they requested, but did not receive, documents to prove that the services under this contract benefitted Florida and concluded that no benefits were received. The Auditors further recommended that the matter be further investigated to determine whether additional action was warranted. (AF Tab L, 68.)

Mr. Guess stated that the performance of all of the service contracts benefitted Florida's federally funded programs. Mr. Latham agreed with this assertion. Nonetheless, in its post-hearing brief, ETA asserts that "[i]t is particularly disheartening for Florida to have contracted for professional services when such services may have been provided to Florida at no cost." (ETA post-hearing brief, 11). Florida failed to produce evidence that ETA had no professionals available that would have suited its needs.

Florida was unable to produce documentation to prove that it received ETA's approval prior to entering into the service contracts. In fact, Florida does not affirmatively contend that it ever did receive approval for the contracts. (TR 191-199.) Furthermore, Florida failed to produce documentation that the services rendered under the contracts in question even benefitted the federally funded program. Even if the services did benefit the program, ETA may have been able to provide the services at no additional cost. Florida has failed to show otherwise.

Accordingly, the Regional Administrator's disallowance of $94,505.04 representing expenditures for unapproved service contracts will be affirmed.

ITEM NO. 12.

The Regional Administrator disallowed $72,432.77, associated with janitorial services provided between July 1, 1973 and May 21, 1975, because the contracts for these services were not procured on a "competitive basis."

The Auditors referred to FMC 74-7/OMB Circular A-102 which provides that grantees may use their own procurement regulations, provided specific minimum requirements are met. The minimum requirements include "[f]ormal advertising, with adequate description, sealed bids, and public opening...." or, where necessary to accomplish sound procurement, "[p]rocurements may be negotiated if it is impracticable and unfeasible to use formal advertising...." The Auditors then referred to Florida's procurement procedures which provide that "specific services covered by contract [such as janitorial contracts] or agreements and recurring expenses do not always fall under Procurement Procedures and will not be covered by Purchase Order."

The Auditors stated that "[c]ompetitive bids were not obtained for janitorial services because [of] the Agency's [Florida's] own procurement procedures" (AF Tab L 72), and because "sometimes a janitorial contract remained in effect over a number of years, resulting in the total cost of the contract exceeding the amount which required competitive bidding. Id. The auditors further assert that "procurement procedures did not conform to the Federal regulations relating to services [and therefore] the Agency [Florida] failed to procure janitorial services on a competitive basis...." It was acknowledged by ETA that the amount disallowed is representative of a penalty inasmuch as no set-off for the value of the services rendered is reflected in the disallowance. Mr. Latham stated that "[n]ormally the total amount is disallowed" (TR 276.) He concluded that the value of the service contracts were received (TR 311).

Florida testified that both its Bureau of Employment Services ("ES") and its Bureau of Unemployment Compensation ("UC") received bids for the performance of janitorial service contracts. Mr. Charles Copenhaver worked for the UC Bureau Chief and Mr. Harold Cason worked directly for the ES Bureau Chief. Both were in charge of reviewing the bids and the bid recommendations made by the Bureaus' local office manager. Mr. Copenhaver and Mr. Harol''s choices, as well as the remaining bid information, would be sent to Florida's purchasing agent.

At the UC Bureau, local office managers usually relayed oral bids along with their recommendation of one of these bids to Mr. Copenhaver. The UC Bureau, relying on the local office manager's knowledge of the available vendors, generally accepted his recommendation. In some instances, only one bid would be submitted because only one vendor was available or none were available and the local office had to seek the employment private of individuals (TR 201-205). However, Mr. Copenhaver stated that he compared the costs of the bids before making his recommendation to Florida (TR 209). The audit report stated that Florida concurred with the Auditors' findings that competitive bids were not obtained for the services.

Mr. Carson indicated that the review of bids at the ES Bureau was similar to that of the UC Bureau. The ES Bureau generally required the local office to submit three written bids. He stated that normally the lowest bid was accepted unless the lowest bid made by an irresponsible company (TR 211,213). Mr. Carson stated that he was personally unaware of the whereabouts of the unsuccessful bid information, but that, generally, the bid acceptance and the unaccepted bids were transferred to Florida's purchasing agent (TR 219). Although all but three of the contracts which were performed were located and presented for the Auditor's inspection (EX. 7), Florida did not produce the bid information which was submitted on these contracts.

All but three of the contracts in question were presented to the Auditors. It is not disputed that the value for these contracts was received. The evidence establishes that oral and written bids were taken and that consideration of these bids included a cost comparison. This review of bids constitutes a "competitive bidding" process, albiet not necessarily in the form ETA requires for audit purposes. Moreover, there is agreement that janitorial services were provided and ETA does not assert that the cost of the services was in any manner out of line with the usual value of these services. While ETA cannot be faulted for generally insisting on adequate following of regulations designed to permit control and audit of expenditures, application here would place form over substance. The amount expended should not be disallowed.[4/] Accordingly, the Regional Administrator's determination disallowing $72,432.77 under Item No. 12 is not sustained.

ITEM No. 13

Based on the Auditors' finding that competitive bidding information could not be located for supplies, printing, and equipment expenditures, the Regional Administrator disallowed $94,486.55 under Item No. 3. The Auditors initially disallowed $97,383.27. After the audit, Florida located additional competitive bid documentation. The Auditors then reduced the recommended disallowance to $94,486.55. No argument is made that these supplies were not provided under the contracts, or that the costs were excessive.

Mr. Latham, on behalf of ETA, testified that the aforesaid amount was disallowed because there is not sufficient documentation "showing that it was bid." (TR 313.) Mr. Guess, Florida's comptroller, testified that Florida would not have approved the expenditures unless competitive bidding information was available. (TR 223.) He extrapolated that documents, such as the invoices which were tested by the Auditors and the contracts represented in Exhibit 7, had to have been posted in the Cost Accounting System. In order for an expenditure to be posted in the CAS, it must have been supported by a purchase order and by a voucher. (TR 222; 226.) Although bid information is missing, the bids would have had to have been supported by the proper documentation, such as purchase orders, invoices, and vouchers in order for the State Comptroller to have authorized the use of federal funds for the expenditures in question. (TR 223.) He knows of no case where approval would have been given without underlying bid submissions.

4/ The testimony indicated that many of Florida's offices were rural with few contractors, and that bids for the services could not therefore be solicited.

Jana Walling, from the State Comptrollers Office, confirmed Mr. Guess' assertion. She testified that it is her office's policy to verify that all statutes and rules are compiled with and, when a purchase is required by law to be bid, the State Comptroller requires that vouchers be supported by bid documentation. If they were not substantiated accordingly, the voucher would be rejected. (TR 165, 266.) Ms. Walling concluded that in the instant matter, since vouchers were processed and payment was permitted, the competitive bid information did, in fact, exist for the expenditures in question. (TR 266.)

A high degree of credibility is to be assigned to the testimony of Mr. Guess and Ms. Walling concerning the processing and payment procedures of Florida and the State Comptroller. Similar procurement procedures within the Office of Administrative Law Judges, U. S. Department of Labor were noted by the presiding Judge. Mr. Latham, also from the U. S. Department of Labor, admitted that he knew of no different procedure within the Department. (TR 231, 232.)

The evidence establishes, even in the absense of current availability of the supporting documentation, that competitive bid information had substantiated the vouchers for the expenditures which were approved by Florida and by the State Comptroller, and which were ultimately paid by the State Comptroller in the total amount of $94, 486.55. Accordingly, the Regional Administrator's determination under the Item No. 13, disallowing $94,486.55, is not sustainable.

Item No. 14

The Regional Administrator disallowed $411,256.26 because Florida could not locate documentation to support reported expenditures concerning services connected with Florida's stockroom, its telephone system, its design and reproduction division, IBM equipment, other equipment, staff travel, and training. Initially the auditors disallowed $57,536.43, but some of this amount was later allowed because Florida was able to locate support documentation such as invoices, vouchers and purchase orders. Again, no argument is advanced that the services were not supplied or that the cost of such services was excessive.

As before, both Mr. Guess and Ms. Walling testified that the expenditures in question would not have been approved without supporting vouchers. (TR 248; 266-267.) Ms. Walling stated that the vouchers numerically indicate from which source an item was paid -- such as from a general revenue fund, a state trust fund, a work capital fund or a federal revenue sharing fund. She acknowledged, however, that while one cannot readily tell from a given voucher

whether an expenditure is for a state or federal program, it is possible to determine the particular program from which monies are paid by referring to the applicable statute. (TR 266.)

Mr. Guess added that it is likely that the vouchers for the expenditures in question would not have been approved without supporting vouchers. (TR 248; 266-67.) He testified that Florida made an unsuccessful effort to retrieve copies of invoices from vendors such as IBM, Suncom (telephone company) and the Florida Department of General Services. These vendors had destroyed their documents. (TR 245.)

As in Item No. 13, a high degree of credibility is attributed to Mr. Guess' and Ms. Walling's testimony that the questioned expenditures would not have been approved and paid if supporting vouchers had not been submitted. Additionally, the length of time between the actual expenditures and the audit, the problems inherent in transferring large numbers of documents, and Florida's efforts to locate the documentation, all mitigate the impact of Florida's inability to provide the necessary documentation of the questioned expenditures.

In light of the foregoing, the Regional Administrator's determination disallowing $41,256.26 under Item No. 14 is not sustainable.

ITEM No. 15.

The Auditors recommended disallowance of $57,738.26 of the costs associated with 38 time-limited personnel appointments which exceeded the authorized duration for these positions. While Flordia agreed that the duration of the appointments exceeded established limits, it did not agree that the cost of the salaries for the employees who filled the positions should be disallowed. Florida contends that the salaries were legitiimate costs which benefitted its federally funded program. (AF Tab L 86, 87.) In his findings for Item No. 15, the Regional Administrator acknowledged that "when compared with the total number of all types of appointments made by the Agency [Florida] during the five year audit period the number of appointments identified as being in excess of approved time-limits is small and possibly due to administrative oversight." Nonetheless, the Regional Administrator disallowed costs under Item No. 15 on the ground that the appointments exceeded authorized time-limits.

Mr. Punshon, chief of Florida, Bureau of Employment Services during the period under consideration, stated that the questioned expenditures occured in its various local offices throughout Florida. He testified that these extensions were usually three

to six months in duration (TR 252.), and that Florida has taken corrective measures to prevent such oversights from occuring again. He stated that a personnel unit within the Bureau has been established which, among other things, "tracks" individuals' employment dates. (TR 253.)

Retaining time-limited personnel beyond the stated duration is contrary to the objectives of the program. The program seeks to train people in order that they will obtain permanent positions in the market place. No evidence was produced that an extension for the retainment was either granted or justified. Florida's efforts to rectify its errors can not act retroactively to justify an allowance of the expenditures.

Accordingly, the Regional Administrator's disallowance of $57,738.26, representing excessive costs is sustained.

ITEM No. 16

The Auditors found that Florida had continued, since the issuance of a prior audit report, to employ personnel in unauthorized positions. Florida concurred with this finding. The Regional Administrator therefore disallowed $156,063.31 in costs associated with four individuals and three positions for which ETA had disapproved federal funding. At the hearing, ETA stipulated that the audit report is not based on the conclusion that the individuals in question did not render a federal service, but only on the notion that the positions in question did not have prior federal approval. (TR 253, 254.)

Florida offered a limited response concerning two of the three positions. The audit report and the final determination note Florida's more substantial response regarding the third position, that of Deputy Director of Employment Security. During 1973 this position was not approved by ETA. This same position description, originally submitted in 1973 was later approved in 1975. (AF Tab L, 91.) The audit report and the final determination state that this subsequent authorization does not invalidate the earlier decision to deny the use of federal funds for the questioned job classification. (AF Tab L, 88-92.) The final determination disallowed the entire salary and fringe benefits for this position for a total of $47,354.03.

Upon review of the evidence, it is determined that Florida provided insufficient evidence to contradict the existence of the error concerning costs associated with two of three positions at issue. The position of Deputy Director of Employment Security was not authorized during the entire period in question, but it

was later approved. Such circumstances minimize the impact of Florida's error concerning this particular position. Nonetheless, Florida was aware that is was unauthorized to hire the person at the time in which he was hired. The approval can not act retroactively to allow the expenditure.

Accordingly, the Regional Administrator's determination under Item No.16 will be affirmed.

ITEM No. 17

Upon recommendation of the Auditors, the Regional Administrator disallowed costs of $1,174.17 that were paid to one employee above the maximum range for her pay. Florida concurred with the Auditor's finding. (AF Tab L, 94.) Although each item of the final determination was appealed by Florida, it was unable to submit any evidence at the hearing to contest the aforesaid disallowance. (TR 254.)

Accordingly, the Regional Administrator's determination disallowance of $1,174.17 under Item No. 17 will be sustained.

FINDINGS

Based on the record as a whole, it is determined that ETA has the authority to recoup misspent funds, and that the burden of proof is on Florida to demonstrate that the funds were properly spent. It is further determined that Florida's Motion to strike Mr. Latham's testimony regarding the audit on the ground that it is unreliable is denied, but the Motion to Strike certain portions of Mr. Latham's testimony on the ground that it is an interjection of issues is granted.

Item No. 2: Expenditures in the amount of $2,342,455, of which 54% of the supporting documentation was produced but not audited by ETA, is allowed in the amount of $1,264,925.70, and disallowed in the amount of $1,077,529.30.

Item No. 5: Florida did not exceed its obligational authority in the amount of $982,014.67. Rather, the obligational authority was increased by that amount by ETA either verbally, without written confirmation, or the written confirmation was lost by Florida. Thus, $982,014.67 disallowed in Item No. 5 is allowed.

Item No. 8: Florida's failure to recharacterize its payment of rent to a state agency to a use and maintenance fee resulted in overpayment of 50% of the rental. Thus, $51,871.99 of the rent payments is disallowed, and $51,871.99 is allowed.

Item No. 10: Florida's payment of interest in the amount of $112,021.27 for the purchase of computer equipment was contrary to ETA policy and is therefore not an allowable cost.

Item No. 11: Florida's expenditure of $94,505.04 on personal service contracts cannot be allowed in view of the fact that the requisite prior approval was neither sought nor received, and that ETA possibly could have provided the services at no additional cost to Florida.

Item Nos. 12 and 13: ETA's disallowance of $72,432.77, expended for janitorial service contracts under Item No. 12, and $94,486.55 expended for supplies and equipment under Item No. 13, cannot be sustained. Both items were disallowed for Florida's failure to solicite competitive bids in strict compliance with ETA's rules and regulations. Florida produced sufficient evidence that, in awarding the contracts, it engaged in a competitive bidding process sufficient to ensure that the goals of ETA's policies were met.

Item No. 14: Florida produced credible and convincing evidence that the expenditure of $411,256.26, would not have been approved without supporting vouchers at the time of the request for expenditures, and that apparently the supporting vouchers had been lost. The disallowance of the amount, therefore, was in error.

Item No. 15: Florida's expenditure for salary costs on time-limited personnel resulted in an over-expenditure of $57,738.26. The payments were made to personnel employed beyond the duration of their appointments. Retaining the employees was unjustified. Therefore, the expenditure will be disallowed in the amount of $57,738.26.

Item No. 16: The Regional Administrator properly disallowed $156,063.31 in salary costs as ETA had disapproved federal funding for the salaries. While ETA subsequently approved one of the salary payments, the approval does not apply retroactively, and, thus, disallowance of the salary costs is proper.

Item No. 17: Disallowance of $1,174.17, paid to one employee above the maximum range for her pay grade is affirmed.

ORDER

Accordingly, it is ORDERED that:

1. the Motion to Dismiss is DENIED:

2. The Motion to Strike testimony based on its unreliability is DENIED, but based on that the testimony is an interjection of issues is granted;

3. Expenditures under Item No. 2 are allowed in the amount of $1,264,925.70, and disallowed in the amount of $1,077,529.30;

4. Expenditures under Item No. 5 are allowed in the amount of $982,014.67;

5. Expenditures under Item No. 8 are allowed in the amount of $51,871.99, and are disallowed in the amount of $51,871.99;

6. Expenditures under Item No. 10 are disallowed in the amount of $112,021.27;

7. Expenditures under Item No. 11 are disallowed in the amount of $94,505.04;

8. Expenditures under Item No. 12 are allowed in the amount of $72,432.77;

9. Expenditures under Item No. 13 are allowed in the the amount of $94,486.55;

10. Expenditures under Item No. 14 are allowed in the amount of $411,256.26;

11. Expenditures under Item No. 15 are disallowed in the amount of $57,738.26;

12. Expenditures under Item No. 16 are disallowed in the amount of $156.063.31.

13. Expenditure under Item 17 are disallowed in the amount of $1,174.17.

Thus, of the $4,427,880.60 disallowed by the Regional Administrator, $2,876,987.60 is allowed, and $1,550,893.00 is disallowed.

Nahum Litt

NAHUM LITT
Chief Judge

NL:MB:ajg

Service Sheet

Case Name: Department of Labor vs Florida Department of Labor and Employment Security

Case No : 83-WPA-6

Title of Document : DECISION AND ORDER

I certify that a copy of the above document was sent to the following individuals:

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