U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY,

COMPLAINANT,

v.

UNITED STATES DEPARTMENT OF LABOR,

RESPONDENT.

ARB CASE NO. 96-134

ALJ CASE NO. 93-JTP-2

DATE: NOV 27 1996

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

FINAL DECISION AND ORDER

This case arises under the Job Training Partnership Act (JTPA or the Act), 29 U.S.C. §§ 1501-1791 (1988), the Wagner-Peyser Act (WPA), 29 U.S.C. § 49 (1988), and the regulations issued thereunder at 20 C.F.R. Part 29 (1992).[2/] The Administrative Law Judge's (ALJ) Decision and Order (D. and O.) issued on May 13, 1996, is affirmed in part and reversed in part for the reasons set forth below.

[1/] Secretary's Order 2-96 was signed on April 17, 1996, delegating jurisdiction to issue final agency decisions under these statutes and regulations to the Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). The order also contains a comprehensive list of the statutes, executive order and regulations under which the Board now issues final agency decisions. 61 Fed. Reg. 19982.

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

BACKGROUND

The Grant Officer disallowed $847,515 in costs claimed by Florida Department of Labor and Employment Security (FDLES) subcontractors under 24 tied unit price, performance-based contracts (FUPPB), nine of which were funded by JTPA and 15 by WPA. Respondent's Exhibit 1, Administrative File (A.F.) at 101-107. The Grant Officer also disallowed $364,934 in administrative costs for four support contracts funded solely by WPA. Subsequently, the disallowance pertaining to the FUPPB contracts was reduced to $813,321, of which $146,056 were costs related to the JTPA contracts.

After a lengthy hearing that generated more than 3,500 pages of testimony, the ALJ reversed the Grant Officer's determination of disallowance with regard to all of the FUPPB contracts. With regard to the support contracts, the ALJ allowed $245,414 and affirmed the disallowance of $119,520 of the claimed costs. D. and 0. at 24-25.

The Grant Officer appealed the ALJ's decision and the Board asserted jurisdiction on June 24, 1996. The Grant Officer's appeal is limited to the allowance of costs claimed under the JTPA contracts.

DISCUSSION

The Job Training Partnership Act limits the administrative costs of training and retraining programs funded under the Act to not more than 15 percent. Section 108, 29 U.S.C. § 1518. The pertinent regulations at 20 C.F.R. § 629.38(a) require contractors to allocate the cost of program operations to each of three categories: training, administration and participant support; and require that costs be allocated to a particular cost category to the extent that benefits are received by that category to ensure compliance with the statutory limitation. The regulations at 20 C.F.R. § 629.38(d) provide that: "[t]he Governor is responsible for ensuring that SDA [Service Delivery Area] grant recipients and other subrecipients plan, control, and charge expenditures against the aforementioned cost categories."

The regulations at 20 C.F.R. § 629.38(e)(2) provide for an exception to the allocation of costs among the several cost categories when the costs are billed as ***single unit charges***,[3/] in which case all costs may be charged to training. This exception to the statutory rule allows for the costs which would otherwise be categorized as administrative costs and subject to statutory

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[3/] Single unit charge agreements are generally characterized as fixed unit price, performance-based contracts which provide that a contractor will be paid a specific negotiated price for each participant who completed training *and* was placed in unsubsidized employment in ***the occupation*** *trained for* and ***at not less than the*** *wage specified* in the agreement. The fixed unit price was not to be allocated by cost category and the contractor assumed the risk of non-payment for any participant who did not complete training or was not placed in unsubsidized employment.

expenditure limits, to be folded into the training cost category under a fixed unit price contract, thereby avoiding the restrictive administrative cost limits.[4/]

The issue before us is whether the JTPA funded fixed unit price contracts entered into between FDLES and its contractors, pursuant to § 629.38(e)(2), did in fact comport to the regulatory requirements. It is uncontroverted that the JTPA funded FUPPB contracts entered into by FDLES with various SDA's were administrative in function. FDLES's witnesses, including Private Industry Council (PIC) executives, which are JTPA SDA subcontractors, testified that the scope of work under the single unit charge agreements they entered into with FDLES was intermediary in nature, and that PIC staff were responsible for developing the actual job training and employment opportunities for JTPA participants with local third party entities.

Frieda Sheffield, Executive Director, Panhandle PIC, testified that the PIC's subcontractors did participant placements, Transcript (T.) at 1397-98, *see also* T. at 1387, 1413-15, 1427-29, 1445; Charles Collins, Senior V.P. for Finance and Administration, Withlacoochee PIC, testified that the PIC subcontracted out all training to "comprehensive services providers" T. at 1555-56; Collins testified that he believed the PIC charged costs to the administrative cost category rather than to the § 629.38(e)(2) contracts, T. at 1646; James Boggs, Executive Director, Escambia PIC, testified that the PIC could not have trained program participants in certain of its single unit charge contracts with the State, T. at 1854, see *also* T. at 1850-51, 1975-78, 2023-24; Roy Chilcote, FDLES Planner, testified that the State planners knew that the Withlacoochee PIC was "strictly an administrative entity" and the actual training service providers were unknown when the contract was executed, T. at 2734-36; Carol Breyer, Executive Director, Florida Governor's Alliance for Employment of Handicapped Citizens, Inc., testified that the Alliance was paid to provide technical administrative support to subcontractors, T. at 3258, and that employment training services were subcontracted to other entities throughout the State, T. at 3267-68.

Although the costs associated with the administrative services provided by these subcontractors may be otherwise allowable expenses, the issue is whether administrative expenditures by intermediary contractors comply with § 629.38(e)(2) requirements, in contrast to administrative costs expended by an actual training and employing contracting entity.

[4/] The regulations at 20 C.F.R. § **629.38(e)(2),** entitled Classification **of costs** provide:

> (2) Costs which are billed as a single unit charge do not have to be allocated or prorated among the several cost categories but may be charged entirely to training or retraining services when the agreement:
>
> (i) Is for training under title II or for retraining under title III. ... under a performance-based contract/agreement;
>
> (ii) Is fixed unit price; and
>
> (iii)(A) Stipulates that full payment for the full unit price will be made only upon completion of training by a participant and placement of the participant into unsubsidized employment in the occupation trained for and at not less than the wage specified in the agreement; ....

The Secretary decided that contracts executed pursuant to 20 C.F.R. § 629.38(e)(2), must strictly follow the regulatory requirements, and contracts which did not comport to the stated requirements could not qualify as single unit charge agreements. Texas ***Department of Commerce and Fort Worth Consortium v. U.S. Dep't of Labor, Case No.*** 90-JTP-5, ***Sec.*** Final Dec. and Order, Nov. 1, 1993, slip op. at 6,(appeal pending before the Fifth Circuit, No. 96-60256). ***The ALJ in the case*** before us failed to follow the Secretary's decision in ***Texas, as*** he was bound to do, even though it was extensively cited in the Grant Officer's post-hearing brief at 61-65.

The fact situation in ***Texas*** is strikingly parallel to those in this case, we therefore have no reason to diverge in our opinion with regard to the application of the pertinent regulations. In ***Texas, an*** SDA entered into a series of single unit charge contracts with a number of "vendors." In the case before us, FDLES entered into a series of single unit charge contracts with a number of SDAs. In ***Texas, the*** vendors, acting on behalf of the SDA, solicited training and employment opportunities for JTPA eligible participants with local employers. In the case before us, the SDAs solicited training and employment opportunities for JTPA participants with local service providers and employers. The vendors in ***Texas,*** similar to the SDA intermediary contractors in the case before us, provided pre-employment assessment and employment placement services but not specific occupational training to participants. The ***Texas*** vendors, like the SDA's in the case before us, had post-placement responsibilities such as monitoring work sites and providing assistance to the actual employers. ***Texas*** at 4-5.

We note that the contracts in ***Texas,*** as in this case, were executed prior to March 13, 1989, when the U.S. Department of Labor published an interpretive regulation concerning restrictions in the use of single unit charge agreements. 54 Fed. Reg. 10,459 (1989). The interpretive regulation prohibited the use of "tiered" or "layered" contracts pursuant to § 629.38(e)(2). In the ***Texas*** decision, the Secretary found that the plain meaning of the underlying regulation was clear, and the U.S. Department of Labor's apparent delay in providing a dispositive interpretation of the regulation did not vitiate the clear meaning of the regulation. *Id.* at 6-8.[5/] Therefore the ALJ erred in holding that contracts executed prior to the operative date of the interpretive regulation were not bound by the regulation's plain meaning prescriptions. D. and 0. at 15. The JTPA FUPPB contracts had to strictly follow the regulatory requirements in order to comply with the Secretary's decision in ***Texas,*** slip op. at 7-8.

In ***Texas***, the ALJ determined and the Secretary affirmed, that the regulations had dual requirements, and a single unit charge contractor had to provide training *and* place participants who completed the training in unsubsidized employment in the occupation trained for to qualify for the regulatory exception. Id. at 6. There is an additional regulatory requirement that an employed participant's wages can not be less than the wage specified for the identified

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[5/] A full discussion of the background concerning the development of the regulation and the ensuing policy interpretation can be found in the Secretary's *Texas* decision, slip op. at 2-4, 6-8.

occupation in the agreement. 20 C.F.R. § 629.38(e)(2)(iii)(A). In *Texas*, *as* in the case before us, the single unit charge agreements provided for categories of occupations and ranges of wages, with average wages to be paid, but did not link identified occupations with specific wage rates. Id. at 4.

The Secretary reaffirmed the necessity of scrupulously satisfying the regulatory requirements of § 629.38(e)(2) governing single unit charge contracts in *State* of *Florida Dep't of Labor and Employment Security v. U.S.* Dep't *of Labor, Case No.* 92-JTP-17, Sec. Final Dec. and Order, Dec. 5, 1994, slip op. at 12; Order Denying Reconsideration, Jan. 6, 1996, *aff'd, Nos.* 94-3613 and 95-2218 (1 lth Cir., Apr. 9, 1996)(affirmation of disallowed costs on other grounds).

We concur with the Secretary that when single unit charge agreements do not comport to the specific requirements of the § *629.38(e)(2)* regulation, they fail to qualify for the regulatory exception to allocate costs by category and are subject to the statutory administrative cost limitation. The regulatory requirements must be met even if the services provided pursuant to such agreements are otherwise allowable under the Act.

The ALJ erred when he found that the Grant Officer failed to timely raise the issue that the contracts in question were in violation of the governing regulation. D. and 0. at 15. The Grant Officer's Initial Determination and Final Determination specifically state that the intermediary contracts did not qualify for the single unit charge provisions of § 629.38(e)(2), because they did not provide for the training and placement of JTPA participants. A.F. at 23-24 and 12-13.

We disagree with the ALJ's decision to reverse the Grant Officer's disallowance of costs claimed by FDLES and its subcontractors pursuant to the nine FUPPB contracts funded by JTPA. We concur with his decision to allow costs claimed pursuant to the FUPPB contracts funded by WPA because these contracts are not governed by JTPA regulations. We also concur with his decision concerning the allowance of a portion of the costs associated with the WPA funded support contracts and his affirmation of the Grant Officer's disallowance of the balance of these costs. D. and 0. at 23-25.

We are concerned by the ALJ framing the decision with regard to the Grant Officer's failure to support a case of fraud or presumed allegations of other illegal activities against the State. D. and 0. at 5, 12, 13 and 14. The ALJ made a number of comments during the hearing concerning "illegal profits" T. at 215; the Department's "obvious focus ... was, basically, fraud." T. at 2396; the disallowances regarding the FUPPB contracts as "almost a fraud case." T. at 2403. By contrast, the Grant Officer's witnesses testified that although they considered the contractors charging administrative costs to single unit charge agreements under § 629.38(e)(2) improper, the transcript is replete with their statements denying any allegations of fraud or illegal activity by the State. T. at 127, 134, 145, 219, 312, 809, 813, 859, 861 and 1125-26. We believe the ALJ missed the gravamen of the case which pertains to the Grant

Officer's disallowance of claimed costs pursuant to single unit charge contracts where there was a failure to comply with unambiguous regulatory requirements.

Although we address Complainant's case solely on the merits and the prevailing case law, we are compelled to note the unsupported allegations by FDLES's counsel regarding purported legal misrepresentation by Grant Officer's counsel to this Board. FDLES Brief at 14-17. Neither the Grant Officer's Exceptions nor Brief submitted before this Board referenced the interpretive regulation which FDLES' counsel avers Grant Officer's counsel wrongfully urged should be retroactively applied to the contracts in this case. In fact, during the hearing, the ALJ directly asked Grant Officer's counsel: "[I]s there any contract in this case that that particular [interpretive] regulation would apply to?" Counsel replied: "No, Your Honor." T. at 1667. We regard FDLES counsel's remarks intemperate and unwarranted in light of the record before us.

ORDER

The ALJ's Decision and Order of May 13, 1996, IS REVERSED with regard to that portion of costs associated with those contracts funded by JTPA in Finding 1, and the Grant Officer's disallowance in the amount of $146,056 is affirmed. In our review of the record, we note that FDLES might have certain additional documentation that could be directly attributable to and allowable pursuant to these JTPA contracts. See T. at 3498-3500. If FDLES submits any documentation to the Grant Officer to support additional allowable costs relating to the disallowed costs under Finding 1, the Grant Officer is ordered to review such submissions and report to us as to the final amount of the disallowance to be affirmed, subject to our review, if necessary.

The ALJ's decision with regard to the allowance of costs funded by WPA in the amount of $667,265 in Finding 1 IS **AFFIRMED**.

The ALJ's decision allowing $245,414 and affirming the Grant Officer's disallowance of $119,520 under Finding 2, IS **AFFIRMED**.

The State of Florida Department of Labor and Employment Security will pay to the U.S. Department of Labor the amount of $146,056 in non-Federal funds.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

CERTIFICATE OF SERVICE

Case Name : ***Florida Department of Labor and Employment Security v. united States Depamnent of Labor***

ARB Case No.: 96-134

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Document : Final Decision and Order

A copy of the above-referenced document was sent to the following persons on NOV 2 7 1996.

CERTIFIED MAIL

Carolyn D. Cummings, Esq.
On behalf of Florida Department of Labor
and Employment Security
Cummings, Hobbs, & Wallace, P.A.
1020 E. Lafayette Street, Suite 205
Tallahassee, FL 32301

HAND DELIVERED

Associate Solicitor for Employment
and Training Legal Services
Attn: Frank P. Buckley, Esq.
U.S. Department of Labor
Room N-2101
200 Constitution Avenue, N. W.
Washington, DC 20210

REGULAR MAIL

Mr. R. Lance Grubb
Grant/Contract Officer
Office of Grant and Contracts
Management
U. S. Department of Labor/ETA
Room N-4716
200 Constitution Avenue, N.W.
Washington, DC 20210

Shirley Gooding, Secretary
Florida Department of Labor
and Employment Security
The Hartman Building
Suite 303
2012 Capital Circle, S.E.
Tallahassee, FL 32399-2 189

Jaylynn Fortney
Regional Solicitor
U.S. Department of Labor
Room 339
1371 Peachtree Street, N.E.
Atlanta, GA 30367-2302

Bryan A. Keilty
Administrator
Office of Financial &
Administrative Management
U. S. Department of Labor
Room N-4716
200 Constitution Avenue, N.W.
Washington, DC 20210

Linda Kontnier
Division of Audit Closeout
and Appeal Resolution
U.S. Department of Labor
Room N-4716
200 Constitution Avenue, N. W.
Washington, DC 202 10

Hon. John M. Vittone
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Department of Labor
Suite 400
800 K Street, N.W.
Washington, DC 20001-8002

Hon. Jeffrey Tureck
Administrative Law Judge
Office of Administrative Law Judges
Suite 400
800 K Street, N.W.
Washington, DC 20001-8002