

U.S. Department of Labor

Office of Administrative Law Judges
211 Main Street
San Francisco, California 94105



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JUN23 1989

Date:
Case No. 86-JTP-10

In the Matter of

MOTIVATION, EDUCATION, AND
TRAINING, INC.

Complainant,

vs.

U.S. DEPARTMENT OF LABOR

Respondent,

James L. Feldesman, Esq.
For the Complainant

William E. Everheart, Esq.
For the Respondent

Before: ALEXANDER KARST
Administrative Law Judge

SUMMARY DECISION AND ORDER

This matter arises under the Job Training and Partnership Act, 29 U.S.C. §1501 et seq., and the regulations promulgated thereunder, 20 C.F.R. Parts 626, 636, 676; and 29 C.F.R. Part 18 (hereinafter "the Act"). The Grant Officer issued a final determination on March 17, 1986 in which ~~he~~ disallowed a total of \$56,723 in costs charged to two JTPA grants administered by the complainant, Motivation, Education and Training, Inc. (hereinafter "MET"). The final determination questioned certain excess indirect costs, travel expenses and \$6,518.00 of consultant services costs. MET filed a timely request for a hearing to contest the disallowance. On July 29, 1987 the Grant Officer stipulated to a revised disallowance and MET withdrew its appeal as to the indirect costs and the travel expenses. On February 18, 1988 the Secretary of Labor issued a decision, In the Matter of ORO Development Corporation v. U.S. Department of Labor, 86-JTP-6, which addressed the issue of consultant services and found them to be unallowable. As no factual matters are in dispute and as the allowability of consultant services is the only outstanding issue in this case, the Grant Officer moved for summary decision citing ORO Development Corporation. On the complainant's representation that there are important policy

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matters not considered by the Secretary in ORO Development Corporation which deserve to be developed for the record, and over the Grant Officer's objection, I accepted the presentation of evidence. Having considered the arguments put forth, I now grant summary decision to the Grant Officer.

The \$6,518.00 in question was paid to a law firm retained by MET for services rendered in contesting an earlier CETA disallowance. The earlier matter concerned an initial determination, issued June 10, 1983, which **questioned** costs totalling \$358,371 incurred by MET in connection with grants numbered 99-0-333-31-28 and 99-0-333-31-48 which were in operation from October 1, 1979 to September 30, 1981. MET engaged a law firm for representation during settlement negotiations with the Grant Officer. Largely due to the efforts of the law firm the disallowance was settled for \$8000. MET paid for the legal services with grant funds from grants numbered 99-4-1262-56-159-02, 99-4-0333-56-179-02 and 99-3-1262-56-184-02 which covered the period from January 1, 1984 through June 30, 1985.

Allowable costs for a JTPA grantee are determined pursuant to 20 C.F.R. Part 633.303 which incorporates 41 C.F.R Part 29-70 and OMB Circular A-122. In disallowing the legal services costs, the Grant Officer relied on OMB Circular A-122, Attachment B, 34(d) which states in part that "that cost of legal, **accounting**, and consulting services incurred in connection with . . . the prosecution of **claims** against the Government, are unallowable". The Grant Officer argues that when a grantee requests a hearing to dispute a **disallowance** made in a final determination, he is prosecuting a claim against the government. This interpretation was accepted by the Secretary when she refused to review Judge Gilday's decision in U.S. Department of Labor v. Oakland County Board of Commissioners, 84-CTA-177 (April 17, 1987). A **divided** panel of the U.S. Court of Appeals affirmed the Secretary's decision, the majority finding the interpretation reasonable and not contrary to Congressional intent. Oakland County Board of Commissioners v. U.S. Department of Labor, 853 F.2d 439, (6th Cir. 1988).^{1/}

^{1/} This interpretation was rejected by Judge **Matera**, in U. S. Department of Labor v. Utah Rural Development Corporation, 86-CTA-25, (April 30, 1987)(**exceptions** filed) where he concluded that a grantee contesting a disallowance is defending itself against charges brought by the government rather than prosecuting a claim. See, Oakland County Board of Commissioners v. U.S. Department- Labor, 853 F.2d 439, (6th Cir. 1988)(**Guy, J.**, dissenting).

A JTPA grantee is also subject to OMB Circular A-122, Attachment A, Paragraph 4 (b) which provides:

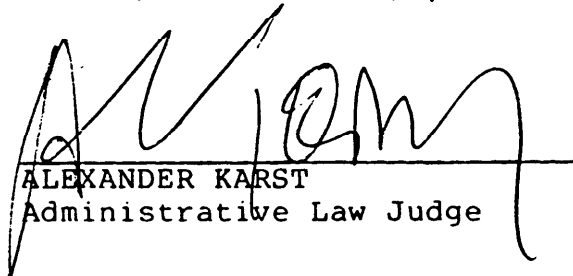
"Any cost allowable to a particular award of other cost objective under these principles may not be shifted to other Federal awards to overcome funding deficiencies, or to avoid restrictions imposed by law or by the terms of the award."

The Secretary, in ORO Development Corporation, supra, interpreted **this** provision to prohibit charging to a current grant, legal fees incurred in contesting a final determination of costs charged to an earlier grant. Even where the very survival of the grantee agency is imperiled, such cost shifting is forbidden because "there is no programmatic imperative that every incumbent grantee **must** succeed itself in each new grant funding." Id. at p.11. While the public policy implications of this interpretation are open to debate, and although I might decide otherwise if free to do so, I am constrained by the unequivocal language of the Secretary's ruling. Inasmuch as the complainant has charged to a grant, legal fees which were not incurred in the administration of that grant, the disallowance of those fees must be upheld as a matter of law.

Accordingly, the Grant Officer's Motion for Summary Decision is hereby granted.

ORDER

The Final Determination of the Grant Officer, dated March 17, 1986, as revised by **stipulation**, July 29, 1987, is affirmed. Motivation, Education and Training, Inc. shall pay the U.S. Department of Labor, from nonfederal funds, the sum of \$6,518.00.


ALEXANDER KARST
Administrative Law Judge

San Francisco, California

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86-JTP-10

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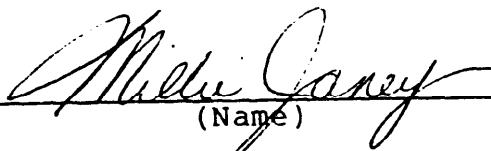
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