U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON. D.C.

DATE: September 13, 1995
CASE NOS. 90-JTP-29
91-JTP-11
92-JTP-34

IN THE MATTER OF

COMMISSIONER, EMPLOYMENT SECURITY
OF THE STATE OF WASHINGTON,

COMPLAINANT,

v.

U. S. DEPARTMENT OF LABOR,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Job Training Partnership Act (JTPA or the Act), 29 U.S.C. §§ 1501-1791 (1988), and the regulations issued at 20 C.F.R. Parts 626-638 (1992) and at Part 627 (1994).[1/] For the reasons set out below, the decision of the Administrative Law Judge (ALJ) is affirmed in part and reversed in part.

BACKGROUND

The Grant Officer issued three Final Determinations during 1990, with regard to the three above cited cases, disallowing a total of $2,657,300 in program costs claimed by the State during

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1/ JTPA regulations were revised in 1992. The pertinent program regulations for this case were last published in the 1992 edition of the Code of Federal Regulations. The 1994 edition is cited for relevant repayment methods.

the Program Years (PY) 1984-1989. The State filed timely appeals from each of the determinations and the cases were consolidated before the ALJ.

The Grant Officer's disallowances were based on the State Auditor's findings that some costs claimed by the State Board of Vocational Education (SBVE), a state agency delegated by the Governor to oversee the expenditure of certain set-aside funds (8% funds), failed to satisfy the statutory requirements concerning those funds. The 8% funds were set aside from the State's JTPA Title II allocation by Section 123, and were to be used by the Governor "to provide education and training, ... and related services ***to participants*** under title II." (Emphasis added). 29 U.S.C. § 1533(c)(l).

The State Auditor questioned the expenditure of those 8% funds SBVE used to underwrite contracts that did not have sufficient documentation to show they'provided benefits to program participants. The Grant Officer determined that the questioned costs were expended in contravention of the requirements imposed by § 123 and consequently disallowed them. ALJ's Decision and Order (D. and 0.) at 2-3.

The ALJ determined that the case record and testimony at the hearing supported a finding that some of the questioned contracts resulted in the placement of JTPA participants and allowed $1,022,943.58 in costs disallowed by the Grant Officer. D and 0. at 38. The ALJ affirmed the Grant Officer's disallowance of $1,616,984.20, finding that there was no demonstrated benefit to

the participants in those questioned contracts. *Id.*[2/] The ALJ further decided that pursuant to the "equitable considerations" set forth in Section 164(e)(2) of the Act, the State was entitled to a waiver of repayment of the disallowed costs. D. and 0. at 43-44.

The Grant Officer did not contest the ALJ's findings with regard to the allowance of costs associated with contracts wherein he found documented participant benefits, nor to the ALJ's affirming the disallowance, but did except to the ALJ's granting a waiver of repayment of the disallowed funds pursuant to § 164(e)(2)."'

DISCUSSION

I concur with the ALJ's determination that the 8% funds available under Section 123 are restricted to providing services to participants and concur with his affirmation of the Grant

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[2/] There is a $2,000 disparity between the ALJ's final allowed and disallowed costs, after adding the originally questioned costs concerning Grays Harbor College and certain expenses improperly paid to a state official. This last issue appears to have been resolved. D. and 0. at 38, fn. 28. Since the sums specifically excepted to by the Grant Officer pertain solely to the amount the ALJ waived and the sum paid to Grays Harbor College, I will not consider the disparity.

[1'] The Grant Officer also excepted to the ALJ's failure to affirm a disallowance of $1,201 paid to Grays Harbor College and $14,171 improperly paid for a former Commissioner's personal expenses. The State's Response to the Grant Officer's exceptions indicated that the issue of the improperly paid expenses had apparently been previously resolved. Since the Grant Officer's subsequent submissions to the Secretary drops any mention of recovery of the Commissioner's improperly claimed expenditures, I assume this matter is resolved.

Officer's disallowance of claimed costs not demonstrated as benefitting participants. D. and 0. at 38.

The ALJ erred, however, in waiving repayment of the disallowed costs by the State as a recipient of JTPA funds, pursuant to Section 164(e)(2) and (3). The Act provides for a waiver of the imposition of sanctions against the recipient due to a *subgrantee's* misexpenditure of JTPA funds, if the recipient can adequately demonstrate that it substantially complied with the requirements set forth in Section 164(e)(2). 29 U.S.C. § 1574(e)(3). The statute cannot be read, however, as foregoing the collection of a debt that was incurred by the impermissible actions of the recipient. Cf. *Pennsylvania Dep't of Labor and Industry v. U. S. Dep't of Labor,* 962-JTP-12, Sec. Final Dec. and Order, Mar. 5, 1995, slip op. at 5-6 (state cannot forego collection of a debt of a subgrantee under the regulations at 20 C.F.R. § 629.44(d)(4)(1992) if the subgrantee had itself misexpended the program funds).

The State Board of Vocational Education is a state agency, delegated by the Governor to oversee the expenditure of the 8% funds on behalf of the state and therefore is not a subgrantee of the state. The Act contemplates relief for a recipient where it can demonstrate that it established appropriate standards of review and was diligent in adhering to those standards, but nevertheless could not reasonably prevent a subgrantee from violating the Act. That the waiver was to insulate a recipient against loss from the misexpenditures of a subgrantee is

illustrated by the last sentence in § 164(e)(3), which authorizes the Secretary to impose the appropriate sanction directly against the misspending subgrantee. The immediately preceding sentence authorizes the Secretary to waive sanctions against the recipient. 29 U.S.C. §1574(e)(3). In this case, it is the State, through its policies permitting subgrantees to expend 8% funds without a concomitant guarantee that these activities would be targeted for the benefit of program participants, that violated the Act.

The ALJ's decision to waive repayment of the disallowed costs is based on his premise that the State would not have misspent the funds but for "DOL's confusing and inconsistent administration of the Act." D. and 0. at 43. However, it is evident that the State misspent the 8% funds in contravention of the statute's unambiguous restriction of only allowing costs which are directly attributable to participant activity, and DOL's putative questionable administration of the program does not change the clear meaning of the Act's language. Nor was Congressional intent restricting such expenditures to benefit participants under the Act in any way uncertain. See S. Rep. No. 97-469, 97th Cong., 2d Sess. 3, reprinted *in 1982* U.S. CODE CONG. & ADMIN. NEWS 2639, 2652. Although the ALJ unflatteringly characterizes DOL's administration of JTPA, he does not suggest that the Grant Officer's inaction rose to the threshold of estoppel, which is the practical effect of his decision to waive

repayment of the misexpended funds. See ***Heckler v. Community Health Services, 467*** U.S. ***51, 60, 63 (1983).***

The ALJ recommends that the State should be permitted to augment the case record with regard to the possibility of using excess matching funds as stand-in costs for the disallowed costs.[4/] D. and 0. at ***43.*** ***I*** agree. Although the Grant Officer argues that the State should have offered evidence as to the allowability of the excess matching funds as stand-in costs at

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[4/] "Stand-in costs" as defined by USDOL ETA Field Memorandum 78-82 (Apr. 28, 1982) are previously unreported costs which a grantee proposes to report in place of unallowable costs. In general, stand-in costs are acceptable, at the Grant Officer's discretion, if they would have been allowable had they been reported in place of the disallowed costs. Stand-in costs may be accepted if: (1) they are allowable, and allocable to, the grant to which the disallowed costs apply; (2) were incurred in support of grant activities during the grant period in which the disallowed costs were incurred; (3) are properly documented; and (4) would not have been incurred in the absence of the program.

The issue of the allowability of excess costs as stand-in for disallowed costs was discussed in Comptroller General (Comp. Gen.) Decision B-208871.2 (Feb 9, 1989). That decision held that stand-in costs were to be considered at the time of audit resolution. The amended 1992 JTPA regulations at 20 C.F.R. § 627.481(b)(1994) accords with the Comp. Gen. decision. The amended regulations define stand-in costs as:

> costs paid from non-Federal sources which a recipient proposes to substitute for Federal costs which have been disallowed as a result of an audit or other review. In order to be considered as valid substitutions, the costs (1) must have been reported by the grantee as uncharged program costs under the same title and in the same year in which the disallowed costs were incurred and (2) must have been incurred in compliance with laws, regulations, and contractual provisions governing JTPA.

20 C.F.R. § 626.5 (1994).

The period in question in this case predates both the Comp. Gen. decision and the amended JTPA regulations.

the hearing,?' I am persuaded, given the totality of the factual circumstances in this case, to allow the State to present additional evidence that its excess matching costs qualify as stand-in costs for the disallowed costs. See *generally U.S. Dep't of Labor v. Steuben County, New* York, Case No. 83-CTA-162, Sec. Final Dec. and Order, July 22, 1985.[3/]

The documentation submitted by the State, Exhibit 103, indicates that excess matching § 123(b) funds *were* expended *in* PYs 1984 and 1987-89, but not in PYs 1985 and 1986. I am also persuaded that it is appropriate for the State to have the opportunity to submit at this time the requisite documentation regarding the disallowance concerning Grays Harbor College. The Grant Officer is requested to advise me as to the outcome of the disposition of the debt owed by the State with regard to his determination concerning the allowability and allocability of the excess matching costs appropriately documented by the State, as well as the documentation regarding the debt concerning Grays Harbor College.

ORDER

For the foregoing reasons, the ALJ's decision to waive the affirmed disallowed costs is REVERSED. The Grant Officer's disallowance of $1,616,984.20 is AFFIRMED. The case is REMANDED to the Grant Officer solely to determine which of the State's proposed excess matching costs are appropriate as stand-in costs. The grantee, State of Washington is therefore ORDERED to pay to

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[5/] Grant Officer's Brief at 11.

the U.S. Department of Labor $1,616,984.20 less any credit determined to be allowable as stand-in costs by the Grant Officer. The Grant Officer shall be guided as to the appropriate method of repayment by the State pursuant to Section 164(d) of the Act and 20 C.F.R. § 627.708 (1994).

SO ORDERED.

Secretary' of *Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: ***Employment Security Commmisioner, State of Washington, U.S. Department of Labor***

Case Nos.: **90-JTP-29**
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Document : Final Decision and Order

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