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In the matter of

WISCONSIN DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS

Complainant

v.

U. S. DEPARTMENT OF LABOR

Respondent
.....

Date: December 21, 1988

Cases Nos. 87-ESA-2
87-UIA-13

Howard I. Bernstein, Esq.
for complainant (on brief)

Marcella L. Thompson, Esq.
for respondent (on brief)

Charles W. Campbell
Administrative-Law Judge

DECISION AND ORDER

This matter is before me pursuant to requests for hearing filed by the complainant, Wisconsin Department of Industry, Labor and Human Relations ("DILHR"), with respect to a determination by the Employment and Training Administration of the U. S. Department of Labor, the respondent, which disallowed costs of \$82,239 incurred by DILHR with respect to a lease-purchase by DILHR of computer and word processing equipment with federal grant funds.¹

¹ The \$82,239 is allocable to the following types of grants:

Employment Service (ES)	\$35,798
Unemployment Insurance (UI)	43,160
Comprehensive Employment and Training Act (CETA)	3,281
TOTAL	-\$82,239

DILHR has already repaid the CETA program the amount of \$3,281 (Tab C).

The parties have waived an oral hearing and agreed to a decision on the basis of the documentary evidence, together with the stipulations and briefs. The documentary evidence consists of the Administrative File and DILHR's Exhibits Nos. 1, 2 and 3, all of which are hereby received in evidence. References in this decision to the Administrative File will refer to the "Tab number," and references to DILHR's exhibits will employ the prefix "C."

The following stipulation of the parties is hereby accepted as accurate:

1. This stipulation is a joint stipulation of the facts which are not in dispute and neither party is precluded from submitting additional evidence by affidavit or other means, subject to the objections of the other party.
2. The Wisconsin Department of Industry, Labor and Human Relations (hereinafter DILHR) is established pursuant to section 15.22 Wisconsin Stats. Administrative powers and duties are vested in a Secretary who is appointed by and serves at the pleasure of the Governor with the advice and consent of the Senate.
3. DILHR is responsible-a for administering programs. including unemployment compensation, employment services, apprenticeship job training, safety and building code inspections, worker's compensation and equal rights in employment and housing.
4. During the years questioned in the audit, DILHR received funds to administer the aforementioned programs, the ES and UC programs with the State of Wisconsin..
5. The State of Wisconsin, Legislative Audit-Bureau, conducted a financial and compliance audit of the DILHR for the period July 1, 1983 through June 30, 1985.
6. The auditors of the Wisconsin Legislative Audit-Bureau questioned costs of \$82,239 as constituting interest payments made-for the lease/purchase of computer and word processing equipment charged against federal grants.
7. On February 27, 1987, Melvin J. Howard, Grant Officer, issued an initial determination to Mr. John T. Coughlin, Secretary, Department of Industry, Labor and Human Relations, wherein \$82,239 was determined to be disallowed costs on the same basis as the audit.
8. On May 29, 1987, Melvin J. Howard, Grant Officer, issued a final determination to Mr. John T. Coughlin, Secretary, Department of Industry, Labor and Human Relations, wherein \$82,239 was determined to be disallowed costs on the same basis as the audit.
9. On June 12, 1987, Mr. Howard I. Bernstein, General Counsel for DILHR, notified the Administrative Law Judge that DILHR requested an administrative hearing before an Administrative Law Judge of the United States of America.
10. The parties herein stipulate to the authenticity of documents contained in the Administrative File and the documents attached as Complainant's Exhibits 1. 2 and 3.

Furthermore, the parties stipulate and admit into the record the Administrative File and Complainant's Exhibits 1, 2 and 3.

The record shows that the purchase price of the equipment was \$1,940,300 and that the State of Wisconsin made a down payment of \$1,160,200, and agreed, pursuant to a lease-purchase agreement, to pay the balance to Texas Governmental & Industrial Finance, Inc. in installments of \$205,210.06 per year payable on November 15 of each of the five years 1982-1986, inclusive. Prior to this proceeding, the State of Wisconsin Legislative Audit Bureau questioned the allowability of \$74,508 which it considered to be the interest portion of payments under the lease-purchase agreement for fiscal years 1982 and 1983. Those costs were disallowed by the U.S. Department of Labor and were repaid by DILHR, although DILHR continued to contest the disallowance and requested the state Department of Justice to pursue the matter in federal court.

DILHR continued to make payments on the lease-purchase agreement, and the State of Wisconsin Legislative Audit Bureau questioned \$82,239.32 of what it considered to be the interest portion of the payments for federal fiscal years 1984 and 1985. In questioning payment of that amount, the Audit Bureau referred to OMB Circular A-87 which stated:

Unallowable Costs . . . Interest on borrowing (however represented) bond discounts, cost of financial and refinancing operations . . . are unallowable except when authorized by Federal legislation and except as provided for in paragraph C.2.a of this Attachment.

It is this \$82,239.32 asserted interest portion of the lease-purchase payments for fiscal years 1984 and 1985 which is involved in this proceeding.

Contentions of parties. The respondent asserts that the disallowed costs of \$82,239 represent the interest portion of the payments made by DILHR pursuant to the foregoing lease-purchase agreement, and that such interest payments are not allowable costs under the applicable regulations and policy memoranda issued by the U. S. Department of Labor.

DILHR contends that (1) because the costs in question were incurred under a lease-purchase agreement the costs by definition do not constitute interest, (2) the costs in question are allowable under the terms of 41 CFR 1-15.712-1 and the Department of Labor's General Administrative Letter ("GAL") 14-81,² and (3) to the extent that the costs in question are definable as "interest" the respondent is estopped by its prior statements from asserting this position.

Character of costs as "interest:" It will first be considered whether the disallowed costs constitute "interest." Although the lease-purchase agreement itself did not characterize any part of the payments to be made thereunder as "interest," DILHR does not dispute that it intended to "finance" part of the price of the computer system being purchased. However, it asserts that it understood at the time, based on official publications of the Department of Labor, that the payment of interest for data processing equipment was permissible and that the consideration of

² GAL 14-81 (C-2) was issued on March 6, 1981 by the Department of Labor to transmit policy on procurement of automatic data processing equipment by grantees.

different types of financing was encouraged. DILHR states that although the rental payments may have been established after looking at factors such as interest costs, in literal fact it "entered into only a lease-purchase agreement under which it made rental payments that did not constitute payment of interest."

This contention presents a question as to whether recognition should be accorded to the admitted economic reality that interest costs were incurred, or to the form of the lease-purchase agreement, which called only for rental payments.

There is no question but that a portion of the rental payments represented interest, although not so designated in the lease-purchase agreement. Although the lease-purchase agreement itself did not refer to interest costs, other documentation associated with the transaction clearly and explicitly referred to "interest." The purchase order issued to the vendor by the State of Wisconsin contained the statement, "Interest rate will be 11.2388% per official Sealed Bid R4095." (C-3) The "Acknowledgment" accompanying the lease-purchase agreement and which was signed by both parties to the transaction stated:

Notwithstanding any terms of the Agreement, the undersigned hereby acknowledges that a portion of each monthly payment represents the payment to interest calculated at the simple rate of 11.0 percent per annum. (C-3)

In view of all of the facts and circumstances herein, it is concluded that interest costs clearly were incurred.

Interest costs not allowed. DILHR points out that rental of data processing equipment is an allowable cost under 41 CFR 1-15.712-1 and argues that the statement by the Department of Labor in its own GAL 14-81 that "the various financial methods available must be figured into the cost analysis" constitutes advance approval of this type of cost. Conversely, the respondent argues that GAL 14-81 by its very terms incorporated the regulations which prohibited payment of interest.

It is clear that interest costs are not allowable under applicable regulations and guidelines. At times relevant herein, 41 CFR §1-15.713-7 provided that interest payments "however represented" were an unallowable cost. Thus the fact that the lease-purchase agreement included interest as a component part of the rental payments rather than as a separately stated item does not affect its unallowable character.

Availability of estoppel. GAL 14-81.(C-2) when read as a whole, together with all incorporated regulations, does, as the respondent states, prohibit payment of interest. Nevertheless, there are portions of it which, read in isolation, could give a grantee the impression that interest costs were permissible in connection with a lease with option to purchase. At page 12 it states in part:

(a) The following criteria will be used to determine the appropriate method of acquisition:

...

(2) The lease with option to purchase method is indicate when t is necessary or advantageous to acquire equipment that meets system specifications, but desirable to defer temporarily a decision to purchase because circumstances do not satisfy fully the conditions which would indicate purchase. This situation might arise when a short period of operational experience is desirable to prove the validity of a system design with which there has been no previous experience.

The existence of these provisions raises the question whether the respondent is estopped from recovering the disallowed interest costs because of its issuance of GAL 14-81.

There is a division of authority on the question whether the government can ever be estopped from enforcing the law. However, it is unnecessary to decide this question because even under the cases which hold that the government can be estopped under some circumstances, the necessary elements of an estoppel against the government are lacking in this case.

In Onslow Count v. U. S. Department of Labor, 774 F.2d 607 (4th Cir. 1985) the court in denying a claim or estoppel against the Department of Labor held in part:

Moreover, Onslow does not show that it could not have discovered that the expenditures were improper, which bars the defense.

The denial of estoppel to a grantee except where the grantee shows that it "could not have discovered that the expenditures were improper" clearly bars any defense based on estoppel in this case. Under this holding, a grantee seeking estoppel against the government cannot rely on a .partial or superficial reading of a government document even in circumstances where reading and understanding the whole document, the materials referenced therein and the applicable regulations might be a somewhat tedious exercise. (Here, as pointed out previously, GAL 14-81 and the rules and regulations referenced therein clearly prohibited payment of interest.)³

This conclusion is not altered by the fact that 41 CFR 1-15.712-1 states that rental of data processing equipment is an allowable cost. "Rent" in its usual meaning is payment for use of property. The "rental" payments in the lease-purchase agreement involved in this case obviously included more than this usual meaning of "rent;" they were also partly payments of interest and principal. In view of the express prohibitions against payments of interest in 41 CFR 1-15.7 and GAL 14-81 the complainant cannot reasonably contend that it could use grant monies for payment of interest by designating as "rental payments" payments which included an interest component.

In Portmann v. United States, 674 F.2d 1155 (7th Cir. 1982), the Seventh Circuit adopted the "substantial injury" test established in TRW Inc. v. Federal Trade Commission, 647 F.2d 942

³ The record does not disclose whether or not the Legislative Audit Bureau had already questioned the 874,508 interest costs for fiscal years 1982 and 1983 at the time DILHR made the 1984 and 1985 interest payments which are involved in this case. The respondent makes no claim that the questioning of the 1982 and 1983 costs had already occurred.

(9th Cir. 1981), in the case of a claimed estoppel against the government. In Portmann the court set forth a quotation from the TRW Inc. decision which stated in part as follows:

First, the party to be estopped must know the facts. Second, this party must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has a right to believe that it is so intended. Third, the party asserting estoppel must have been ignorant of the facts. Finally, the party asserting estoppel must reasonably rely on the other's conduct to his substantial injury. Portmann, 674 F.2d at 1167.

In this case, the record fails to show that the elements of even an ordinary estoppel between private parties are present. This is because the evidence does not show that DILHR suffered a detriment by incurring expenses for interest. Indeed, DILHR states at page 6 of its brief:

From the record in this appeal, there is no basis to doubt that DILHR could have purchased the computer outright had it chosen to use its grant funds in this manner.

Although the record is silent on this point, this argument by DILHR implies that it may have had sufficient grant funds on hand at the time the lease-purchase agreement was entered to have purchased the equipment outright. If this was so, however, it would defeat DILHR's argument that it suffered a detriment by incurring interest costs. For all the record shows, DILHR in exchange for its interest payments enjoyed an extended use of grant funds which it would not have enjoyed if it had used the grant funds for an outright purchase. Thus, DILHR received or may have received the usual type of value which persons receive in exchange for interest payments, namely, use of money over a period of time. In this respect, this case is similar to Onslow County v. U. S. Department of Labor, 774 F.2d 607 (4th Cir. 1985). In that case Onslow County claimed that the Secretary of Labor was estopped from recouping monies erroneously paid by the county to teachers' aides because an official of the Secretary erroneously told the county that the aides were eligible. The court held that the county had failed to show any detriment because it received the services of the aides. Here, for all the record shows, DILHR received the extended use of grant monies in exchange for its interest payments. DILHR also may have received the benefit of employing a lease-purchase transaction as outlined in the portion of GAL 14-81 quoted above. That benefit was a period of operational experience with the equipment before payment of the entire cost of the equipment was required.

In view of the foregoing, it is concluded that no basis has been shown for estopping the Department of Labor from recovering the unallowable interest costs.

DOL Field Memorandum #6-85. DILHR also argues that in the summer and fall of 1985 the Department of Labor itself exhibited some uncertainty as to the allowability of interest costs associated with lease-purchase agreements. See Tab N. It is true that the memoranda at Tab N indicate that there was some uncertainty on that point within the Department of Labor before it was definitely decided that interest on lease-purchase agreements was not an allowable cost. However, DILHR does not contend that it relied on any of these memoranda; thus, this fact does

not help its case. Moreover, as stated earlier, even if such reliance did occur the other necessary elements of an estoppel are absent in this case.

It is concluded, in view of the foregoing, that DILHR owes reimbursement of the costs in question to the Department of Labor.

ORDER

IT IS HEREBY ORDERED that the Grant Officer's final determinations are affirmed. The respondent, Wisconsin Department of Industry, Labor and Human Relations ("DILHR") shall pay the U. S. Department of Labor, from non-federal funds, the sum of \$78,958, representing \$35,798 payable with respect to an Employment Service ("ES") grant and \$43,160 payable with respect to an Unemployment Insurance ("UI") grant. In addition, the U. S. Department of Labor is entitled to retain the \$3,281 heretofore repaid to it by DILHR with respect to a Comprehensive Employment and Training Act ("CETA") grant.

Charles W. Campbell
Administrative Law Judge

NOTICE OF APPEAL RIGHTS:

ES. With respect to the ES funds involved in this case, this decision is the final decision of the Secretary of Labor. 20 CFR §658.710(c).

CETA. With respect to the CETA funds involved in this case, this decision shall constitute final action by the Secretary of Labor unless, within 30 days after receipt of the decision, exceptions have been filed with the Secretary of Labor by a party specifically identifying the procedure, fact, law, or policy to which exception is taken. Thereafter this decision shall become the final decision of the Secretary unless the Secretary, within 20 days of such filing, has notified the parties that the case has been accepted for review. 20 CFR §676.91(f).

UI. With respect to the UI funds involved in this case, any party may, within 20 days after the date of receipt of this decision, file a petition for review of the decision with specific supporting reasons. Such petition shall be submitted in writing to the Secretary of Labor pursuant to Employment and Training Order No. 5-85 (August 16, 1985), 50 Fed. Reg. 40,072 (October 1, 1985), with a copy thereof to the Chief Administrative Law Judge. The petition shall refer to the specific findings of fact, conclusions of law, or order at issue.