



Date Issued: NOVEMBER 17, 1997

Case No. 95-JTP-9

In the Matter of

CENTRAL VALLEY OPPORTUNITY CENTER
Complainant

v.

U. S. DEPARTMENT OF LABOR
Respondent

RECOMMENDED DECISION AND ORDER

This case arises under the Migrant and Seasonal Farmworkers Programs of the Job Training Partnership Act (JTPA), Title IV, Section 402, 29 U.S.C. § 1672, and the applicable regulations at Title 20 of the Code of Federal Regulations. The complainant, a JTPA grantee, is Central Valley Opportunity Center (CVOC), located in Merced, California. Pursuant to 20 C.F.R. § 636.10 (1994), CVOC has appealed the Grant Officer's final determination to disallow and require repayment of allegedly over expended costs of \$33,008 on a JTPA grant for employment and training services for migrant and seasonal farmworkers.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BACKGROUND

On August 11, 1995, the Regional Office of the Department of Labor's Inspector General ("OIG") issued a final audit report, number 09-94-556-03-365-449 1. The report questioned expenditures of \$33,008 on Grant #99-1-2473-56-287-02, in addition to other matters not at issue here. On December 16, 1994, the Grant Officer ("GO") issued an initial determination disallowing the expenditure of \$33,008. (Administrative File ("AF") 20-27). The initial determination notified CVOC that it was being given the opportunity to resolve the matter informally within 30 days of receipt and that a final determination would be issued upon expiration of the 30-day period. (AF 18-19).

CVOC did not respond to the Initial Determination. (AF 5). On February 6, 1995, the GO issued the Final Determination unchanged from the Initial

Determination. CVOC was advised that the Final Determination established a debt owed to the U.S. Department of Labor in the amount of \$33,008. (AF 6-16).

The reason given for the disallowance was as follows:

The auditors found that the Grantee over expended fund 122 by \$33,008 during fiscal year 1991-1992. That fund, they noted, was closed as of June 1992 and the operating deficit carried forward to fund 222, which started on July 1, 1992. The decision was to be cleared by the controller with the U.S. Department of Labor according to a memorandum furnished by the Grantee, but the controller indicated in an interview that she did not contact the Department. The auditors noted that, although funds 122 and 222 involve the same grant, they are for different periods and dollar amounts and that operating losses should not be carried forward to other grant periods unless permitted by the Agency.

OMB Circular A-122, Attachment A, Section (A)(4)(b) states in brief that any cost allocable to a particular award may not be shifted to other Federal awards to overcome funding deficiencies.

41 CFR 29-70.207-2(b), 7/1/84, states in part that recipients shall maintain records which identify adequately the source and application of funds for grant supported activities, and shall ensure that the records systematically assemble information concerning Federal awards, assets, outlays, and income into balance sheet format for internal control purposes.

The Grantee disagreed with the finding, contending that the questioned costs represent expenses associated with participant carry-over under the same grant and grant period although to a different program year.

After further review, the Grant Officer has concluded that the questioned costs are unallowable since grant funds are allocated on a program year basis and cannot be shifted between periods to overcome funding shortages without DOL approval.

Determination: Based on all information furnished and the referenced regulations, costs of \$33,008 are disallowed.

AF 15.

By letter of February 27, 1995, Mr. Ernie Flores, Executive Director of CVOC, appealed and requested a hearing before the Office of Administrative Law Judges pursuant to the regulations at 20 CFR § 636.10. He took the position that the \$33,008 was incurred between two grant years that were covered under one contract, that the costs were necessary for the continuing of one program year to the next program year, i.e. to cover supplies and operating costs related to carryover students, and that the following program year benefited from those expenditures.

The case was assigned to the undersigned for disposition on June 11, 1997. The parties agreed that the case may be decided without a live hearing. The record consists of the administrative file submitted by the GO, and the parties' submissions. CVOC filed an opening brief on September 15, 1997 (hereafter "CVOC Brief") and a reply brief on October 15, 1997. The GO also filed an opening brief on September 15, 1997 (hereafter "GO Brief"), and a reply brief on October 15, 1997. The GO states that the material facts in the case are set out in the Administrative File and are not in dispute. (GO Brief at 2). 'The parties have briefed only the disallowance of costs of \$33,008.

DISCUSSION

In State of Texas Department of Commerce. et al v. U.S. Department of Labor ("Texas"), 94-JTP-20, slip op. at 9-10 (ARB Dec. 11, 1996), the Administrative Review Board discussed the parties' respective burdens of proof in a similar JTPA case challenging a GO's disallowance of costs pursuant to an audit by the OIG. As the Board noted, the burden of parties in JTPA cases has been provided for by regulation. 20 C.F.R. § 636.10(g) provides, in pertinent part:

(g) Burden of production. The Department shall have the burden of production to support the Grant Officer's decision. To this end, the Grant Officer shall prepare and file an administrative file in support of the decision. Thereafter, the party or parties seeking to overturn the Grant Officer's decision shall have the burden of persuasion.

The Board rejected the Administrative Law Judge's summary of the GO's burden to establish, as a prima facie case, "that [the Grantee] violated JTPA regulations based on substantial evidence." Texas, slip op. at 6. The Board held that Section 636.10(g) provides the most rational allocation of burdens that would be consistent with the JTPA statutory scheme. The burden of producing the basis for disallowed costs, i. e. of establishing a prima facie case, falls on the Secretary's designee. The burden of persuasively challenging such disallowances falls on the grant recipient who seeks reversal of the Grant Officer's decision. Texas, slip op. at 10. The GO is not required to rule out the possibility that such costs could be statutorily authorized. Id., slip op. at 6, 8. Rather, the burden falls on the grantee to establish as an affirmative defense that such costs were authorized.

¹ On June 30, 1997, CVOC moved for a stay of the proceedings until the OIG completes another audit of the organization involving the same issue and the same time period. The motion was denied on August 12, 1997. CVOC renewed the motion on September 11, 1997. The renewed motion is denied for the reasons stated in the GO's opposition to the motion, filed on September 15, 1997.

The GO asserts that the costs must be disallowed because the carryover violates OMB Circular A- 122 Attachment A, Section (A) (4) (b), and 41 CFR § 29-70.207-2(b), 7/1/84. (AF 15; GO Brief at 2; CVOC Brief attachment). Pursuant to 20 C.F.R. § 633.303(b), direct and indirect costs in JTPA programs are to be charged in accordance with these authorities. The Grant Officer's sole basis for concluding that the questioned costs are not allowable under these authorities is that "grant funds are allocated on a program year basis and cannot be shifted between periods to overcome funding shortages without DOL approval." (AF 15). It must be noted that, while the auditors stated that operating losses should not be carried forward to other grant periods unless permitted by the Agency, they did not refer to the OMB Circular or any other authority for this proposition. They also recommended only that the questioned costs "could" be disallowed by the granting agency, not that they "should" be disallowed. (Audit report 40, AF 72). The GO made the determination to disallow the costs on the basis of the OMB Circular and 41 CFR 29-70.207-2(b). (AF 20, 26).

The GO has submitted the administrative file, which demonstrates that the grantee carried over 1991 program year costs, which were \$33,008 in excess of its 1991 program year allocated funds, to its 1992 program year allocated funds. The grant was for the two-year period from July 1, 1991 to June 30, 1993. (CVOC Brief, attachment) .² The initial determination to be made is whether this showing is sufficient to meet the GO's burden to produce the basis for the disallowed costs at issue here, i.e. to establish a prima facie case. The GO has not addressed this issue in his brief.

In general, "a party will have satisfied his burden of production if the evidence presented is sufficient to enable a reasonable person to draw from it the inference sought to be established." Texas, n. 14; State of Maine v. U.S. Department of Labor, 669 F. 2d 827, 830 (1st Cir. 1982). The reasonable inference to be established by the GO is that the carryover of costs violates OMB Circular A- 122 Attachment A, Section (A)(4)(b), and 41 CFR § 29-70.207-2(b), 7/1/84.

OMB Circular A- 122, Attachment A, Section (A) (4)) provides as follows:

- a. A cost is allocable to a particular cost objective, such as a grant, project, service, or other activity, in accordance with the relative benefits received. A cost is allocable to a

² I note that the "basic grant agreement" submitted in the administrative file at pp. 92-204 is for another period altogether, from 7/1/93-6/30/94. The file does not disclose whether the agreement was amended in any way.

Government award if it is treated consistently with other costs incurred for the same purpose in like circumstances and if it:

- (1) Is incurred specifically for the award.
- (2) Benefits both the award and other work and can be distributed in reasonable proportion to the benefits received.
- (3) Is necessary to the overall operation of the organization, although a direct relationship to any particular cost objective cannot be shown.

b. Any cost allocable to a particular award or 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 cited portion of 41 CFR § 29-70.207-2(b)(1984) provides as follows:

(b) Records. The recipient shall maintain records which identify adequately the source and application of funds for grant or agreement supported activities. The recipient shall ensure that the records systematically assemble information concerning Federal awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays, and income into balance sheet format for internal control purposes.

There is nothing in the language of the OMB Circular which expressly prohibits shifting costs from one program year to another in the same grant. The OMB Circular prohibits shifts between “awards,” but the GO has offered no reason for finding that a single program year fund allocation within a single multi-year grant is a separate federal “award.” I have found nothing in the file which shows that each program year funding allocation was a separate “award.” Rather, it appears that the “award” in this case is the two-year grant itself.

The two cases cited by the GO in his brief also do not support a prohibition under OMB Circular A- 122 against shifting costs from one program year to a second program year in the same grant to overcome a funding deficiency. In Oro v. Department of Labor, Case No. 86-JTP-6 (Sec’y February 18, 1988), the costs disallowed pursuant to OMB Circular A- 122 Attachment A(4) were for services charged against CETA grants that ran from October 1, 198 1 through June 30, 1985. Those services related, however, to contesting disallowances from prior expired CETA grants, which covered the period January 1, 1977 through June 30, 1979. Here, in contrast, the costs concerned the JTPA grant that ran from July 1, 199 1 to June 30, 1993, and were charged against that grant during the covered period; the costs charged were not from a prior expired grant. Milwaukee County, Wisconsin v. Donovan, 771 F.2d 983 (7th Cir. 1985), cert. denied, 476 U.S. 1140 (1986), did not

involve OMB Circular A- 122 Attachment A(4). That case held that, under a Federal Management Circular with similar language, costs could not be retroactively shifted from one CETA grant title to another. A grant title is not the same as a program year, however, and there is no issue in this case that CVOC has attempted to shift its costs from one JTPA title to another.

Finally, the language of 41 CFR § 29-70.207-2(b) cited by the GO at AF 1.5 deals with maintenance of records. It says nothing about shifting of costs.

Although the GO need not support the disallowance of costs by substantial evidence to establish a prima facie case, to be “in support of the decision” as 20 C.F.R. § 636.10(g) requires, I find that the file should contain, at a minimum, a reasoned explanation of why the cited portions of the OMB Circular and the regulations referenced here support the disallowance of the cost. It would be arbitrary and unfair to the grantee to allow the GO to meet its burden of production by simply referring, as it does here, to general principles set forth in regulations or OMB circulars without specifying a specific causal link between the disallowance and the authorities cited where, as here, a causal link is not immediately apparent from a reading of the authorities cited. Neither the grantee nor the Administrative Law Judge should have to guess why the authorities cited by the GO require disallowance of costs.

In sum, the facts produced by the GO do not support an inference that OMB Circular 122 and 41 CFR § 29-70.207-2(b) have been violated. Accordingly, I find that the GO has failed to meet its burden to produce the basis for the disallowed costs of \$33,008 and the disallowance must be reversed.

RECOMMENDED ORDER

The Grant Officer’s disallowance of \$33,008 in costs is hereby REVERSED.



EDITH BARNETT

Administrative Law judge

EB: bdw
Washington, D.C.

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, D.C. 20210. See 61 Fed. Reg. 19978 and 19982 (1996).

SERVICE SHEET

Case Name: Central Valley Opportunity Center

Case No.: 95-JTP-9

Title of Document: Recommended Decision And Order

A copy of the above document was deposited in the U.S. mail on the date issued addressed to each of the following persons:



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