UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: February 16, 2011

CBCA 2024-ISDA

LAC COURTE OREILLES BAND
OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN /
LAC COURTE OREILLES OJIBWE SCHOOL BOARD,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Joseph H. Webster and Lisa F. Ryan of Hobbs, Straus, Dean & Walker, LLP, Washington, DC, counsel for Appellant.

Alice Peterson, Office of the Field Solicitor, Department of the Interior, Fort Snelling, MN, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **VERGILIO**.

DANIELS, Board Judge.

The Department of the Interior claims that it is entitled to recover from the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin and the Lac Courte Oreilles Ojibwe School Board grant funds which the Department's Secretary provided for use in fiscal year 2006, but which were used to cover deficits that had occurred in prior years. On the parties' cross-motions for summary relief, we hold that the Department's action was permissible and that the funds must be repaid.

Uncontested Facts

The Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin (the Tribe) is a federally recognized Indian tribe with headquarters on its reservation in Hayward, Wisconsin. Appellant's Statement of Uncontested Facts (ASUF) ¶ 1. Since 1976, the Tribe, under the auspices of the Lac Courte Oreilles Ojibwe School Board, has operated a kindergarten through twelfth grade educational program (the School) on the reservation in Hayward. ASUF ¶ 2. This School is funded by a grant awarded by the Secretary of the Interior through the Bureau of Indian Education (BIE) under the authority of the Tribally Controlled Schools Act (TCSA), 25 U.S.C. §§ 2501-2511 (2006). ASUF ¶ 3; Respondent's Statement of Uncontested Facts (RSUF) ¶ 1. The Department of the Interior, through its Assistant Secretary for Indian Affairs and the BIE, is responsible for overseeing the operation of the schools. ASUF ¶ 6.

The TCSA requires each grantee to provide an annual financial audit conducted pursuant to the Single Audit Act of 1984, 31 U.S.C. §§ 7501-7507. 25 U.S.C. § 2505(b)(1)(B). The School's fiscal year (FY) 2006 audit report was submitted on March 4, 2009. ASUF ¶¶ 9, 10.

On March 3, 2010, BIE, through Education Line Officer Everett Bad Wound, issued a "Findings and Determination" on the School's FY 2006 audit report. ASUF ¶ 11. In this document, Mr. Bad Wound found that the School inappropriately had applied $344,183 in FY 2006 Indian School Equalization Program (ISEP) funding to reduce the school's operating deficit.[1] He also found that the School had reprogrammed $315,938 in FY 2006 administrative grant funds received from BIA to reduce the operating deficit.[2] Mr. Bad Wound concluded that these amounts, totaling $660,121, were disallowed costs and had to be refunded to the Government.[3] ASUF ¶¶ 13-15. The Tribe appealed the BIE determination to this Board on May 27, 2010. ASUF ¶ 21; RSUF ¶ 4.

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[1] ISEP funding is "direct funding of Bureau [of Indian Affairs (BIA)]-operated and tribally operated day schools, boarding schools, and dormitories." 25 CFR 39.1 (2010).

[2] The scope of administrative costs which may be paid with these funds is defined in 25 U.S.C. § 2008(a)(1).

[3] A "disallowed cost" is "a questioned cost identified by the auditor that the awarding official determines should not have been charged to the Federal financial assistance program." 5 Indian Affairs Manual (IAM) 2.6.B (2005).

Previously, on June 23, 2006, the Tribe had submitted an audit report regarding its fiscal year 2004. Respondent's Statement of Genuine Issues (RSGI), Exhibit A. This was the Tribe's first single audit report "prepared in accordance with new accounting standards which significantly changed the reporting for . . . tribal grant schools." RSUF ¶ 6. The report revealed that the School had engaged in a pattern of deficit spending in both its General and Special Revenue Funds dating as far back as its fiscal year 1997. ASUF ¶ 24. According to the report, as of June 30, 2004, $2,017,636 of "Special Revenue Funds – Federal Grant Advances" were being used to support the deficit. ASUF ¶ 26.

The Tribe states, "[t]he over-expenditures which created the deficit at issue in this appeal were all for 'education related activities.'" Appellant's Memorandum of Law in Support of Motion for Summary Relief at 14. "[A]ll grant funding received under [the FY 2006 grant] was in fact used to defray the expenses associated with the operation of the School whether the expenses were incurred in FY06, or earlier." *Id.* at 17-18. The Department of the Interior believes that "it is more likely that the TCSA grant funds were not so used," but accepts the Tribe's allegations as true for the purpose of the motions for summary relief. Respondent's Memorandum of Law in Support of Its Motion for Summary Relief and in Opposition to Appellant's Motion for Summary Relief at 4 n.1, 9 n.5.

In the audit report for FY 2004, the Tribe's auditor wrote, "Grant funds are required to be expended only for activities authorized by grant agreements. Using one grant's funds to finance another grant, or to finance general fund spending, is a violation of the grant agreement." RSGI, Exhibit A at 52. The Tribe agreed with this statement. RSUF ¶ 11. In response to that audit report, the BIE's Mr. Bad Wound on December 21, 2006, issued a "Findings and Determination" in which he sustained "questioned costs" in the amount specified by the auditor as "Special Revenue Funds – Federal Grant Advances." ASUF ¶ 28.

The audit report for the Tribe's next fiscal year, 2005, stated that progress had been made in FY 2005 in stopping deficit spending, and that the overall deficit had been lowered by $800,000. ASUF ¶ 36; Appellant's Statement of Genuine Issues (ASGI) ¶ 15. In a corrective action plan dated March 30, 2007, the Tribe said that "solutions to resolve the deficits are being addressed . . . to provide funding relief through tribal support dollars and the reprogramming of BIA Administrative Grant dollars." Appeal File, Exhibit 10 at 402.

On May 13, 2008, the BIE Education Line Officer at the time, Lynn Lafferty, determined that the Tribe owed the agency $1,824,000 and asked the Department's National Business Center to issue a bill for collection of that amount. ASUF ¶¶ 38-39. The Tribe challenged the Department's attempt to collect this money by filing a complaint on November 13, 2008, in the United States District Court for the Western District of Wisconsin. ASUF ¶ 41. The Tribe's main claim was that BIE had failed to comply with the

requirements of section 106(f) of the Indian Self Determination and Education Assistance Act, 25 U.S.C. § 450j-1(f) (made applicable to TCSA grants by 25 U.S.C. § 2507(a)(8)), which requires that any finding of disallowance of costs in an audit be issued within 365 days of the date an audit report was received by the Secretary of the Interior. ASUF ¶ 42. BIE ultimately conceded that its collection action was initiated too late. The bill for collection was withdrawn, and the Tribe's suit was dismissed on September 21, 2009. ASUF ¶ 43.

While the Tribe's suit was pending, on March 4, 2009, the Tribe submitted its FY 2006 audit report to BIE. ASUF ¶ 44. This report stated that the Tribe's overall deficit, "largely due to tribal support dollars as well as the reprogramming of B.I.A. Administrative grant dollars," had been lowered from $3.1 million to $1.8 million. ASUF ¶ 45. The report stated additionally that $660,121 in surplus BIE grant funds had been applied to deficit reduction during FY 2006. ASUF ¶ 46. The parties agree that the Tribe used FY 2006 TCSA grant funds during FY 2006 to reduce past years' deficits. RSUF ¶ 5; ASGI ¶ 5.

As recited above, on March 3, 2010, BIE's Mr. Bad Wound issued a "Findings and Determination" letter stating that the use of $660,121 in federal grant money had been disallowed. On March 15, 2010, the National Business Center issued a bill for collection of that amount. Appeal File, Exhibit 20. Through this appeal, the Tribe challenges that action.

Discussion

Each party has asked the Board to resolve these appeals by granting its own motion for summary relief and denying the opposing party's motion. Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The sole issue presented here is a question of law, so considering the issue on cross-motions for summary relief is appropriate. *Olympus Corp. v. United States*, 98 F.3d 1314, 1316 (Fed. Cir. 1996).

The TCSA was enacted with the twin goals of "provid[ing] the resources, processes, and structure" that will "enable Indian tribes to obtain the quantity and quality of educational services and opportunities that will permit Indian children . . . to compete and excel" and "assur[ing] maximum Indian participation in the direction of educational services so as to render the persons administering such services and the services themselves more responsive to the needs and desires of Indian communities." 25 U.S.C. § 2501(a), (c). Under this law, the Secretary of the Interior provides grants to Indian tribes and tribal organizations for the operation of schools, including tribally controlled schools. *Id.* § 2502(a).

The Secretary has provided such grants to the Tribe, for operation of the School, for several years. An independent auditor's reports for the Tribe's fiscal years 2004, 2005, and 2006 all revealed that the Tribe in prior years had run up a deficit of more than two million dollars. In FY 2006, the Tribe used $660,121 in TCSA grant money -- $344,183 for ISEP funding and $315,938 in administrative grant funds -- to reduce the School's deficit. All of this money was spent, the parties agree for the purpose of resolving the cross-motions, for education-related activities. After reviewing the FY 2006 audit report, an education line officer found that spending the money to cover past years' deficits was improper and that the Tribe must refund the amount to the Government.

The Tribe believes that it had the discretion to spend the money as it did, since it used those funds for the purpose for which they were intended. The Supreme Court has explained that a canon of construction is that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). The TCSA does not constrain a school's use of grant funds with respect to time, the Tribe maintains. In particular, the argument continues, administrative cost grant funds "shall remain available to the . . . school without fiscal year limitation," 25 U.S.C. § 2008(f), so using FY 2006 administrative funds to cover past years' administrative costs is permissible. Further, according to the Tribe, because it informed BIE, as early as April 2007, that it intended to use TCSA grants to pay down the accumulated deficit, and the agency did not timely raise any objection to this plan, equitable estoppel should lie against the Government. Finally, the Tribe maintains that because the money at issue here is all funding that BIE did not try to collect after reviewing the FY 2004 audit and did not timely try to collect after reviewing the FY 2005 audit, the agency's right to recovery of the money is barred.

The Department of the Interior contends to the contrary that TCSA grant funds provided for a specific year may only be used to cover costs incurred for that year. The Department reads 25 U.S.C. § 2008(f) as allowing administrative cost grant funds to be used in future years, as well -- but not to pay down deficits from prior years. The Department sees the concept of equitable estoppel as inapposite to the matter at issue here; BIE could not have known that FY 2006 grant moneys were spent impermissibly, the Department says, until it received the Tribe's FY 2006 audit report.

As the Tribe points out, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances." *Rubin v. United States*, 449 U.S. 424, 430 (1981); *see also United States v. Missouri Pacific Railroad Co.*, 278 U.S. 269, 277 (1929) ("It is elementary that, where no ambiguity exists, there is no room for construction."). The TCSA clearly limits the time when grant funds may be used. It does this in multiple places: 25 U.S.C. § 2502(b)(1) provides that only "one [TCSA] grant may

be provided . . . with respect to any Indian tribe or tribal organization *for any fiscal year*." Section 2503(a) speaks of a grant provided "*for any fiscal year*" and "funds that are allocated . . . *for such fiscal year*." Under section 2506(a)(1), payments shall consist of amounts "to which [a] grantee is entitled *for the academic year*." In each of these provisions, as we have emphasized by italicizing the relevant language, each TCSA grant is *for* a particular fiscal or academic year. This means that the funds provided through that grant are available only to cover obligations which are incurred within a particular year. 31 U.S.C. § 1502(a); I General Accounting Office, *Principles of Federal Appropriations Law* (3d ed. 2004) (GAO Redbook) 5-3 to -6 , 5-12 to -13, 5-48; *see also Chairman, Committee on Appropriations*, 55 Comp. Gen. 768 (1976) (appropriations for current fiscal year may not be used for payment of unliquidated obligations incurred in prior years, without express statutory authorization). Funds provided through the grant for the Tribe's FY 2006 were available only to cover obligations which were incurred during that year. Though the Department provided funds to the Tribe for similar purposes through grants in previous years, those – contrary to the Tribe's argument – were separate grants. The FY 2006 grant funds could not be used to pay for obligations incurred in those years. In determining that the Tribe's spending of these funds in this way was unallowable and issuing a bill of collection, BIE and National Business Center officials acted consistent with the Department's Indian Affairs Manual requirements. *See* 5 IAM 2.7.C(7), 2.7.D, 2.16.

The Tribe contrives an ambiguity in the statute by pointing out that sections 2502(a)(3)(A) and 2507(a)(10) of title 25 (the latter incorporating section 450j-1(k)) give a school board of a tribally controlled school considerable discretion in spending TCSA grant funds. While these provisions do indeed allow discretion, they must be read together with the provisions cited in the previous paragraph: that discretion must be exercised within the time limits specified for each particular grant. *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (words of a statute must be read with a view to their place in the overall statutory scheme, fitting all parts into a harmonious whole whenever possible). Without an ambiguity in the statute, there is no cause for employing the canon of construction that ambiguous provisions are to be interpreted for the benefit of the Indians. *See Rice v. Rehner*, 463 U.S. 713, 733 (1983) (quoting *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975)) ("[a] canon of construction is not a license to disregard clear expressions of . . . congressional intent").

While this analysis applies with full force to the ISEP funds, it must be modified slightly with regard to administrative cost funds, for those moneys "shall remain available to the contract or grant school without fiscal year limitation." *See* 25 U.S.C. § 2008(f). Clearly, this statute permits the Tribe to spend the administrative funds in fiscal years other than the years for which each grant is made. Those years are not, however, as the Tribe maintains, all fiscal years. Unless an appropriations act clearly indicates that an

appropriation may be used to pay past obligations, a grant recipient may not use funds appropriated for use in a particular fiscal year to pay expenses or reduce deficits incurred in an earlier year. *Honorable Daniel K. Inouye*, B-133001 (Mar. 9, 1979); *Secretary of the Navy*, A-76081 (June 3, 1936). No such language appears in the two appropriations acts which fund TCSA grants covering the Tribe's FY 2006. *See* Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-54, 119 Stat. 499, 513-14 (2005); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3055-56 (2004). Indeed, under 25 U.S.C. § 2504(e), with one exception not relevant here, "a [TCSA] grant . . . shall become effective beginning the academic year succeeding the fiscal year in which the application for the grant . . . is made, or at an earlier date determined by the Secretary." If a grant does not become effective until a particular year, it may not be used to cover expenses incurred in prior years, when, per the statute, the grant was not effective. We therefore conclude, consistent with courts which have interpreted statutes which similarly say that funds "shall remain available without fiscal year limitation," that this language unambiguously makes funds available for future fiscal years, not past ones. *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075, 1090 & n.15 (Fed. Cir. 2003) (noting that because the language is not ambiguous, the Indian canon of statutory construction does not come into play), *aff'd sub nom. Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005); *American Management Systems, Inc. v. United States*, 53 Fed. Cl. 525, 527 n.1 (2002).

We hold not only that the Department's claim for repayment of the money in question is valid, but also that the Tribe's defenses to the claim are unavailing. The first of these defenses is equitable estoppel.

> Equitable estoppel requires: (1) misleading conduct, which may include not only statements and actions but silence and inaction, leading another to reasonably infer that rights will not be asserted against it; (2) reliance upon this conduct; and (3) due to this reliance, material prejudice if the delayed assertion of such rights is permitted.

Mabus v. General Dynamics C4 Systems, Inc., Nos. 2009-1550, et al., slip op. at 6 (Fed. Cir. Feb. 4, 2011). "From [its] earliest cases, [the Supreme Court has] recognized that equitable estoppel will not lie against the Government as it lies against private litigants." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 419 (1990). A private party bears a heavy burden when asserting this doctrine against the Government because "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 (1984).

We find that none of the elements required for equitable estoppel is present here. In response to the FY 2004 audit, BIE told the Tribe that it questioned the use of current year grant funds to pay down a deficit incurred in prior years. In response to the FY 2005 audit, BIE attempted to collect funds which were being used in that way (but was unable to do so because it was tardy in finding a disallowance of costs). Any inference that these actions demonstrated that the Government would not assert its rights to collect such funds was unreasonable to say the least, and perhaps even fanciful. Reliance upon such an inference would not have been rational.

The Tribe's other defense, that the Department is barred from collecting the FY 2006 grant funds which were improperly spent because BIE did not try to collect them after reviewing the FY 2004 audit and did not timely try to collect them after reviewing the FY 2005 audit, is also flawed. As BIE points out, the money the Tribe misspent in its FY 2006 was not available to it in prior years, so any prior attempts (or non-attempts) to seek repayment do not apply to these funds. The provision of 25 U.S.C. § 450j-1(f) which requires that any finding of disallowance of costs identified in an audit be issued within 365 days of the date an audit report was received by the Secretary of the Interior clearly prevents BIE from now attempting to collect questioned costs identified in the FY 2004 audit, as it prevented collection of costs identified in the FY 2005 audit. But the costs which the agency identified as disallowed based on the FY 2006 audit may be collected, since the finding of disallowance was made within the time limit applicable to the audit report for that year.

It may be true, as the Tribe alleges, that using current year TCSA grant funds to repay debts incurred in prior years is a prudent way to retire those debts. Prudent or not, however, it is not legally permissible.

Decision

The Tribe's motion for summary relief is denied. The Department of the Interior's cross-motion for summary relief is granted. The appeal is **DENIED**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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JOSEPH A. VERGILIO
Board Judge