



Issue Date: 28 June 2005

In the Matter of:

COMMONWEALTH OF PUERTO RICO,
DEPARTMENT OF LABOR AND HUMAN
RESOURCES,
Complainant,

Case No.: 2004-JTP-1

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent.

**ORDER DENYING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION
AND GRANTING COMPLAINANT'S CROSS-MOTION FOR SUMMARY DECISION**

Respondent, United States Department of Labor, moves for partial summary judgment on the issue of repayment of interest earned from July 1, 1986 to June 30, 1993 on federal funds granted to the Commonwealth of Puerto Rico, Department of Labor and Human Resources.¹ Respondent contends that the Commonwealth must repay the interest earned because it does not fall within the exception embodied in the Intergovernmental Cooperation Act of 1968 (ICA), Pub. L. No. 90-577, 82 Stat. 1270, 1273 (1968) because of the length of time the federal grant funds remained in Puerto Rico account 256. Complainant, Commonwealth of Puerto Rico, Department of Labor and Human Resources, filed a cross-motion for summary judgment on the issue of repayment of the interest, claiming the ICA specifically excused Complainant from accounting for the interest earned.²

The United States Department of Labor Office of the Inspector General conducted an audit of Complainant's administration of the Employment and Training Administration's Job Training Partnership Act, Unemployment Insurance, and Employment Services programs for the period of July 1, 1993 to September 30, 1997. The audit called into question interest applicable to federal funds during the period July 1, 1986 through June 30, 1998. *AR at 39.*³ The Employment and Training Administration issued its Final Determination on March 31, 2004, concluding that \$4,108,973 in interest on federal grant funds is subject to collection by

¹ Respondent's motion was filed on October 22, 2004. Respondent filed a reply to Complainant's cross-motion on January 14, 2005.

² Complainant's cross-motion and response to Respondent's motion was filed on December 17, 2004.

³ AR refers to the Administrative Record.

Respondent. It is unclear from the record how much of this \$4,108,973 is interest earned from July 1, 1986 to June 30, 1993.⁴ The interest at issue was accrued before June 30, 1993, the effective date of the Cash Management Act of 1990 (CMA), Pub. L. No. 101-453, 104 Stat. 1058 (1990), which amended section 203 of the ICA to require States to pay interest earned on funds to the Federal Government.

Before Section 203 was enacted in 1968, it had long been established in decisions of the Comptroller General that interest earned by a grantee on funds advanced by the United States belonged to the United States rather than the grantee and had to be refunded unless special authorization was provided. *See e.g.*, 42 Comp.Gen. 1289 (1962); 1 Comp. Gen. 652 (1922); *see also* 64 Comp. Gen. 96 (1984); 59 Comp. Gen. 218 (1980). By 1968, however, an “extraordinary expansion in the dollar amounts and number of grants-in-aid” had produced “serious management difficulties.” H.R.Rep. No. 1845, 90th Cong., 2d Sess. 9 (1968), reprinted in 1968 U.S.C.C.A.N. 4220, 4229 (quoting Advisory Commission). Section 203 was enacted in 1968 to correct some of the management problems and to reduce the administrative burden on the States.⁵ One such burden lifted was the need to account for interest earned on federal funds. Section 203(a) exempted the States from accounting for interest earned from grant-in-aid funds, pending their disbursement for program purposes. Section 203(a) provided during the period at issue here, 1986 – 1993, that:

Heads of Federal departments and agencies responsible for administering grant-in-aid programs shall schedule the transfer of grant-in-aid funds consistent with program purposes and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement thereof by a State, whether such disbursement occurs prior to or subsequent to such transfer of funds. *States shall not be held accountable for interest earned on grant-in-aid funds, pending their disbursement for program purposes.*

Intergovernmental Cooperation Act of 1968, Pub. L. No. 90-577, 82 Stat. 1270, 1273 (1968) (italics added).

The plain language of the ICA, as it was in effect during the period in question, supports Complainant’s argument that Congress intended to limit the amount of interest States earned on federal grant-in-aid funds by placing the onus on the federal agencies to schedule the transfer of such funds to the States to minimize the possibility of the States earning interest on those funds. States were not required to account for any interest earned on the funds while they were pending disbursement for program purposes. No time limit was placed on how long funds could be “pending disbursement for program purposes.”

Respondent’s argument rests upon the holding of *Commonwealth of Pennsylvania v. Dep’t of Health and Human Services*, 996 F.2d 1505 (3rd Cir. 1993). In *Pennsylvania*, the Court

⁴ \$9,534,864 of interest was initially subject to collection, but the Final Determination found only \$4,108,973 of the original total disallowed. *AR at 17-19.*

⁵ *Commonwealth of Pennsylvania v. Dep’t of Health and Human Services*, 996 F.2d 1505 at 1510 (3rd Cir. 1993).

examined “interest earned on federal grant funds that were placed in self-insurance accounts used to pay workers’ compensation and health benefit claims by state employees who administer federally funded programs.” *Id.* The Court examined the legislative history of the ICA and determined that the phrase “pending disbursement for program purposes” of section 203 of the ICA was “intended to refer to the period during which a state temporarily holds federal grant-in-aid money that is destined for prompt transfer to the ultimate recipients of program benefits. The phrase was clearly not intended to refer to the long-term holding of federal funds in reserve accounts.” *Id.* at 1511. The Court’s decision was driven by Congressional intent to ““save the Federal Government considerable amounts of interest costs’ (114 Cong. Rec. 26,986), not to give the states a huge interest windfall.” *Pennsylvania*, 996 F.2d at 1511. While the *Pennsylvania* decision is considered as “persuasive authority”, it is not controlling as the present case is not within the jurisdiction of the Third Circuit Court of Appeals.

The majority’s holding in *Pennsylvania* is inconsistent with the plain language of Section 203. In his dissent, Judge Becker argued that the majority’s holding “supplant[ed] the terms of § 203(a) in its entirety, including language that is clear and unambiguous.” *Pennsylvania*, 996 F.2d at 1514. Judge Becker acknowledged that Congress intended the ICA to improve the administration of grant-in-aid programs, but did so with the “apparent assumption that there would be a minimal period between federal and state disbursal” that would save the Federal Government considerable amounts of interest costs. *Pennsylvania*, 996 F.2d at 1515. If the federal agency fulfilled its responsibility of minimizing the period between federal and state disbursal, no interest or very minimal amounts of interest would be accrued. Judge Becker explained:

Indeed, it seems clear to me that despite this assumption, the drafters of § 203(a) were willing to place the burden of minimizing the pre-disbursal time period on the relevant federal agency, not on the states. Congress, in enacting § 203(a), changed the pre-existing rule that state-grantees were accountable for interest on federal funds. *See* 42 Comp.Gen. 289 (1962). The drafters of § 203(a) could have either retained the pre-existing rule or at least retained it in those situations in which states would receive federal funds for a considerable time before their disbursement. However, Congress chose not to do so.

Id. Thus, the legislative history demonstrates that Congress only assumed that the period of time funds would be pending disbursement for program purposes would be brief. Congress did not enact its assumption into law.

The majority holding in *Pennsylvania* did not address two Comptroller General decisions confirming that § 203(a) does not require States to pay accrued interest in situations as present here.

In 1980 the Comptroller General issued an opinion addressing the application of Section 203 to concerns that States were earning significant sums of interest on grant monies. 1980 WL 16395 (B-198,255). The Comptroller General explicitly held that agencies could not recover interest from States that accrued over an extensive period. The opinion stated:

Question 2: Can Federal agencies draw a distinction between earning interest on Federal funds in excess of immediate needs and earning interest on funds not in excess and, hence, require States to return interest income earned on funds in excess of three days' supply?

Answer: Section 203, by its terms, *absolutely* relieves the States of the legal obligation to account for interest earned on grant-in-aid funds pending their disbursement. Therefore, Federal agencies cannot require States to return interest income earned on grant-in-aid funds in excess of immediate needs (whether those needs are for three days' supply of funds, or more or less than that). This is true even though it can result in a 'bonanza' for the States.

...

The best way to avoid State interest earning on grant-in-aid funds in excess of immediate needs is to control the flow of funds through proper agency scheduling and monitoring techniques so as to limit advances to the minimum amounts needed by the State. Where, however, this approach fails and the State nevertheless earns interest on grant-in-aid funds which are in excess of immediate needs, under the law as presently written, the State is entitled to keep the interest earned.

1980 WL 16395 (B-198, 255) at *6.

The 1980 opinion also specifically recommended that Congress amend the ICA if States were earning large amounts of interest on grant funds. Id. at *4-6. The decision stated:

Question 1: Is there a reasonable basis to recommend that Congress amend the Act to require States to return interest income if it can be shown that States would not be burdened in accounting for the interest and are earning significant sums of interest on Federal funds?

Answer: Congress apparently did not contemplate or intend that significant amounts of interest would be earned by States on advances of grant-in-aid funds. Because this nevertheless appears to be occurring, we believe that there may be sufficient basis for recommending that Congress consider amending the Act to require interest accountability on the part of the States, under the described circumstances.

Id. at *4.

The Comptroller General concluded:

If however, ...even the best agency scheduling and monitoring procedures, including the termination of the advance financing technique where appropriate, still permit States to earn significant amounts of interest on grant-in-aid advances,

then we believe that there would be a reasonable basis for recommending that the act be amended to require return of interest income by the States.

Id.

In 1981, the Comptroller General issued another decision regarding Section 203 that confirmed States do not need to account for any interest income earned while the funds are pending disbursement. 1981 WL 24415 (B-196,794). The Comptroller General responded to a request by the OMB to reconsider 1973 and 1980 opinions that permitted subgrantees to “keep interest earned” on Federal monies distributed by the States. Id. at *1. In affirming the previous decisions, the Comptroller General observed:

[T]here is some evidence that the amounts now being earned on advances to the States are substantial. We have not yet recommended a change to Sec. 203. Whether we will recommend a legislative change will depend upon the outcome of audit work now in progress.

Id.

The Department of Labor rests its argument principally on the modifier language in § 203(a), “pending [the grant funds] disbursement for program purposes.” It argues that the language would be entirely superfluous if § 203(a) is interpreted to permit a State to keep all interest earned on grant money drawn from the federal government for an unlimited time.⁶ However, the better interpretation of the modifier is that offered by the Complainant: the interest is to remain with the State so long as the grant monies are spent for program purposes. Complainant references a Comptroller General opinion which addressed two scenarios where States must return interest on grant funds that would not be spent on federal programs. The opinion considered whether States must return interest earned on Federal monies that would not be spent because (1) the program was completed or (2) the interest had accrued on disallowed cost funds. 1980 WL 16395 at *7. The Comptroller General held that these monies were not “pending disbursement” because they would never be spent for program purposes and therefore did not fall under Section 203’s exemption. Id. at *8-9. The phrase “pending disbursement” is not superfluous because it serves to exclude instances in which States might earn significant amounts of interest on agency grant funds that will never be spent on Federal programs.

Congress placed the onus of minimizing the pre-disbursal time period on the federal agencies and not on the States. Individual agencies promulgated regulations to address this burden. Treasury Department regulations and the Department of Labor’s regulations implementing the Job Training Partnership Act did not permit the Federal Government to recover any interest earned on the federal grant funds pending disbursement. In 1969, the Treasury Department found “it necessary to revise its regulations at 31 CFR Part 205 which govern withdrawal of cash from the Treasury for advances under Federal grant and other programs to . . . implement the provisions of section 203 of the Intergovernmental Cooperation Act of 1968.” 34 Fed. Reg. 6521 (April 16, 1969). The regulations and future amendments to these regulations never mentioned recovering accrued interest as a remedy. Instead a letter-of-

⁶ P. 7 of Respondent’s brief on Motion for Partial Summary Judgment.

credit system was implemented. Remedies for violating the requirements that grant advances be limited to the minimum amount needed and timed to occur with the actual cash needs of the State were limited to revoking a State's letter-of-credit, termination of advancement of funds, and subsequent reimbursement of funds. 42 Fed. Reg. 62,928 (December 14, 1977). The Department of Labor regulations echo the language of the ICA:

Interest earned on advances of Federal funds (pending their disbursement for activities under the grant or agreement) is not program income. The recipient shall account for interest earned on advances in the following manner:

- (a) States or instrumentalities of a State. In accordance with section 203 of the Intergovernmental Cooperation Act of 1968 (42 U.S.C. 4201 *et seq.*), a recipient which is a State or instrumentality of a State is not accountable to the DOL Agency for such interest. In addition, local governments receiving Federal grant fund under subgrants or subagreements from States may retain interest earned on such Federal funds.

44 Fed. Reg. 141 (July 20, 1979). Thus, the Department of Labor regulations support Complainant's argument that the plain language of section 203 of the ICA does not require Complainant to pay to Respondent any interest Complainant earned on the Federal grant money in question prior to June 30, 1993.

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40(d), which provides: "The administrative law judge may enter summary decision for either party if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d). This section is derived from Fed. R. Civ. P. 56.

In the present case, the Department of Labor does not argue that the interest in question was not earned while the funds were pending disbursement for program purposes. The Department of Labor argues that a limit exists on the length of time funds can be pending disbursement for program purposes. No such time limit exists. Congress enacted the ICA with the assumption that the federal agencies would time the federal disbursements to the States so that the funds would be pending disbursement for program purposes for only a brief period of time. In the instant case, Congress's assumption has proven erroneous. The law does not permit the Department of Labor to recover the interest earned.

Therefore, IT IS HEREBY ORDERED that

1. Respondent's Motion for Partial Summary Decision is DENIED; and
2. Complainant's Cross-Motion for Summary Decision is GRANTED.

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Thomas M. Burke
Associate Chief Administrative Law Judge

