

Date: APRIL 30, 1996

CASE NO.: 94-JTP-20

In the Matter of

STATE OF TEXAS
DEPARTMENT OF COMMERCE

Complainant,

and

MIDDLE RIO GRANDE
DEVELOPMENT COUNCIL

Intervenor and
Party in Interest,

versus

UNITED STATES
DEPARTMENT OF LABOR

Respondent.

APPEARANCES:

MARGO KAISER, ESQ.
For the Complainant

C. MARK JODON, ESQ.
JEFFREY C. LONDA, ESQ.
For the Intervenor and
Party in Interest

ANNALIESE IMPINK, ESQ.
ED DONAHUE, ESQ.
For the Respondent

RECOMMENDED DECISION AND ORDER

This case arises under the Job Training Partnership Act ("JTPA or the Act"), 29 U.S.C. § 1501 et seq., and its implementing

regulations at 20 C.F.R. Part 629.¹ The purpose of the JTPA is to establish programs to prepare youth and unskilled adults for entry into the labor force and to afford job training to those economically disadvantaged individuals and others facing serious barriers to employment. 29 U.S.C. § 1501 (1982).

Pursuant to 29 U.S.C. § 1511(a)(1) (1982), the Governor of Texas, through his designated agent, the Texas Department of Commerce ("TDOC"), was required to allocate its JTPA funding from the United States Department of Labor ("USDOL") among its service delivery areas ("SDA"). According to the allocation plan set forth in 29 U.S.C. § 1511(4)(a) (1982), TDOC allocated the appropriate share of Title II JTPA funding to the Middle Rio Grande Development Council ("MRGDC").

The United States Department of Labor, Office of the Regional Inspector General for Audit ("OIG"), performed an audit of MRGDC's compliance with the Federal and State JTPA requirements. The OIG issued an audit report containing its findings March 23, 1993 wherein the audit report questioned \$885,525 in the JTPA expenditures.² (GX 1 at 151-177). The OIG forwarded the audit report to the Employment and Training Administration ("ETA") for resolution. On March 31, 1993, the Grant Officer also forwarded the audit report to TDOC with instructions to resolve the findings with MRGDC and submit its audit resolution report to ETA. (GX 1 at 147-148).

On September 30, 1993, TDOC submitted its audit resolution report and supporting documentation. (GX 1 at 42-146). The Grant Officer did not agree with TDOC's resolution of the findings; therefore, he issued an Initial Determination on December 15, 1993 proposing to disallow \$885,525 of MRGDC's JTPA expenditures. (GX 1 at 31-39). The Grant Officer offered TDOC the opportunity to engage in informal resolution. During the informal resolution period, TDOC met with Regional Office staff and provided additional documentation in support of its position. The Grant Officer

¹ The program years at issue in this proceeding are 1989 and 1991; therefore, the 1982 version of JTPA applies as well as the amendments in 1988 and 1990 to the Act. 29 U.S.C. §1501 et seq. (1982 & Supp. 1988, 1990). Further, the substantive regulations in effect for these years are located at 20 C.F.R. Part 629 (1989-1991). Procedural issues dealing with the audit resolution process or appeal rights are found at 20 C.F.R. 627 (1993) and 29 C.F.R. Part 18 (1995).

² The following abbreviations will be used in citations to the record: CX - Complainant's Exhibit, IX - Intervenor's Exhibits, GX - Government/Respondent's Exhibit, and TR - Transcript of the Proceedings.

reviewed the information and issued his Final Determination on March 14, 1994 which allowed \$63,268 and disallowed \$822,257 in expenditures which is subject to federal debt collection. (GX 1 at 17-26).

The TDOC appealed the Grant Officer's Final Determination to the Office of Administrative Law Judges ("Court" or "Judge") on April 12, 1994 which was docketed as 94-JTP-20. (GX 1 at 1-3). Thereafter, on April 21, 1994, MRGDC requested that it be permitted to intervene in the proceeding, and that request was docketed as 94-JTP-21. (GX 1 at 7-9). The Court granted MRGDC's request to intervene, and the cases were consolidated as 94-JTP-20.

The Grant Officer and MRGDC filed cross motions for summary decision, and the Grant Officer filed a Motion for Protective Order due to an October 11, 1995 discovery request by MRGDC. After reviewing the briefs and evidence, the Court granted the Grant Officer's Motion for Partial Summary Decision and granted in part the Grant Officer's Motion for Protective Order but denied MRGDC's Motion for Summary Decision in a Decision and Order ("Order") dated November 3, 1995.

A formal hearing was held in this matter on November 27-28, 1995 in Georgetown, Texas. Complainant submitted ten exhibits labeled CX 1A through CX 7, Intervenor submitted thirty seven exhibits labeled IX 2 through IX 65, and Respondent submitted one exhibit labeled GX 1. This decision is based on the evidence in the record.

ISSUES

(1) Whether MRGDC's accounting system for costs under the Act was improperly maintained.

(2) Whether the Grant Officer correctly disallowed costs for Middle Rio Grande Development Center's economic development activities.

(3) Whether the Grant Officer correctly disallowed employment generating activity costs under the participant support category of Section 108 the Act.

(4) Whether the Grant Officer correctly disallowed costs under the training cost category of Section 108 of the Act.

SUMMARY OF THE FACTS

Pursuant to 29 U.S.C. § 1511(4)(a) (1982), TDOC allocated the appropriate share of Title II JTPA funding to the Middle Rio Grande Development Council ("MRGDC") for the operation of job training

programs throughout its geographic area.³ In addition to JTPA programs, MRGDC also performed employment generating activities ("EGA") and administered economic development activities ("EDA") throughout its region. (GX 1 at 157, 160). MRGDC's internal EGA policy described three major types of employment generating activities: (1) industry targeting projects, aimed at recruiting specific industrial sectors, (2) working with a specific firm or group of potential investors, and (3) targets of opportunity. (GX 1 at 160). MRGDC identified various activities as EGA and charged expenditures incurred for these activities among the costs categories identified in Section 108 of the Act.⁴ 29 U.S.C. § 1518(a) & (b) (1982).

The OIG audited MRGDC for the period 1989 through 1992, and the scope of the audit was limited to EGA funded under Title IIA of JTPA, whether internally operated or externally contracted and performed between July 1, 1989 and June 30, 1992. (GX 1 at 158) (TR 65). Specifically, Mr. David Williams, senior auditor in the audit of MRGDC for USDOL, Office of Inspector General for Audit, testified that the audit focused on the type of EGA, what cost category the EGA costs were charged to under the Act, and the results of the EGA. (TR 65-66, 181-182, 188). The audit report identified three findings and questioned costs of \$885,525 in JTPA expenditures. (GX 1 at 160-165).

Prior to the commencement of the audit, the OIG conducted entrance conferences with both the SDA and the State to apprise them of the purpose and scope of the audit. As part of the audit process, the auditors reviewed EGA related contracts and invoices, interviewed key SDA staff, interviewed employers who hired JTPA participants as a result of employment generating activities, and sent verification letters to JTPA participants regarding such employment. (GX 1 at 158-159) (TR 66-68).

The Grant Officer reviewed the audit report and TDOC's response to the report and issued an Initial Determination which affirmed the auditor's findings. (GX 1 at 31-39). Upon reviewing TDOC's response to the Initial Determination, the Grant Officer issued a Final Determination which allowed costs of \$63,268 and identified three findings which disallowed costs totalling

³ The Governor also allocated Title II funds, funds for Section 123 and 124 for state education coordination grants and training programs for older individuals to MRGDC. The expenditure of those funds is not at issue in this case.

⁴ To comply with the limitations on certain costs contained in Section 108 of the Act, allowable costs shall be charged against the following cost categories: training, administration, and participant support. 20 C.F.R. 629.38(a) (1989-1991).

\$822,257. (GX 1 at 17-26). However, prior to the hearing, MRGDC provided the Grant Officer with documentation that was sufficient for the Grant Officer to allow \$102,690 of training costs that had been reclassified to the administration cost category by the auditors. The reclassification of these costs to the training cost category reduced the total disallowance to \$719,567. (TR 8, 258).

DISCUSSION

Under 20 C.F.R. 629.57 (1991), the United States Department of Labor shall have the burden of production to support the Secretary's decision. To this end, the Secretary shall prepare and file an administrative file in support of the decision. This means that USDOL must put forth sufficient evidence to establish a prima facie case in support of the alleged violations. See Greenwich Collieries v. Director, OWCP, 114 S. Ct. 2251, 2258 (1994). This burden requires USDOL to produce relevant evidence "sufficient to enable a reasonable person to draw from it the inference sought to be established." McCormick, Evidence, 789-790 (2ed. 1972). Thereafter, the party, Texas Department of Commerce, seeking to overturn the Secretary's decision shall have the burden of persuasion. Thus, USDOL must establish first that TDOC violated JTPA regulations based on substantial evidence. Then, the burden shifts to TDOC to show that it complied with the pertinent provisions of the JTPA.

I. MRGDC's accounting system

The first issue to be examined involves an administrative finding by the Grant Officer. In Finding 1 of the Final Determination, the Grant Officer determined that MRGDC failed to comply with Sections 164(a)(1)⁵ and 165(a)(1)⁶ of the Act, and Part 629.35(a)(2)⁷ of the regulations because it failed to maintain the

⁵ Section 164(a)(1) states, in part, "[e]ach State shall establish such fiscal control and fund accounting procedures as may be necessary to assure the proper disbursement of, and accounting for, Federal funds paid to the recipient under titles II and III...." 29 U.S.C. § 1574 (1982).

⁶ Section 165(a)(1) provides, in part, "[r]ecipients shall keep records that are sufficient ... to permit the tracing of funds to a level of expenditure adequate to insure that the funds have not been spent unlawfully." 29 U.S.C. § 1575 (1982).

⁷ Part 629.35(a)(2) provides that "[t]he Governor shall ensure that financial systems within the State provide fiscal control and accounting procedures sufficient to ... [p]ermit the tracing of funds to a level of expenditure adequate to establish that funds have not been used in violation of the restrictions on the use of such funds;..." 20 C.F.R. 629.35(a)(2) (1989-1991).

documentation necessary to demonstrate that JTPA funds were spent on allowable JTPA EGA activities. (GX 1 at 18-19, 160-161). Mr. Williams, the senior auditor in the MRGDC audit, explained that MRGDC's accounting system did not specifically track costs by individual projects but identified costs as an employment generating activity regardless of the specific activity and charged the costs to one of the three JTPA cost categories. Thus, the auditors were unable to determine what costs could be properly charged as EGA and what costs were for EDA. (TR 72-74, 188-191) (GX 1 at 160). The auditors recommended that MRGDC develop a proper accounting system to allow the tracing of specific projects so that the auditors could determine what projects were charged to what cost category for purposes of determining the costs of allowable internal EGA. (GX 1 at 160-162).

Mr. Edward Donahue, who was an audit resolution specialist at the time of the audit and wrote the Initial and Final Determinations for the Grant Officer, testified that the problem with MRGDC's accounting system was the inability to determine whether the costs were proper JTPA activities because of the way MRGDC labeled all costs as EGA. Thus, he affirmed the finding in the audit report.⁸ (TR 218) (GX 1 at 17-19, 32-33).

However, during the hearing, Mr. Williams admitted that there was nothing in the Act or regulations that requires an SDA to track the costs for a particular category to individual projects. Mr. Williams testified that the regulations required a grant recipient and an SDA to maintain adequate documentation for tracing of funds, and that MRGDC maintained sufficient records to determine what costs were charged to the different categories, and that no additional documentation was needed to trace the funds. (TR 195-198)(IX 34) (CX 1). Thus, the auditors and the Grant Officer's administrative finding regarding MRGDC's accounting system appears to be in error, and the Grant Officer has not established a prima facie case of a violation. Accordingly, the Court reverses Finding 1 in the Grant Officer's Final Determination.

II. Costs incurred for economic development activities

The first questioned cost to be examined is the \$42,296 disallowed by the Grant Officer in Finding 2 of the Final Determination because the expenditures labeled as employment generating activities were incurred for economic development activities which are prohibited under the Act. (GX 1 at 19-21). The JTPA Conference Report, No. 97-889, 103 (September 28, 1982) provides that "[t]he House recedes with an amendment to assure that employment generating services are not to be used as a substitute

⁸ Finding 1 was administrative in nature and, thus, did not specifically question certain costs. (GX 1 at 18-19).

for economic development activities or for funds available for similar activities under other Federal programs." "To be allowable, a cost must be necessary and reasonable for proper and efficient administration of the program, be allocable thereto under these principles, and, except as provided herein, not be a general expense required to carry out the overall responsibilities of the Governor or subrecipient...." 20 C.F.R. 629.37(a) (1989).

The auditors determined that two out of the three employment generating activities listed in MRGDC's internal EGA policy were actually prohibited economic development activities. (GX 1 at 18-19, 160-161). The auditors reclassified the EGA costs as economic development activities because the activities seemed to be serving the population in general, and the auditors could not find any direct link from the activities which benefitted JTPA participants and the JTPA program. (TR 74-75, 144-148) (GX 1 at 161).

The Grant Officer reasoned that the purpose of the contracts were to assist business ventures and employers not JTPA participants. In its response to the Initial Determination, MRGDC argued that the specific activities identified as economic development activities were allowable EGA, and that they were intended to benefit JTPA eligible individuals. However, the Grant Officer found that neither TDOC nor MRGDC provided documentation to demonstrate how MRGDC's projects directly resulted in the placement of JTPA eligible individuals and participants into jobs created by these contracts. Thus, the Grant Officer concluded that the costs constituted prohibited economic development activities and disallowed the costs. (GX 1 at 19-21, 161-162) (TR 220-223).

Specifically, the disallowed economic development activities under Finding 2 were classified into three categories: business analysis projects, payments for marketing of the area through video, magazines, and brochures, and contracts of professional services. (GX 1 at 19, 160-162). First, Mr. Williams explained that the auditors reviewed the business analysis projects that included three consultant agreements between MRGDC and Mr. J.P. Bates, Mr. Jose Luis Balderas, and Mr. Elias Urbina, totalling \$6,925. Although Mr. Williams admitted that the contracts mentioned the likelihood of job creation, he stated that the auditors were looking for actual job creation from the projects, and that the documents did not identify actual jobs created or specific efforts toward job creation for JTPA eligible individuals or participants. Rather, based on the face of the contract, the auditors determined that the contracts were business analyses and feasibility studies and concluded that the contracts were economic development activities geared toward general business analysis due to the lack of a link between the contracts and any job creation. (TR 75-79, 164) (GX 1 at 156, 160-162) (IX 7-9).

Mr. Donahue reviewed the consultant agreements and determined that the contracts were for an analysis of economic development

projects and constituted economic development activities. He based his opinion on the language in the agreements that discussed analyzing projects that were part of an economic development effort on the part of MRGDC. Although the agreements discussed a potential for job creation, he testified that there was nothing in the documents that referred to JTPA or indicated that the intent of the contract was to generate jobs for JTPA eligible individuals. (TR 220-223).

However, Mr. Donahue admitted later that phase two of the three consultant contracts specifically referred to creating jobs for JTPA participants and had some focus on the creation of jobs for participants, but he asserted that the contracts were not real specific as to the focus on JTPA participants.⁹ (TR 339-341) (IX 7-9). Although the Act and regulations do not require that the EGA efforts produce a certain number of jobs within a set amount of time or require that the jobs created be filled with JTPA participants to be an allowable JTPA cost, he asserted that the Act does require that JTPA money be spent on contracts that provide some benefit to the JTPA program. (TR 330-332).

Based on the above, the Court finds that USDOL has proved a prima facie case. This is based on substantial evidence that Texas Department of Commerce, through its subrecipient, violated the JTPA and its regulations by charging the consultant agreements, which provided business analyses and feasibility studies, as employment generating activities due to lack of evidence that the contracts benefitted JTPA eligible individuals or participants or the JTPA program.

TDOC and MRGDC argued that the purpose of the contracts were to engage in work necessary to allow the business to create jobs for JTPA participants which is indicated in the contracts. (IX 7-9). Mr. Paul Edwards, Deputy Executive Director for Operations for MRGDC, explained that the contracts were used to determine what projects suggested to the incubator center, an idea center used to establish businesses, would be feasible projects that could create businesses which would hire JTPA participants, and then if the projects were feasible, the consultants would help establish the businesses. (TR 554-556). Mr. Edwards testified that the consultant contracts were used to establish or advance the EGA

⁹ Mr. Donahue conceded that the Elias Urbina contract did make a reference to JTPA participants with regard to preparing financial packages for lenders and for funding projects, but he reasoned that the preparation of financial projects was an economic development activity. (TR 220-223) (IX 9). Later, Mr. Donahue speculated that a situation may arise where the preparation of a financial package for payroll may be an allowable JTPA EGA cost. (TR 339-341) (IX 7-9).

projects of meat packing and specialty seamstress training programs in sewing and knitting which were ideas from the incubator center, and that the seamstress program grew out of the Urbina contract. (TR 533, 554-556). Specifically, as a result of the contracts, JTPA participants were placed in jobs at Parker-Marmion, Casales Antiques & Novelties, and Texarome. (TR 536, 556) (IX 13).

Further, Intervenor's exhibit number thirteen lists the JTPA participants, the on the job training they received, and the employer that hired them. (IX 13). Mr. Edwards asserted that the on the job training projects and job placements listed in exhibit thirteen were due to the successful EGA efforts.¹⁰ Specifically, he reported that Casales Antique & Novelties on the job training project was a by product of the Urbina consultant contract. (TR 532-534). Mr. Edwards testified that the costs associated with on the training programs listed in exhibit thirteen were not questioned in this case. (TR 598, 606-607). Thus, the Court finds that the contracts that lead to the allowable on the job training projects listed in exhibit thirteen should also be an allowable cost, especially, because the evidence indicates that contracts benefitted the JTPA program by creating jobs for JTPA participants.

Both Mr. Donahue and Mr. Williams admitted that if the contracts provided benefits to the JTPA program, the contracts would be allowable JTPA costs. Because there is evidence that the contracts provided some benefit to the JTPA program, TDOC and MRGDC has demonstrated that they complied with the Act and its regulations. Accordingly, the questioned costs associated with the consultant agreements of \$6,925 in Finding 1 are reversed.

The second group of disallowed costs include payments for marketing of the area through videos, magazines, and brochures which included a contracts with Anne Vexler Film & Video Production and Ben Vargas Design totalling \$21,927.00. (GX 1 at 160-162) (IX 23). As a result of the Vexler contract, two videos were produced. Mr. Donahue reviewed the first Vexler video, titled "JTPA Making the Team" which he labeled as an orientation to individuals who would come to the Middle Rio Grande area looking for job training assistance. He explained that the video discussed the application and enrollment process, necessary documentation, and eligibility for the JTPA program which he opined was JTPA participant oriented.

¹⁰ Mr. Edwards testified that there were probably more job placements besides those listed in exhibit thirteen that did not involve on the job training contract, but due to the nature of the State's CMS system, he was not able to identify the employer in the other placements. (TR 545-546). Between program years 1989 and 1991, he opined that MRGDC's EGA programs created about 370 to 380 jobs of which 303 were filled by enrolled JTPA participants. (TR 528).

Thus, he found that the cost of the second video was a proper charge to the Act, and that the contract related to the video was included in the training costs of \$102,690 that were allowed by the Grant Officer prior to the hearing. (IX 19A) (TR 226-227) (TR 255-257, 279-281). Thus, the remaining questioned costs under the payments for the marketing group include half of the other video costs associated with the Vexler contract and the Ben Vargas contract which total \$12,950.

Mr. Williams testified that the auditors reviewed the script of the other Vexler video, titled "Middle Rio Grande Region of Texas," determined that the video was an economic development activity because it was promoting the area in general. (IX 17, 19B). Although the script mentioned the JTPA and its availability, he reasoned that the majority of the script was geared toward marketing the region. (TR 82-84, 165-166) (GX 1 at 161). However, Mr. Williams admitted that economic development activities were an allowable cost if the activity benefitted JTPA eligible individuals or participants. (TR 74-75, 144-148).

Mr. Donahue read the script and watched the video and opined that the video was designed to attract business and industry into the area. Although the video made three references to the JTPA as a source of help in training employees for potential employers, he explained that the intent of the video was to promote the Middle Rio Grande area, and that the JTPA was a side reference to the main thrust of the video. He added that there was nothing in the video that explained the JTPA program. (TR 225-226, 341-343) (IX 10, 17, 19B). However, Mr. Donahue admitted that luring of a particular industry to an area may be employment generating job creation activity which would be allowable EGA. Thus, if an SDA targeted an industry and identified a particular employer within the industry and approached the employer regarding job creation, Mr. Donahue asserted that would be an allowable EGA. (TR 330-332).

As Mr. Williams indicated, there are no guidelines in the Act or the regulations or issued by USDOL about the content of an advertisement or how much it has to refer to JTPA before it is an allowable cost. (TR 82-84, 165-166) (GX 1 at 161). The projects emphasized in the video of Mohair combing project, the tanning project, the vegetable processing project, and the seamstress or knitting advantage program, were all part of the efforts that MRGDC labeled as employment generating activities, and the video focused on every one of the EGA projects pursued by MRGDC. (TR 550, 607) (IX 3). Also, the video promoted the availability of a skilled JTPA work force due to training which was a central component of the MRGDC marketing strategy. (TR 549). Mr. Edwards testified that as a result of the video, some JTPA participants obtained jobs. (TR 607-608).

The Court finds that the central focus of the video was to promote the area to attract businesses who will create jobs and

utilize the JTPA program, and in fact, the video did result in creating jobs for JTPA participants. The Act allows employment generating activities aimed at creating jobs for JTPA eligible individuals and participants. 29 U.S.C. § 1604(19) (1982). The intent of Congress in allowing these activities is further elaborated in the Report of the House Senate Conference Committee as an effort to "relieve some of the economic pressures on Service Areas in severely depressed or rural parts of the country" which is consistent with the Middle Rio Grande area. H & S Rep. No. 97-889, 97th Cong., 2d Sess. 3. (IX 6). Thus, the Court finds that the video was an allowable EGA used to create jobs in the area, and the Grant Officer has failed to demonstrate that TDOC or its subrecipient MRGDC has violated a provision of the Act. Thus, the \$8,977 of questioned costs for the production of the video under the Vexler contract is an allowable JTPA expense.

With regard to the Ben Vargas Design Consultant Agreement with MRGDC, Mr. Williams explained the contract was for the consultant to provide a variety of graphic design, literature, and promotional materials. (IX 64) (GX 1 at 162). He testified that the contract did not mention the JTPA or identify efforts taken towards JTPA eligible individuals. Due to the lack of any benefit to the JTPA participants, the auditors determined that the contract was a prohibited economic development activity. (TR 84-87). Upon cross examination, Mr. Williams testified that he could not dispute that the questioned brochures were produced as a result of the Vargas contract, and at the hearing, he reviewed the brochures which focused on the JTPA program and determined that they were an allowable expense under the Act and could be charged to the training cost category because the brochures were sent to potential employers to determine if they could place or provide on the job training to JTPA participants. (TR 167-169) (IX 65).

Mr. Donahue reviewed the Ben Vargas contract and explained that most of the brochures produced as a result of the contract discussed the JTPA and were geared towards JTPA participants. Thus, the costs of these brochures and advertisement costs were allowable training costs that were stipulated to prior to the hearing. Also, he asserted that the other brochures and a couple of advertisements which talked about the JTPA program but were geared to the employer but were also an allowable EGA activity and could be charged to the administration cost category. (IX 18, 64, 65) (TR 228-231, 257-258). However, Mr. Donahue admitted that it was not uncommon for a job developer to contact companies and notify them about the JTPA program and give them literature about the program such as the brochure which would be an allowable job development effort which could be charged to the training cost. (TR 343-345). In fact, Mr. Edwards testified that the brochures were used as part of the job development effort and were sent to employers and used by the job developers to solicit on-the-job training contracts. (TR 553).

Based on Mr. Williams and Mr. Donahue's admissions that the Vargas contract benefitted the JTPA program and that the cost of the contract, brochures, and advertisements were an allowable expenses, the Court finds that these are allowable activities under the Act and can be charged to the administration cost category because the contract directly benefitted JTPA participants. The brochures that were sent to potential employers to determine if they could place JTPA eligible individuals and participants were also allowable EGA and could be charged to the training cost category. Because the Grant Officer failed to prove that TDOC violated a provision of the JTPA or its regulations, the Grant Officer's finding with regard to the Vargas contract of \$3,973 in costs is reversed.

The third group of disallowed costs includes contracts for professional services which included contracts with the University of Texas at San Antonio and Japan Consultants, Inc. and totalled \$13,444. The auditors reviewed the contract for professional services with the University of Texas at San Antonio and determined that the \$5,000 contract was not an allowable expense. (IX 12). However, Mr. Williams admitted that only half of the cost of the contract was charged to JTPA, and that the audit report mistakenly indicated that \$5,000 of JTPA money was used on this particular contract. As a result, Mr. Williams asserted that only \$2,500 of JTPA expenses should be questioned under the University of Texas contract. (IX 12 at 36) (GX 1 at 162).

The auditors determined that the University of Texas contract was for economic development analysis of the region such as identifying trade possibilities and resulted in the issuance of statistics. He added that the auditors viewed the contract as providing an analysis of the marketing of the processing resources in the area and not directed towards JTPA participants. However, Mr. Williams indicated that he was unaware of the truck driving training program and job creations for JTPA participants based on the transportation information obtained from the contract. Thus, Mr. Williams admitted that the expenses of \$2,500 would be allowable expenses because the expenses were linked to a job training program which created jobs for JTPA participants. (TR 87-88, 169-173) (GX 1 at 162). Mr. Edwards testified that the University of Texas contract lead to the development of a job training program which involved training of commercial truck drivers which was still an ongoing program at MRGDC, and the truck driving training program had allowed MRGDC to meet its performance standards. (TR 557) (IX 13).

Although there is an express reference to creating employment opportunities in the contract, Mr. Donahue testified that the contract was for research to analyze exports from Middle Rio Grande area and identify incentives such as job training that could be used to attract firms to create and expand opportunities in the region. Thus, he reasoned that the contract was for research on

economic development to locate good businesses and to identify the types of things that could be exported in the region. He classified the contract as an economic development activity as opposed to EGA because the intent of the contract was to identify products and industries rather than developing or creating jobs for JTPA eligible individuals which would classify it as EGA. Although the contract identified types of training that participants could go through for particular industries, Mr. Donahue explained that the research project did not appear to be designed to create jobs for JTPA eligible individuals. (TR 231-233, 345-346). (IX 12). The Court notes that the Grant Officer was unaware of the benefits of the contract with regard to the truck driving program.

Based on the testimony of Mr. Williams and the evidence in the record, the Court finds that the \$5,000 of questioned expenses with regard to the University of Texas contract are allowable costs. (GX 1 at 19-21, 162). First, the Court finds that only \$2,500 of the expenses from the contract were charged to the JTPA account. Next, the Court finds that the purpose of the contract was to explore job opportunities for JTPA participants in the Middle Rio Grande area, and the contract results helped to establish a truck driving training program that provided training and created jobs for JTPA eligible individuals and participants. (IX 13). Because the contract provided direct benefits to JTPA participants, the contract constitutes allowable EGA costs. Thus, the Grant Officer has failed to prove that TDOC inappropriately spent the funds in violation of the Act or its implementing regulations because the contract provided a benefit to the JTPA program and is an allowable EGA. Accordingly, the Grant Officer's finding with regard to the University of Texas Contract is reversed, and the \$5,000 of costs that were originally questioned is now an allowable expense.

Finally, the auditors reviewed the contract between MRGDC and Japan Consultants, Inc., which was part of the Asian Initiative, as coordinating and arranging travel for the MRGDC staff. (IX 11). Thus, the auditors determined that the contract for \$8,444 was for economic development activities because there was no relationship between the contract and creation of any jobs for JTPA participants. Although Mr. Williams admitted that the primary focus of the Asian Initiative was focusing on the JTPA trained workforce in the Middle Rio Grande region, he reported that the EGA expenses from this contract were disallowed because the EGA did not result in a "substantial benefit" to the JTPA program. He added that if the contract had resulted in more jobs to the JTPA participants, then there would have been more of a direct benefit to the JTPA program and would have been an allowable expense. (TR 88-89, 173-175) (GX 1 at 160-162). However, he admitted that there is nothing in the Act or regulations or within USDOL or OIG's policies that required a certain degree of success to become an allowable EGA activity. (TR 144-160).

Mr. Donahue reviewed the consultant contract between MRGDC and Japan Consultants and found that the consultant was to assist in the preparation of project materials and briefing MRGDC's representatives prior to a trip to Japan, and the consultant was to identify and make contacts with the Japanese government and industry representatives as well as provide translation and protocol advice. He did not find anything in the document about the JTPA or creating jobs. As a result, Mr. Donahue determined that the agreement was an economic development activity designed to lure Japanese companies to do business in the Middle Rio Grande region and not an allowable JTPA expense. Thus, the Grant Officer determined that the contract was economic development activities which are not allowable under the JTPA. (TR 233-235) (IX 11). However, later, Mr. Donahue admitted that he only reviewed the contract but was unaware of the activities or benefits of the contract or the whole Asian Initiative project. He admitted that the costs from the industry targeting projects such as the Asian Initiative, whether they resulted in participants being placed in jobs in the future, would be proper EGA costs. (TR 330-332).

Mr. Williams admitted that the focus of the contract was on the trained JTPA work force, and Mr. Donahue admitted that the contract was a proper EGA cost. Specifically, the purpose of the contract was to identify and contact potential employers in Japan who were involved in the employment generating projects of beef packing, wool/mohair combing, knitting and apparel assembly, frozen vegetable processing, and leather tanning, that would be interested in locating businesses in the Middle Rio Grande area and hiring JTPA participants which is an industry targeting project that is allowable under the Act. (IX 11 at 7).

As Mr. Williams indicated, the Act or its regulations as well as USDOL does not require that the employment generating activities produce a certain degree of benefits to the JTPA program to be an allowable expense. Furthermore, Mr. Donahue stated that employment generating activities are allowable costs regardless of their success rate for creating future jobs for JTPA participants. (TR 326). In any event, the evidence at the hearing established that the Asian Initiative did result in direct benefits to JTPA participants. Mr. Edwards testified that the PEP industries was one of the Japanese firms that MRGDC contacted through its Asian Initiative, and PEP Industries hired 48 direct placement participants through MRGDC's EGA program. (TR 528, 546). Thus, based on Mr. Donahue's admission that the contract was an allowable EGA cost because it was an industry targeting project which provided direct benefits to the JTPA program, the Court finds that the Grant Officer's finding that the contract was an economic development activity is hereby reversed, and the \$8,444 in costs is an allowable JTPA expense.

Because Texas Department of Commerce and its subrecipient have demonstrated that they complied with the Act and its regulations,

the Court reverses Finding 2 of the Grant Officer in the Final Determination and allows the cost of \$42,296 which were questioned in that Finding.

III. Costs charged to the participant support cost category

The second cost to be examined is the \$822,257 of EGA costs charged to the participant support category that were reclassified to the administration cost category by the auditors. The auditors examined the employment generating activities and determined that MRGDC had improperly charged EGA to the participant support cost category, and that EGA could only be charged to the administration cost category by law. Mr. Williams testified that EGA could never be charged to the participant support category according to OIG's interpretation of the regulations, and during the audit, EGA costs were automatically questioned when such costs were charged to the participant support category. (TR 135-137, 162-163, 194-195) (GX 1 at 162). Because the auditors took a blanket approach that EGA could not be charged to participant support category, the auditors did not look at the individual activities charged to the cost category. Thus, even if MRGDC would have given the auditors documentation on the individual EGA costs charged to the participant support category, Mr. Williams asserted that it would not have mattered because the EGA costs could not have been charged to that category anyway.¹¹ (TR 195-198). However, Mr. Williams admitted that there was nothing in the Act that expressly prohibited the charging of EGA costs to the participant support category. (TR 143).

In Finding 3 of the Final Determination, the Grant Officer disallowed \$822,257¹² in JTPA expenditures because the expenditures

¹¹ The parties stipulated that the Texas JTPA policy regarding employment generating activities chargeable to the participant support category described in JTPA information Bulletin 85-26 is consistent with the Job Training Partnership Act and its implementing regulations. (TR 21-22) (GX 1 at 93) (CX 2). Mr. Williams stated that where the Act and its regulations were silent on an issue, the governor had authority to make policy in that area as long as it was consistent with the Act and regulations; thus, the governor could define what constitutes EGA in the state and how EGA could be charged to the cost categories. However, Mr. Williams admitted that during the audit, the auditors gave no deference to the state policy on charging EGA to the participant support category due to OIG's position that EGA could never be charged to the participant support category. (TR 139-141).

¹² The Final Determination notes that \$822,257 includes the \$42,296 disallowed in Finding 2. (GX 1 at 21). However, due to the allowance of training costs prior to the hearing, the

exceeded the fifteen percent cap on costs charged to the administrative cost category. See 29 U.S.C. § 1518(a) & (b) (1982); 20 C.F.R. 629.39(a)(1) (1989-1991). The Grant Officer explained that the MRGDC exceeded its administrative cap after the

questioned costs in Finding 3 now total \$719,567.

auditors reclassified \$724,085 of EGA expenditures from the participant support cost category and \$257,410 of EGA expenditures from the training cost category to the administration cost category. Based on the audit report, the Grant Officer opined that the Act and its regulations left no option but to charge EGA costs to the administration category because the EGA did not fall within one of the three subcategories of the participant support category,¹³ and the regulations prohibited charging EGA to the training cost category.¹⁴ (GX 1 at 24-25, 162-164) (TR 311-312).

Mr. Donahue explained that EGA did not fit within the work experience¹⁵ and need based payments subcategories of the participant support category. Specifically, the "need based payments" are payments that enable an individual to participate and pay for the costs of housing and food while they are in training.¹⁶ Also, he reasoned that EGA costs were not considered "supportive services" under the participant support category because supportive services, such as child care, counseling, and transportation which are listed in the definition, are the costs that enable an individual to participate in training.¹⁷ His interpretation of "supportive services" is based on the catch-all phrase at the end

¹³ 29 U.S.C. § 1518(b)(2) (1982).

¹⁴ 20 C.F.R. 629.38(e)(5) (1989-1991).

¹⁵ Work experience expenditures include work experiences expenditures that meet the requirements under Section 108(b)(3) as well as work experience expenditures that do not meet the above section. 29 U.S.C. § 1518(B)(3) (1982).

¹⁶ Based on a locally developed formula or procedure, payments based on need may be provided to individual participants where such payments are necessary to enable individuals to participate in a training program funded under the Act. 20 C.F.R. 629.21(a) (1989-1991).

¹⁷ Supportive services are defined in Section 4(24) as:

services which are necessary to enable an individual eligible for training under this Act, but who cannot afford to pay for such services, to participate in a training program funded under this Act. Such supportive services may include transportation, health care, special services, and materials for the handicapped, child care, meals, temporary shelter, financial counseling, and other reasonable expenses required for participation in the training program and may be provided in kind or through cash assistance.

29 U.S.C. § 1503(24) (1982) (emphasis added).

of the definition of supportive services that provides "and such other costs that enable an individual to participate in the program." 29 U.S.C. § 1503 (24). (TR 237-242, 309-313, 320-324) (GX 1 at 21). However, during his deposition, Mr. Donahue opined that the catch-all phrase included employment generating activities that had a direct benefit to participants and could be included within the supportive services subcategory as an allowable JTPA expense. (TR 366-367).

Mr. Donahue admitted that the governor had the authority to define the activities and costs that could be charged to the cost categories as long as the interpretation was not inconsistent with the Act or its regulations. He admitted that the Act does not prohibit charging EGA to the administration or participant support categories and that the ETA did not issue any guidelines as to what EGA costs could be charged to administration and participant support category. (TR 324-326, 334). In accordance with a Secretary of Labor opinion letter dated February 1984, Mr. Donahue stated that EGA costs could be charged to administration and participant support categories as long as the benefits of the costs were received by that particular cost category. (TR 335-336) (IX 53 p. 1).

Although none of EGA costs charged to the participant support category were an allowable expense in this case, Mr. Donahue testified that the ETA, the division of USDOL that employs the Grant Officer, determined that there is a potential or the possibility that some limited costs involved in EGA that enable the participant to participate in a JTPA program could be charged under the supportive services subcategory of participant support. (TR 237-242, 309-313, 320-324, 351) (GX 1 at 21). However, Mr. Donahue clarified that for the EGA costs to be charged under the participant support category, the individual had to be an enrolled as an JTPA participant rather than just as an JTPA eligible individual. (TR 242-244, 317-318, 322-323).

Mr. Donahue asserted that EGA costs that might be incurred as part of an entire project to support some participant or participants or allow them to participate in a JTPA program may be chargeable to the participant support category. For example, the staff time to establish a business incubator center to allow the participants to work in the center could be a potential charge to the participant support category. Also, he admitted that payroll costs of participants who worked at a employment generating site in an incubator project are costs that enabled participants to participate and could be charged to the participant support category. Also, he added that the salaries of people who were training the participant in an incubator project and the ongoing costs of the operation of the center while the participants are working at the center could be charged to training, but the initial and development costs of the center were EGA costs chargeable to the administration category. Further, the staff time spent

creating jobs by developing the industry, even if the staff work could be definitely linked to the placement of a participant, could not be charged to the participant support category but could be charged to the administrative cost category. (TR 318-319, 351-355).

Mr. Donahue admitted that the statements in the Initial and Final Determinations about EGA only being charged to the administration category were incorrect, and that the Grant Officer did not issue any amended Final Determination correcting the language about EGA being charged to the participant support category. (TR 311-313) (GX 1 at 25, 38).

In addition, Mr. Donahue admitted that he was not aware of the specific EGA activities that MRGDC charged to the participant support category because the audit report did not discuss these activities. (TR 333). Further, he was unaware of whether the EGA charged to the participant support category resulted in a direct benefit to JTPA participants such as creating over 300 jobs for JTPA eligible individuals and participants, although Mr. Williams admitted that some of the EGA projects provided direct benefits to the JTPA participants and eligible individuals. (TR 135-137, 162-163, 194-195, 315). However, Mr. Donahue later stated that there was nothing in the documentation that would indicate that any of MRGDC's employment generating activities could be charged properly to the participant support cost category. (TR 251-253, 275, 365).

The Court finds that the audit was based on a faulty premise regarding the charging of EGA to the participant support category. Further, although Mr. Donahue, the USDOL employee who wrote the Initial and Final Determinations, acknowledged the auditors error about charging EGA to the participant support category, he based his Determinations on the audit report and did not issue an amended Determination which indicated that correct interpretation of the law. (GX 1 at 25, 38) (TR 311). Thus, the incorrect interpretation of the regulations were carried throughout the entire audit resolution process. Also, the auditors did not examine any of the documents associated with the costs that were charged under the participant support category, and it is unclear whether the Grant Officer reviewed all of the documents submitted by TDOC and MRGDC of the EGA charged to the participant support category to determine whether any of the EGA costs charged to the participant support category were allowable expenses. Thus, it appears that USDOL cannot question the costs when the documents regarding the costs have not even been examined, and that the questioned costs are based on a wrong interpretation of law which has been recognized by the Grant Officer, but no action was taken to remedy the situation. Accordingly, USDOL has not proved a prima facie case based on substantial evidence that there was a violation of the Act or its regulations. USDOL cannot presume that MRGDC's EGA which was charged to the participant support category was

unlawful or improper. See Greenwich Collieries, 114 S. Ct. at 2258 (citing S. Rep. No.752, 79th Cong., 1st. Sess., 22 (1945)) (emphasis added).

Although in the Court's Order dated November 3, 1995, the Court directed TDOC and MRGDC to submit evidence indicating the EGA costs charged to the participant support category fell within one of the three subcategories and directly enabled an eligible individual to participate in a JTPA training program, the Order does not change the burden of proof of the parties. Order at 6-10. The Grant Officer is required still to prove that TDOC through its subrecipient, MRGDC, violated the Act or its regulations before the burden shifts to the Complainant, TDOC, to prove that it complied with the regulations.

Because USDOL has failed to prove a violation of the Act, the Court reverses the Grant Officer's finding with regard to the EGA costs charged to the participant support category and allows the costs of \$724,085 questioned in Finding 3 to be charged to the participant support category.

IV. Costs charged to the training cost category

The third cost to be examined is the \$822,257 of EGA costs that were charged to the training category which were reclassified to the administration cost category by the auditors. The auditors examined the employment generating activities and determined that MRGDC had improperly charged EGA to the training cost category which was prohibited in the Act. (TR 135-137). However, Mr. Williams admitted that the auditors were not aware that the Planning and Economic Development Department of MRGDC that was administering the EGA was also responsible for performing the basic training under the Act, and that when the department charged "EGA training" to the training category, the auditors automatically questioned the costs without examining the documentation regardless of the activity based the prohibition in the regulations. However, during redirect, Mr. Williams testified that MRGDC did not provide any documentation during the audit that revealed that such EGA costs were actual training costs. (TR 175-176, 184-185, 187-188).

In Finding 3 of the Final Determination, the Grant Officer disallowed \$257,410 of EGA expenditures from the training cost category which were part of the total EGA costs that the auditors reclassified to the administration cost category. The Grant Officer disallowed the costs due to Part 629.38(e)(5) which specifically provides that EGA costs are not allowable training costs. 20 C.F.R. 629.38(e)(5) (1989-1991). (GX 1 at 21-25, 162-164) (TR 216). In the Final Determination, the Grant Officer approved \$63,268 of expenses in the training category classified as accounting codes 3106, 3206, and 3306 relating to salaries, fringe benefits, and travel costs and related expenses of the employees

who were performing primarily job development and/or job creation efforts for the 1989 program year.¹⁸ (GX 1 at 25-26) (TR 276-282).

As noted above, prior to the hearing, MRGDC submitted documentation sufficient to demonstrate that \$102,690 of the \$257,410 disallowed costs were actual training costs which could be charged to the training cost category.¹⁹ (TR 254-258). Thus, the Grant Officer determined that the remaining \$91,452²⁰ in expenditures labeled as EGA were improperly charged to the training cost category.

Mr. Donahue reported that the accounting record documents for program years 1990 and 1991 showed the job development activities as accounting codes 3106 and 3206 and employment generating activities as accounting codes 3107 and 3207, and that two activities got merged together into one category in the accounting records which made it difficult to determine which costs were allowable. (IX 34 at 8-9) (CX 1). Due to the confusion of the accounting system, Mr. Donahue reviewed the job descriptions and timesheets of the employees for the program years 1990 and 1991 to determine if their activities were allowable JTPA costs. (TR 255-257, 279-281). During the hearing, Mr. Donahue testified about a number of job descriptions and corresponding time sheets.

Based on the job descriptions of the staff and their time sheets, Mr. Donahue found that some of the job descriptions indicated that some of the people were primarily or entirely involved in training as job developers. He allowed the training costs associated with such individuals based on their job description which indicated that they spent a majority of their

¹⁸ Mr. Donahue was able to determine who the job developers were in the program year 1989 because MRGDC separated the job developers from other staff in the Planning Department and assigned them a different accounting code, but in subsequent years, MRGDC lumped all staff salaries in the Planning Department together under one accounting code which made it more difficult to determine which activities were allowable under the training cost category. (TR 255-256) (IX 34 p. 8-9).

¹⁹ The allowed costs of \$102,690 included the salaries, fringe benefits, and travel costs and related expenses of employees who spent 100% of their time on training or was involved "primarily" in training for program years 1990 and 1991. (TR 280).

²⁰ This figure was calculated by subtracting the allowable costs of \$63,268 and \$102,690 from the original disallowed training costs in the audit report. (GX 1 at 21-25) (TR 8, 258).

time performing JTPA training.²¹ Although the costs were labeled as EGA in the accounting records, he determined that the job development costs were proper training costs and not an employment generating activity costs. Also, he allowed costs associated with an individual who was doing participant intake and eligibility determinations according to the job description as well as costs associated with a personal services contract for an individual who performed functions as a job developer and performed participant follow up activities as allowable training costs. Furthermore, the travel and fringe benefits associated with these people were also allowable costs. (TR 255-257, 279-281).

Mr. Donahue admitted that two different standards were used to determine if costs were properly charged to the training cost category. For employees whose job description involved primarily or entirely training activities, the Grant Officer allowed the charging of their time to the training cost category based on the job description and time sheet. However, for those employees whose job description did not primarily involve training activities, the auditors and Grant Officer did not accept the time sheets as proof that their activities were allowable training costs. Although the time sheets revealed the amount of time charged to each category, it did not indicate the particular activities of an employee, the time spent on the activities, or the percentage of the employee's duties that were allowable training activities. (TR 282-290, 299-300, 355-360).

Mr. Donahue explained that these employees' activities were questioned due to the mislabeling of costs as EGA in the accounting records and the charging of their time to JTPA cost categories when their job descriptions indicated that they were not involved primarily in JTPA activities. In order to verify that the employees were engaged in JTPA activities, he required specific documentation of their training related activities to indicate how much time and what activities were charged to the training cost category. Due to the lack of documentation, the Grant Officer had no basis for determining the proportion of work on allowable JTPA activities. Thus, the employees who spent some time in training but did not spend a majority of their time in training were not given any credit for their time that was charged to the training category. (TR 282-290, 299-300, 355-360).

²¹ Mr. Donahue admitted that job outreach or job development efforts where an JTPA participant is directly placed in a position or undergoes on-the-job training are chargeable to the training category. A job development kind of activity is an activity wherein a job developer contacts various existing businesses in the area and discusses establishing a position for a qualified JTPA participant. (TR 326-328).

Although the Act does not provide a standard to determine whether the costs are allowable, Mr. Donahue explained that the Act and its regulations require that the funds must be able to be traced to a level of expenditures to insure that the funds have been spent properly. 29 U.S.C. § 15759(a)(1) (1982); 20 C.F.R. 629.35(a) (1989-1991). He suggested that the SDA or employee keep a daily log or weekly summaries of the employee's activities. Although USDOL did not normally require that the local staff of the SDA keep daily logs of their activities per se, he asserted that SDA had to show some basis to prove that it was charging the costs to the correct cost categories²² especially since the JTPA training activities were labeled as EGA and were charged to the training category which is prohibited under the Act. (TR 259-273, 282-290, 299-300, 355-360).

In addition to the staff time, travel, and fringe benefits, the Grant Officer also reviewed the operating costs that were charged under the training category. The costs related to space, telephone, office supplies, and those kinds of activities were not allowed. Although Mr. Donahue admitted that some of the costs may be allowable, he reasoned that there was no basis on which to make a determination on whether the costs were properly charged to the training cost category such as an allocation of costs associated with individuals using the space for specific activities. (TR 273-275).

The Court finds that the USDOL has not proved a prima facie case based on substantial evidence of a violation of the Act or its regulations. First, although in the Final Determination, the Grant Officer allowed the job creation/job development costs for adults, which was accounting code 3306, to be charged to the training cost category in program year 1989, the Grant Officer did not allow the same costs incurred for youths, which was accounting code 3406, in the same program year. The Grant Officer has not alleged that these costs were an unallowable training cost. Further, the documentation indicates that the costs involved the same activities as the allowed cost for adults except the disallowed costs were intended for the benefit of youths. Because the Grant Officer has not indicated that these costs violated a provision of the Act, the Court finds that the costs under accounting code 3406 in the 1989 program year are allowable costs.

Also, the Grant Officer's statement that EGA was merged with the job creation/job development efforts in program years 1990 and 1991 which made it harder to determine the allowable costs is erroneous. MRGDC's accounting system did not merge unallowable EGA costs with the training costs; rather, the accountant testified

²² The regulations require that costs are allocable to a particular cost category to the extent that benefits are received by such category. 20 C.F.R. 629.38(b). (GX 1 at 23).

that the job developer salaries were listed separately in an accounting code in program year 1989 but were added to the same accounting code as the rest of the salaries of the staff under the Planning Department in program years 1990 and 1991. (TR 614-615). Thus, although the other jobs in the Planning Department involved other duties besides training duties, the developer jobs were not merged with EGA activities in the accounting records. Further, Mr. Edwards wrote a letter to TDOC which explained the accounting system of MRGDC in which he gave a detailed explanation of the costs charged to the training category. (IX 43). Based on Mr. Edwards' explanation, the method used in determining appropriate costs to be charged to the training cost category is consistent with the Act and its regulations.

Further, based on Mr. Donahue's testimony that the Grant Officer allowed some training costs labeled as EGA costs in the Final Determination and prior to the hearing, the Court finds that the Grant Officer was aware that the training costs were mislabeled as EGA costs in the accounting report that totalled all the JTPA costs for 1991. (IX 22 at 320) (CX 1 at 255). Due to that admission, the Grant Officer cannot use that as an excuse to apply a different standard for employees who were not solely involved in training activities in determining which costs are allowable. The Grant Officer's application of a different standard in determining allowable costs is arbitrary and overly restrictive and is not permissible under the Act. In fact, Mr. Donahue admitted that there was nothing in the Act or regulations that discussed the standard of reviewing allowable costs. (TR 285).

Although the regulations require a tracing of funds, the regulations do not require that SDAs keep a daily log of their employees' activities. Mr. Williams testified that the regulations required a grant recipient and an SDA to maintain adequate documentation for tracing of funds, and that MRGDC maintained sufficient records to determine what costs were charged to the different categories, and that no additional documentation was needed to trace the funds. (TR 195-198). The regulations only require that the costs charged to the cost category benefit that category, and that the costs are allocated on a fair basis to the cost category. 20 C.F.R. 629.38(b) (1989-1991) (TR 457).

Furthermore, a USDOL policy guidance letter reported that it is appropriate to allocate the "fair share" of JTPA costs to the appropriate cost category. Specifically, if a portion of an employee's time was devoted to JTPA services, then that portion of the employee's salary could be charged to the appropriate JTPA cost category. (IX 63). The policy did not indicate that the SDA had to maintain daily logs of the employee's activities to charge a portion of the employee's time to a particular cost category. Further, Mr. Gilbert Martinez, the State JTPA audit expert, testified that the only records required to prove a proper cost allocation is a job description and time sheets. (TR 457, 487).

Thus, the job descriptions and time sheets adequately show that MRGDC correctly charged employees' JTPA related activities to the training cost category. In fact, Mr. Donahue admitted that some of the job descriptions could include activities that could be charged to the training cost category. (TR 303-305).

The Court notes the travel reports of some of the disallowed positions contain an itinerary of the employees' duties while traveling which provides the specific activity involved and indicates that the employee was engaged in JTPA training related activities when the costs were charged to the training category which is in accordance with the regulations. (IX 22) (CX 1). The itinerary contains enough information to corroborate that the employee's activities were JTPA training activities properly charged to the training cost category. Thus, although not all of the job descriptions and time sheets have travel reports of the employee, the available travel reports verify that MRGDC correctly charged an employee's time to the training category because the employees were involved with JTPA training related activities at the time. Also, the travel report from the job developer which was an allowed training cost is similar to the disallowed job position's travel reports, and, in fact, some of the travel reports of the disallowed job positions have more details regarding their activities than the job developers' travel reports. (IX 22) (CX 1).

Further, the records indicate that MRGDC allocated the fringe benefits and travel to the training cost category when such costs benefitted the training category; thus, these costs were properly allocated on a fair basis to the training cost category. (CX 1). Therefore, the salaries, fringe benefits, travel expenses, and other related expenses of the jobs disallowed by the Grant Officer that were charged to the training cost category are legitimate training costs properly chargeable to the training cost category.

With regard to the operating costs charged to the training category, Mr. Williams testified that MRGDC maintained sufficient records to determine what costs were charged to the different categories, and that no additional documentation was needed to trace the funds. (TR 195-198). Mr. Martinez was in agreement with Mr. Williams's statement that MRGDC's accounting records were sufficient to trace the expenditures back to legitimate training costs. (TR 489-490) (IX 23). Mr. Edwards indicated that MRGDC had a process that was used to compute the operating costs to each category. (TR 597). Mr. Martinez added that the documentation concerning the operating expenses which contained invoices and payments coded to an account code were distributed fairly, equitably among the programs that were charged with the operating expenses. (TR 484-485).

The regulations do not require that the SDA keep a log of the operating costs associated with an employee that is charged to a

particular cost category as suggested by Mr. Donahue, although it appears that for the program year 1991, MRGDC's accounting system listed all of the expenses associated with an employee that was charged to the training cost category. (IX 22 at 320-321). In a letter dated 1985 from Nicholas Gougras, Director of Cost Determination, Mr. Gougras indicated that operating costs can be charged to a particular category based on the fair share of costs that benefit that category. (IX 57 at 5). Thus, based on the time of an employee that is charged to a particular cost category, MRGDC was only required to allocate the fair share of the total operating expenses associated with that employee to that cost category. Further, with regard to indirect costs, MRGDC had an indirect cost allocation plan to assess indirect costs to the cost categories. (TR 597) (CX 1). Based on a letter issued by Grant Officer, Edward Tomchick, in 1985, MRGDC could charge part of its indirect costs to the training cost category to the extent that the indirect costs benefitted the training cost category. (IX 57 at 3-4). Further, it appears that the indirect costs that were charged to the training category actually benefitted that cost category. Accordingly, the Court finds that MRGDC has provided sufficient documentation to trace the operating costs charged to the training cost category, and that USDOL has failed to establish a prima facie case of a violation based on substantial evidence.

Because the United States Department of Labor has failed to establish a violation of the Act or its regulations with regard to the costs that were charged to the participant support and training cost categories, Finding 3 of the Final Determination is reversed.

RECOMMENDED ORDER

As United States Department of Labor has failed to prove a prima facie case that Texas Department of Commerce, through its subrecipient, Middle Rio Grande of Development Council, violated any provisions of the Act or its regulations, the Findings of the Grant Officer in the Final Determination are reversed, and all costs questioned in the audit are allowable costs.

Entered this _____ day of _____, 1996, at Metairie, Louisiana.

JAMES W. KERR, JR.
Administrative Law Judge

JWK/tmd