U.S. DEPARTMENT OF LABOR

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In the Matter of

WEST VIRGINIA DEPARTMENT OF EMPLOYMENT SECURITY

v.

EMPLOYMENT AND TRAINING ADMINISTRATION (ETA), U.S. DEPARTMENT OF LABOR

CASE NO. 82-WPA-30

Jack Freidman, Esquire
For West Virginia Department of Employment Security

Frank Buckley, Esquire
For Employment and Training Administration (ETA), U.S. Department of Labor

Before: WILLIAM H. DAPPER
Administrative Law Judge

DECISION AND ORDER

This is a proceeding under the Wagner-Peyser Act of 1933, as amended, 29 U.S.C. §49 et seq. and the regulations issued thereunder (20 C.F.R. Part 658).

The parties to this proceeding are the West Virginia Department of Employment Security (DES) and the Employment and Training Administration (ETA), U.S. Department of Labor (DOL).

This litigation stems from a determination made by the Regional Administrator of the Employment and Training Administration that the State of West Virginia had not adequately documented its use of and had improperly transferred certain grant monies for the fiscal years 1976 through 1978. That determination resulted from a Labor Department audit completed in 1979 (AF-L). In his Final Notice of Noncompliance, the Regional Administrator disallowed $10,944,823.42 in questioned costs. The disallowance was changed by amendment to $5,365,611.76 on September 21, 1981 (AF-E, F).

DES requested a hearing on October 8, 1981. The hearing was held in Washington, D.C. on February 8, 1983, at which time the parties were afforded an opportunity to present

relevant evidence and to examine and cross-examine witnesses. Briefs were authorized for mailing on April 21, 1983 and were received from both parties.

Findings of Fact and Conclusions of Law

Prior to and subsequent to the hearing in this matter, the parties conducted negotiations which resulted in the settlement of certain contested costs. At the hearing, the Court was informed that the disallowance had been reduced as a result of the settlements to approximately $442,000.00 (Tr. 5, 10). The post-hearing discussions resulted in additional settlements and in further reductions in the disallowance as indicated by a stipulation of the parties entered into on May 10, 1983. The parties have stipulated that the costs questioned in Finding A-2 have been resolved and are no longer at issue. They further stipulated that the following sums remain unresolved:

Finding B-4

JOURNAL ENTRY NO.	AMOUNT
JE 11-76-2 Job Corps	$ 3,911.40
JE 3-77-7 Job Corps	2,619.83
JE 6-77-2 Job Corps	57.04
JE 9-77-14 CETA	34,863.23
JE 6-77-3 CETA	7,382.40
JE 9-77-16 ESAP	8,866.76
JE 9-77-21 ESAP	4,083.11
JE 9-77-18 CETA JEEP	202.38
Subtotal	$61,985.25

Finding B-8

Public Employees Retirement System	$14,630.00
Total Unresolved	$76,615.25

However, in its brief, DES has conceded its liability for repayment of the funds represented by JE 6-77-3, JE 9-77-16 and JE 9-77-21 (Brief at 4). Thus, the amount remaining at issue under Finding B-4 is $41,652.98 and the total amount still at issue in this litigation is $56,282.98.

The costs disallowed in Finding B-4 and B-8 are treated separately below.

Finding B-4: Undocumented Transfer of Costs Among Fund Ledgers

With reference to the first three cost items which involve a total disallowance of $6,588.27, it is the position of DES that the Job Corps funds were generated by a contract with the Federal Government and were not grant monies. Accordingly, it is argued that the audit reached too far when it questioned the State's handling of these funds. The purpose of the audit was to monitor the use of grant monies and, therefore, funds generated in some other fashion would not be within the ambit of the audit and would not be the proper subject of disallowance by the Regional Administrator. However, the State has failed to produce persuasive evidence demonstrating that these funds were actually generated by a contract with the Department of Labor.

The Assistant Employment Security Director, Raymond M. Blizzard, testified on behalf of the State of West Virginia. He stated that the Job Corps funds were earned under a contract which guaranteed earnings of a given amount even when the State performed services requiring a lesser amount (Tr. 74-79). He further testified that once these funds were "earned," the State was free to use them in any manner deemed appropriate by State officials (Tr. 79).

Mr. Blizzard's testimony by itself is not, however, sufficiently probative to resolve this question in favor of West Virginia. Thus, the record does not reflect that Mr. Blizzard had personal knowledge of the terms of the alleged contract, or that he had read the contract or that he had consulted with a lawyer regarding the terms of the contract.

In view of the foregoing and in the absence in the evidentiary record of the contract in question, it is not possible to attach enough credibility to Mr. Blizzard's testimony to sustain West Virginia's position in this respect. Thus, there is no way to evaluate the basis for his understanding of the arrangement between DES and the Labor Department. Accordingly, I find that there is no credible evidence to support the State's contention that the Job Corps funds were contract monies as opposed to grant monies.

The Job Corps monies were actually transferred in effect from one fiscal year to another and in view of the conclusion reached above that the questioned funds were grant monies, it must now be determined whether the transfer of these funds among fund ledgers violated a duty imposed upon grantees as a condition for receiving federal assistance. The Department of Labor and DES appear to agree that the use of federal funds is controlled by Federal Management Circular 74-4 and the Employment Security Manual (Tr. 16, 18, 99). The Department of Labor argues on brief that DES has violated Section 0740 of the Employment Security Manual which provides:

> The amount of granted funds which may be obligated during any period for which obligational authority is provided to a state agency shall be limited to the amount authorized for that period. (Government Exhibit 5)

The Labor Department contends that this provision has been defeated by the unauthorized shifting of funds among fund ledgers. It further argues that DES violated Chapter II, Section VI of ETA Handbook No. 362 which requires documentation to support such transfers (Tr. 29-30; AF-L at 51).

Upon a review of the entire record, I find that DES has not provided documentation to support these transfers. I also find that the transfers were unauthorized and not in conformance with the regulations governing cost accounting for federal grants. Accordingly, I conclude that the unauthorized and undocumented transfer of these funds was an unlawful use of federal funds and that the Regional Administrator's disallowance was therefore proper.

The next category for discussion is designated by the posting reference JE 9-77-14 which involves a disallowance of $34,863.23. The Department of Labor argues with respect to this category that DES transferred funds among fund ledgers thus spending funds appropriated for one purpose for another purpose. DOL argues that DES offered no documentation or explanation to justify the transfer.

DES offered testimony to show that the funds in this category actually represented reversing entries used to correct earlier errors in accounting procedure (Tr. 81-82). The testimony on behalf of the State is however too vague and inconclusive to support West Virginia's contention. Mr. Blizzard, who testified regarding this matter, failed to identify with sufficient particularity when funds were transferred originally from Employment Service accounts to CETA accounts. Thus, the witness failed to specifically identify

which entries were in error and hence there is no way to assess the validity of his assertions. It is necessary to establish the facts with particularly in order to demonstrate that the entry referred to in his testimony, which transferred funds from CETA to Employment Service accounts, was actually a reversing entry. In the absence of this link, Mr. Blizzard's testimony amounts to nothing more than an unsupported conclusion. In view of the foregoing, I find that the disallowance was proper.

The last category questioned in Finding B-4 is the $202.38 item designated by the posting reference JE 9-77-18. In this instance, money was transferred from the CETA JEEP fund ledger to the ES Grants fund ledger (West Virginia Exhibit 10). The State's sole explanation for this transfer was that it was necessary due to a shortage and that the two programs were "related" (Tr. 89-90). Clearly, this is not an adequate justification for the transfer of funds and was in violation of the provisions of the Employment Security Manual and the Federal Management Circular which DES concedes are governing authority regarding these matters (Tr. 99). Accordingly, it is concluded that the disallowance under this category was proper and it is affirmed.

Finding B-8: Inequities in Distribution of Administrative Costs of the Public Employees Retirement System

The Regional Administrator disallowed $14,630.00 on the grounds that the West Virginia Department of Employment Security had been assessed more for the cost of the retirement system than nonfederally-funded State agencies. It is the Regional Administrator's position that pursuant to Section 1081 of the Employment Security Manual, grantees must be given the same treatment as State agencies not receiving federal funds. The Labor Department's auditor testified that the Department of Employment Security was assessed $5.00 per employee for the administration of the retirement sytem, whereas other State agencies were assessed less than $5.00 (Tr. 32-33). The auditor was unable to specify exactly how much less other State agencies were assessed for this purpose.

The testimony of DES on this point was to the contrary. Mr. Blizzard testified that all agencies, regardless of their source of funding, pay the same amount per employee for administration of the retirement system (Tr. 91-93).

It is clear from reviewing the auditor's report, the notices of noncompliance and the various replies of the State of West Virginia that this issue involves many complex factors which have not been fully developed on this record. For

example, the record does not explain adequately the basis for the auditor's determination. Nor does it explain why the auditor was unable to calculate how much less other agencies were assessed. Moreover, the explanations supplied by West Virginia are not documented and West Virginia's testimony simply amounts to a denial of the charges leveled by ETA.

In order to evaluate the significance of the complete lack of documentation with respect to this particular matter, it should be initially noted that it is self-evident that the recipient of federal funds must be held accountable for the use of the funds. Thus, Section 0600 of Part IV of the Employment Security Manual provides as follows:

Accounting of Granted Funds

> Standard. Each state employment security agency shall establish and maintain a cost accounting system as prescribed by the Manpower Administration (showing receipts, and expenditures of the State agency with substantiating records and vouchers) and will adequately supply the information required (a) in the financial reports rendered to the Manpower Administration, and (b) for post-audit of expenditures by the Federal, or other certified auditors. (Government Exhibit 4).

The administrative file contains evidence indicating that the grantee's accounting records were so poorly maintained that costly and inefficient reconstruction of data was necessary to reach any conclusions regarding the use of federal funds. (See, e.g., AF-G at 5.) Even this process of reconstruction has left some matters in doubt. It is not unreasonable to condition the receipt of federal funds on the grantee's ability to account for the use of those funds. With regard to this particular issue, it is not sufficient for Mr. Blizzard to testify that all agencies are assessed the same amount. Some further explanation or documentation is necessary to demonstrate that other agencies were in fact assessed $5.00 per person and that the concerns of the auditor and Regional Administrator were unwarranted. Absent such evidence, the disallowance must be affirmed.

ORDER

IT IS THEREFORE ORDERED that the decision of the Regional Administrator is affirmed and the State of West Virginia is hereby directed to reimburse $56,282.98 to the Department of Labor.

IT IS FURTHER ORDERED that the payment of this judgment shall not involve the use of federal funds.

William H. Dapper

WILLIAM H. DAPPER
Administrative Law Judge

Dated: MAY 25 1983
Washington, D.C.

WHD/paw

SERVICE SHEET

CASE NAME: West Virginia Department of Employment Security

CASE NO.: 82-WPA-30

TITLE OF DOCUMENT: DECISION AND ORDER

A copy of the above document was sent to the following parties on MAY 25 1983.

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