

DATE: January 30, 1995

CASE NOS.: 90-JTP-29
91-JTP-11
92-JTP-34

IN THE MATTER OF

COMMISSIONER, EMPLOYMENT SECURITY
OF THE STATE OF WASHINGTON,
COMPLAINANT,

V.

U.S DEPARTMENT OF LABOR,
RESPONDENT.

Appearances:

Elizabeth Erwin, Esq.
For the Complainant

Gary Bernstecker, Esq.
For the Respondent

BEFORE: THEODOR P. VON BRAND
Administrative Law Judge

DECISION AND ORDER

PRELIMINARY STATEMENT

These cases brought under the Joint Partnership Training Act (JTPA), 29 U.S.C. § 1501 et seq. are proceedings brought by the U.S. Department of Labor (DOL) to collect in excess of \$2,600,000.00 from the State of Washington for allegedly misappropriated funds. Specifically, this dispute involves expenditures by the State's Employment Security Department of 8 percent set aside funds under Section 123 of the Act for job

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training and employment programs for program years 1984-1989.

The Grant Officer's final determinations of June 13, 1990, November 21, 1990, and July 22, 1990, respectively disallowed expenditures of \$517,127.00, \$1,449,345.00, and \$690,828.00. The State of Washington filed timely appeals from these disallowances.

The disallowed funds in question were spent for employment generating activities (EGA) or economic development. Respondent, the U.S. Department of Labor (DOL) urges the disallowances should be upheld since the State failed to demonstrate that the funds in question were expended on direct services to JTPA enrolled participants such as education, training, or related services, as required by Section 123 of the Act.

EALJ000357

The primary issue presented by this case is one of first impression, namely, whether Section 123 in the relevant period permitted expenditure of 8 percent funds on employment generating activity and economic development or whether such expenditures should have been confined to payments for services specifically directed to enrolled participants under the Act.

In the event that there is an adverse decision on this issue, the State urges on the basis of estoppel and related theories that _recoupment of these expenditures should be waived or that at minimum that the State should be permitted to offset these expenditures with stand in costs in the form of matching funds which it has contributed. In addition, the State further contends that in any event this proceeding should be dismissed because DOL denied it due process in the audit resolution process.

Findings of Fact

The State Audits and the Related Final Determinations by the Grant Officers in Issue Here

Case No. 90-JTP-29

1. The State auditor in June of 1989 completed a single audit of Federal funds expended by the State of Washington (DOL Exhibit 1 at 43 et seq.). In that audit the State auditor questioned the expenditure of JTPA 8 percent funds in the Program Year 1988 (July 1, 1987-June 30, 1988) in the amount of \$517,127.00. The auditor's findings in that respect involved eight contracts awarded by the State Board of Education. He questioned those expenditures on the ground that the contracts resulted in expenditure of JTPA funds

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where benefits to targeted individuals were difficult if not impossible to document. (Id. at 60-62).

2. On June 13, 1990 the Grant Officer disallowed the \$517,127.00 previously questioned by the State auditor, finding insufficient documentation that the contracts provided benefits to participants in accordance with the requirements of Section 123 (Id. at 9, 13). The State of Washington appealed the Grant Officer's Final Determination on July 2, 1990 (Id. at 4). This matter was then docketed as Case No 90-JTP-29.

Case No. 91-JTP-11

3. In April 1988, the Washington State auditor issued an audit of the State Commission for Vocational Education for the period July 1, 1984 through June 30, 1986. (DOL Exhibit 2 at 187-188 et seq.). He questioned the expenditures of \$761,262.00 of Section 123 funds relating to 12 contracts let by the Commission for Vocational Education on the ground that benefits to targeted individuals were difficult, if not impossible, to document in the case of such expenditures. (Id. at 198-199). In June of 1988 the State auditor issued his single audit of the State of Washington for Fiscal Year July 1, 1986 through June 30, 1987. (Id. at 40). In the case of that audit he questioned the expenditure of \$686,882.00 of Section 123 JTPA funds for the same reasons. (Id. at 57-59).

4. The Grant Officer on November 21, 1990 issued a Final Determination covering both of the State audits and disallowed a

total of \$1,448,444.00 expended under 20 contracts awarded by the Washington State Commission for Vocational Education on the ground that such expenditures were not sufficiently documented to show the contracts provided benefits to JTPA participants as required by Section 123. The State appealed on December 7, 1990 and the case was docketed as 91-JTP-11. (Id. at 4, 10, 14-15).

Case No. 92-JTP-34

5. The Washington State auditor subsequently questioned the expenditure of \$676,657.00 of Section 123 funds. This State audit was received by the Employment Training Administration of DOL in January of 1992. The audit covered the period July 1, 1988 to June 30, 1990 and involved six contracts awarded by the State Board of Vocational Education. The auditor questioned these expenditures as not directly benefitting JTPA participants. (DOL Exhibit 3 pp. 92-94). The Grant Officer's Final Determination, dated July 22, 1992

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covering that audit, disallowed \$676,657.00 on the ground that funds expended under Section 123 may only be used on or behalf of JTPA eligible participants and that the contracts in question did not meet this requirement. (DOL Exhibit 3 at 32-33). On August 13, 1992, the State appealed this Final Determination and the case was docketed as Case No. 92-JTP-34. (DOL Exhibit 3 pp. 6-8).

The Job Training Partnership Act

Statutory Purpose

6. The Job Training Partnership Act (JTPA), 29 U.S.C. § 1501 et seq., was enacted on October 13, 1982. (Stipulated).

7. The purpose of the Job Training Partnership Act is to provide training to groups specifically targeted as having a need for assistance in the labor market to facilitate their overcoming barriers to employment. (Battle Dep. Exhibit 94 p. 13; Long Tr. 175).

8. JTPA clients typically were economically disadvantaged individuals lacking significant skills. The goal of the State was to get such individuals into entry level jobs for which they already had the requisite skills or in the interim to provide training to qualify such individuals for entry level employment. (Dunn 251-252).

9. JTPA differs from the Comprehensive Employment and Training Act (CETA) in that in the former the state is essentially the manager of the program. The intent was to decentralize programs as a general rule. (Battle Dep. Exhibit 94 p. 13).

Specific Statutory Provisions

10. JTPA Title II provides for allocation of funds to the states as follows: 78 percent of the total is to be distributed by formula to service delivery areas in the state (SDAs). The balance of 22 percent is referred to as set aside monies. One of the set asides are the 8 percent funds provided for by Section 123 of the Act to be used for education, coordination of grants, and to provide services to JTPA participants under the program. (Donahue 31). This set aside is 8 percent of the total Title II

allocation.[1] Not more than 20 percent of the 8 percent funds may be spent "to facilitate coordination of education and training services for eligible participants through such cooperative

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agreements." Section 123(a) (2).

11. At least 80 percent of the 8 percent funds shall be used

(1) to provide services for eligible participants through cooperative agreements between such State education agency or agencies, administrative entities in service delivery areas in the State, and (where appropriate) local educational agencies; ...

12. Section 123 further provides that not less than 75 percent (i.e. 75% of the 80%) of the funds available for activities under Section 123(a)(1) shall be extended for activities for economically disadvantaged individuals. .

13. DOL construes the statute as providing services and training for participants with 80 percent of the 8 percent funds and providing for coordination, training and services for participants with the remaining 20 percent. (Donahue 96).

14. Section 123(c)(1) provides as follows:

(c)(1) Funds available under this section may be used to provide education and training, including vocational education services, and related services to participants under title II. Such services may include services for offenders and other individuals whom the Governor determines require special assistance.

(Emphasis

supplied).

15. Section 204 of the Act provides in pertinent part:

Services which may be made available to youth and adults with funds provided under this title may include, but need not be limited to--

* * *

(19) employment generating activities to increase job opportunities for eligible individuals in the area,

* * *

(26) coordinated programs with other Federal employment-related activities, ...

16. According to the State Administrator, the 8 percent

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spending was authorized under Title I even though it used Title II program activities as allowable. (Wiggins 329).

17. Section 141 of the Act prohibits using JTPA funds for relocation of businesses unless the Secretary determines that such relocation will not result in an increase in unemployment in the area of original location or in any other area. In the view of the Administrator of the Office of Job Training Programs Section 143 also prohibits expenditure of 8% funds for economic development. (Battle Dep. 94 p. 25).

18. The set aside funds such as the 8% were attractive to the State because they were not tied to federally designated performance standards as were 18% of JTPA funds and thus were more flexible in terms of the uses to which they could be put. (Wiggins 291-292; Maul 653).

19. In 1992, JTPA was amended to prohibit economic generating activities and economic development. (Donahue 79).

Relevant Definitions

20. The Regulations define a "participant" as follows:

Participant means any individual who has (a) been determined eligible for participation upon intake; and (b) started receiving employment, training, or services (except post-termination services) funded under the Act following intake. Individuals who receive only outreach and/or intake and initial assessment services or post-program followup are excluded from this definition.
(20 C.F.R. § 626.4 (1992))

A participant is someone formally enrolled in the program. Someone who is eligible to be served but not served was considered to be JTPA eligible by the State. (Wiggins 446).

21. An eligible individual is a person who would be potentially involved in JTPA programs but is not necessarily enrolled or involved in the program. It is DOL's position that "an eligible participant" is an individual enrolled in a JTPA program. (Battle Exhibit 94 p. 16-17).

22. Employment generating activity may be training related to an employer's activity in an area or employer assistance in developing jobs. (Battle Dep. Exhibit 94 p. 16).

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23. Economic development, a broader concept, is assistance to employers to generate jobs. (Battle Dep. Exhibit 94 p. 22). It may relate to state or locality competition for plant locations. However, JTPA funds are not to be used for competition between localities or states for plant locations. (Battle Dep. 94 p. 23).

24. The terms "economic development and employment generating activity" have been used interchangeably. (Wiggins 332).

25. "Incubator" is a term describing the process of bringing startup businesses to a location where they can share various support services such as secretarial facilities, etc. (Donahue 101, Conant 139).

26. In a First Source Hiring Agreement, an employer agrees to hire at least a certain percentage of employees for the jobs created utilizing the JTPA system to recruit those employees. (Gowdey 609).

27. A first source hiring agreement was signed by business beneficiaries of the JTPA contracts or funds as, for example, a business benefitting from an incubator agreeing that they would consider job referrals from the private industry councils before they hired anyone else in filling any jobs created through a business incubator. (Conant 139).

State Agencies and Other Entities Involved in JTPA
Administration

28. Under JTPA the State did not run programs directly. This was delegated to local units of government, i.e., the counties. (Wiggins 265).

Employment Security Department

29. The Employment Security Department of the State of Washington (EMS) is the recipient of the Federal JTPA funds provided through the U.S. Department of Labor. The Employment Security Department was the designated administrative entity of the Governor; it transmitted the Governor's plan to the U.S. Department of Labor. (Wiggins 309).

State Board of Vocational Education

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30. The State Board of Vocational Education (SBVE) is a subrecipient for Section 123 funds pursuant to the Governor's executive order. SBVE was monitored by the Employment Security Department. (Long 183). It was established as the agency to administer the 8% grant. SBVE contracted with the service providers pursuant to their approved bid proposals. (Ortiz 455-456, 458).

31. The SBVE also monitored the service providers' contracts for compliance with the Act and regulations. (Long 182-183; Ortiz 460). The standards for review of SBVE by the Employment Security Department are set forth in SBVE's Monitoring Review Guide. (EX 105). Such reviews are conducted in detail. (EX 107-112). The performance reports pertaining to the JTPA contracts in the record also served a monitoring function. (E.g. EX 235).

State Job Training Coordinating Council

32. The State Job Training Coordinating Council plays a role in implementing the coordination function under the Act. (Gallwas 531). It's function was to set policy on administration of the JTPA. (Long 182). As the deliberative body, the State Coordinating Council was also to develop performance standards with respect to JTPA expenditures. (Wiggins 290).

33. The State Job Training Coordinating Council in addition had some startup responsibilities for JTPA. It had to review all job training plans, and recommend to the Governor a Coordination and Special Services Plan which outlined how the state wide money would be allocated and spent for a two-year period. (Wiggins 306-307). A draft of the plan was forwarded to the Commissioner of Employment Security, who in turn sent it to the Governor. The latter then forwarded the plan to the U.S. Department of Labor. (Wiggins 307). The State Job Training Coordinating Council was the forum for public discussion of JTPA issues. (Wiggins 307).

34. State officials felt they had more latitude in allocating 8 percent funds than in the case of the general funds under JTPA, so the money could be used for projects not necessarily directly

tied to training or placement. (Wiggins 300).

Private Industry Councils

35. A Private Industry Council (PIC) is a group of decision making officials at the local level, e.g., city or county. The

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membership is to be 51 percent business and it is to be chaired by a business member. It is supposed to be generally representative of the business community in the particular area. (Wiggins 275). The PICs decided which contracts were to be awarded and which groups would get emphasis in distribution of services, e.g., migrant workers. PICs also gave oversight to the performance of the contracts. (Wiggins 272). PICs may also procure training for workers, for example, through the community college system. (Gallwas 553).

36. The Tacoma-Pierce County Employment and Training Consortium's contract with the SBVE is illustrative of the PIC contracts involving 8% funds under consideration here. This PIC contracted with the SBVE to provide services such as incubators to small businesses, specialized surveys of a county's economy to assist businesses in planning and a business and industry training program with a community college. Small businesses taking advantage of the incubator projects were required to sign first source agreements whereby they agreed to advertise and consider referrals from the PIC before hiring anyone else in filling jobs created through the business incubators. (Conant 129, 138-139; EX 305) .[2]

37. The intent of the contract was to create jobs to which the PIC would refer JTPA participants. (Conant 142).

38. A Service Delivery Area (SDA) is an area. A Private Industry Council is the board that directs the program within the area. The terms are sometimes used interchangeably. (Wiggins 315). There are 12 SDAs in the state.

Job Service Centers

39. A Job Service Center is a place where people go look for jobs, sign up for unemployment insurance, look for jobs and get referral to training in the State. The Job Service Centers are operated by the State's Employment Security Department. (Gallwas 572-573). Most of the JTPA contracting is for Job Service Centers. PICs would contract their training dollars to the local labor exchange or Job Service Center. (Gallwas 539). JTPA eligible individuals were the first referrals by Job Service Centers and were almost exclusively the referrals for entry level jobs. (Gallwas 575).

The Training Network and the Business

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Resource Network

40. Gary Gallwas, employed by the Employment Security Department in the period 1984 to 1986, planned and started the Washington Training Network; this was an experiment to tie together the State agencies involved in economic development in the State with the JTPA program and all other education and training services

provided by the State of Washington. (Gallwas 523-524). Much of the emphasis was on economic development. The object was to place those needing jobs in positions created by economic development. (Gallwas 533).

41. The focus of the Training Network was to link job creation, job referral and training referral. (Gallwas 544). The number one goal was to get JTPA eligible participants into jobs. (Gallwas 544).[3]

42. One of the objectives under JTPA is to coordinate or bring together other federal programs such as economic development rehabilitative services and labor exchange services. In short, coordination was to be achieved between JTPA and related services. (Gallwas 531-532). A priority for the State was to set up a mechanism for referring JTPA participants or eligible individuals to jobs created by economic development. The Training Network was also to facilitate this process by providing necessary training. (Gallwas 532-535).

43. Late in 1986 and beginning 1987 the Training Network was combined with a new operation, the Business Resource Network (BRN). (Gallwas 524). It was staffed by EMS employees. (Donahue 40). The objective was again to tie together economic development and job creation with local JTPA programs. This also involved getting job orders from employers to place the unemployed. (Gallwas 525).

44. The BRN grew out of the Training Network; it provided a single stop service for employers who were interested in hiring JTPA participants; it tied together the State economic development efforts with all of the publicly funded employment and training programs in the State of Washington. It is an activity housed in the State's Employment Security Department. (Gallwas 571). The BRN as opposed to the Training Network made an effort to market its services to employers-as distinguished from waiting for referrals. (Gallwas 546, 554).

45. As a result of the Business Resource Network, training was provided to JTPA eligible individuals. (Gallwas 568). The intent of such contracts for the Training Network was to benefit

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JTPA eligible and JTPA participant find training. (Gallwas 586).

46. The Training Network was totally funded out of 8 percent funds. (Gallwas 581). The Business Resource Network was not totally funded out of 8 percent funds; the 8 percent contribution to its total budget was approximately 20 percent. (Gallwas 583).

47. Business Resource Network and Training Network contracts for 8 percent grants were disallowed. (Gallwas 566, 569-570).

Community Development Finance Unit

48. The goal of the Community Development Finance Unit (CDF) was to assist small businesses in getting financing, from sources such as the Small Business Administration. (Dunn 236, Gowdey 595-596, 600). The Community Development Finance Unit was financed by a combination of JTPA 8 percent funds and other funds provided by the Department of Community Development. (Gowdey 597-598). Small businesses were targeted because they were considered to be the type of business that created jobs. (Gowdey 598). No JTPA funds went to the businesses which were starting up but they were encouraged to use JTPA participants and programs as a cost saving

measure. (Thompson 70, Gowdey 601). The Community Development Finance Unit would steer businesses to the Training Network once they were in a position to hire. (Gowdey 606, see also Dunn 237). In some cases, the CDF required first source hiring agreements. (Gowdey 606, 608). To the extent that JTPA funds were involved the objective was to create jobs for JTPA participants with a career ladder. (Dunn 235-236). The intended beneficiaries of such job creation efforts were JTPA clients. (Dunn 238).

49. The Training Network was to work closely with the JTPA training community in the interim period from the time when loans were packaged and approved to the time positions became available in order to keep track of businesses benefitting from the loan program. Subsequently, the Business Resource Network performed this function. (Dunn 238-239, 246).

50. When CDF had a successful loan packaging effort, it would call the BRN which would be the first entity to sit down with the business to see what jobs were being created and what the requirements of the job were. BRN would then function as liaison with the PICs and the job service centers to get JTPA eligible individuals or participants into a job. (Dunn 249-250, 252).

51. The Business Resource Network would work with the Job Service Centers and the PICs as the referral entities to get the

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workers that businesses need for the new jobs created. (Dunn 249).

52. The contracts between the CDF and the SBVE contained a subcontract with the National Development Council. This subcontract was in the amount of \$80,000. (Dunn 240-241). The National Development Council is a non-profit organization formed to assist local and state agencies in securing loan assistance for businesses. It provided training for the CDF program staff and assisted in putting more complex loan packages together. (Dunn 240, 253). This arrangement was kept in effect on a yearly basis. (Dunn 242).

53. CDF also worked with Economic Development Councils, which are local private non-profit economic development organizations with the objective of job creation. (Lotto 201). In the case of the Thurston County Economic Development Council it was engaged in small business startups, business expansions, job retention and recruiting firms outside the County. (Lotto 201-202). The Economic Development Councils worked with the Community Development Finance Unit in securing financing for small businesses. (Lotto 206-207).

54. The JTPA process helped small businesses both on the training side by paying part of the training cost when an employee comes on board and in the recruitment process. (Lotto 214).

55. Once a loan was made or approved, the Community Development Finance Unit estimated the number of jobs that would be created or retained. (Gowdey 612-613). The CDF could not guarantee that the end product of its financing activities would result in jobs. The objective however was to create or retain jobs and to work with employers once financing had been approved to funnel JTPA or Block Grant eligible individuals to those jobs. (Gowdey 618).

56. The Community Development Finance Unit was in part funded by 8 percent JTPA funds. The balance of the funds came out of the State's Department of Community Development. (Dunn 239; Gowdey 627).

57. Community Development Finance Unit contracts awarded under the 8 percent grants have been disallowed by the Department of Labor. (Gowdey 611).

58. The Department of Labor was aware that the 8% contracts involving CDF were being used as described above for economic development or job creation. (Dunn 246-247). As noted by the first administrator of the Community Development Finance Program, Susan Dunn:

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Q How did they know that:

A Everything from visits with our [DOL] field representative -- I mean, he came down on a regular basis to visit with us. And we were extremely proud of the Community Development Finance Program and the Business Resource Network. I mean, we told everyone about this because we though we were really
doing something in the spirit of the law, we thought we were doing something that was really making a difference. I mean, we had newsletters, we had brochures, we even
talked about it at national meetings where the Department of Labor was there. .Not only
that, but in their compliance reviews, they looked at the contracts that the Commission
for Vocational Education had with the Department of Community Development and the
National Development Council piece. That was all evident. Contrary to trying to keep
this a secret or under wraps, we were out marketing this thing, you know, right and left, at council meetings where they came and
listened to the debate about what would happen with the 8 percent funds. And I can remember standing up, explaining probably more than one
year to council members exactly what the Community Development Finance Program did and why the Governor was so supportive of it, and the Training Network. There was no way
they couldn't have known about it and the specifics of it.

(Dunn 246-247) (Emphasis supplied)

Job Placement or Retention as a Result of the Disputed Contracts

59. The parties agreed with respect to 33 of the 39 disallowed contracts as to the results achieved in terms of JTP participant placement, JTPA eligible individual placement or jobs retained. (See Appendix A incorporated in this finding by reference.)

60. **The placement results are disputed in the case of the following contracts:**

85-8-40-405

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89-8-77-503

89-a-77-501
89-a-77-408
86-a-55-508
85-a-40-410

Contract No. 85-B-40-405

61. The record shows through the testimony of Vincent Ortiz that the 24 individuals noted as placed were JTP participants. (Tr. 479) .[4]

Contract No. 89-B-77-503

62. It is undisputed that 39 JTPA participants were hired as a result of this contract.[5] The Blegen testimony shows that the 30 individuals recorded as placed on EX 123 were participants. (Blegen 729). Accordingly, a total of 69 participants were placed as a result of this contract.

Contract No. 89-8-77-501

63. The Grant Officer's objection is correct, but 6 participants, according to the relevant records, were hired subsequent to the grant.[6] (EX 202 p. 1). There is no dispute regarding the additional 44 participants recorded as hired and this is supported by the transcript and exhibits. (Blegen 743).

Contract No. 89-B-77-408

64. The record does not permit a finding that the 19 challenged individuals were in fact JTPA participants. (See EX 196, 193[7] p. 22; Ortiz 510-511). The funding for the remaining 33 claimed participants is not in issue in this proceeding. The Grant Officer does not dispute that 71 JTPA eligible individuals were placed.[8]

Contract No. 86-8-55-508

65. The record shows that the 17 individuals placed were unemployed and probably eligible.[9] (EX.300 p. 17).

Contract No. 85-8-40-410

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66. The State claims that 122 participants were placed as a result of this contract. (EX 267, Ortiz 494). The Grant Officer's objection that the number is inflated because of double counting[10] is rejected. A check of the relevant Social Security numbers and names refutes that contention. (EX 267 pp. 60-61). 122 participants were placed as a result of this contract.

Contracts Resulting in Participant Placement

67.

Contract No.
Participants Placed
Amount of JTPA Funds
in Dispute

\$60,000.00	85-8-40-403 8
\$58,199.33	85-8-50-405 24[11]
\$59,989.99	85-8-40-406 57[12]
\$54,802.00	85-8-40-410 122
\$48,049.00	85-8-50-404 6
\$27,467.00	87-8-00-406 28[13]
\$30,633.00	87-8-00-410 10
\$14,233.00	88-8-44-405 6[14]
\$19,917.00	88-8-44-003 22
\$54,457.00	88-8-44-006 20
\$43,642.00	88-8-44-007 19[15]
\$57,372.00	88-8-44-068 20

	88-8-44-011 14 [16]
\$56,047.00	
	89-8-77-406 6
\$54,128.61	
	89-8-77-501 56
\$187,656.44	
	89-8-77-503 69
\$88,757.18	
	90-8-88-503 33 [17]
\$107,593.03	
TOTAL	520 [18] \$1,022,943.58

Contracts Resulting in Disadvantaged JTPA
Eligible Individuals Being Placed

68.

	Contract No. Eligible Individuals Placed Amount of JTPA Funds in Dispute
	85-8-40-408 49 [19]
\$57,719.34	
	85-8-40-411 10 [20]
\$51,728.41	
	86-8-55-508 17
\$28,253.00	
	87-8-00-407 1 [21]

\$26,466.00

87-8-00-408
38

\$44,968.00

88-8-55-001
383

\$168,511.00

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88-8-55-004
278

\$100,948.00

90-8-88-501
147 [22]

\$199,628.90

TOTAL

\$678,222.65

Contracts Where Evidence Does not Permit
Determination that Participants or JTPA
Eligible Individuals were Placed

69.

Contract No.
Jobs Developed
Amount of JTPA Funds
in Dispute

85-8-40-401
450

\$56,303.73

85-8-40-407
33

\$60,000.00

86-B-55-501
48

\$27,700.00

86-8-44-407
19

\$40,046.00	
	86-8-55-504 49
\$81,809.00	
	87-8-00-500 3
\$160,000.00	
	86-8-22-200 48
\$31,787.00	
	89-8-77-408 123[23]
\$38,892.81	
TOTAL	
\$496,538.54	

Contracts Resulting in No Placements

70.

	Contract No.
Amount of JTPA Funds in Dispute	
\$60,000.00	85-8-40-412
\$156,923.56	86-8-55-500
\$57,895.45	86-21-5-551
\$40,336.00	86-8-44-406
\$88,350.00	87-TRN(033)-NZ
\$38,718.00	87-8-00-501
TOTAL	
\$442,223.01	

Submittal and Approval of the State's
Governor's Coordination and Special Services Plans

71. Section 121 of the Act requires a State seeking financial assistance under the Act to submit a Governor's Coordination and Special Services Plan (GCSSP) for two program years to the Secretary of Labor. Such plans according to the statute are to be approved by the Secretary unless the Secretary determines that it does not comply with specific provisions of the Act.

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The GCSSP for Program Years 1984-1985

72. Washington's GCSSP submitted in May 1984 for program years 1984 and 1985 stated in pertinent part as follows:

The Governor has identified four statewide needs which are to be addressed by 8% program funds, 80 percent of the allocation, at the ratio prescribed:

- Offenders, with emphasis on adult offenders 35%
 - Limited English speaking individuals 10%
 - Economic development 25%
 - Special projects, with emphasis on meeting the needs of women, youth, and minorities 30%
- (EX 5 p. 9)

73. The Department of Labor failed to raise any objections to the plan. Accordingly, it must be deemed as approved. (See EX 5 p. 1).

74. The GCSSP for program years 1984 and 1985 with modifications states for 1985 in pertinent part as follows:

The Governor has identified four statewide needs which are to be addressed by 8% program funds.

* * *

4. 24 percent of the funds to address locally significant barriers to development of job opportunities, i.e., the need for linkages with economic development agencies, absence of training opportunities in a specific demand occupation, or expansion of education opportunities in a rural areas. [sic] Private industry councils (PICs) should designate such barriers, or combinations of barriers, that present a particular problem in their area. Problems may also include, based on analysis on services to date, that a significant target population, with multiple barriers to employment is not being adequately served.

(EX 6 p. 9)

75. On July 1, 1985, the State submitted to the Department of

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Labor certain modifications for program years 1984 and 1985 including the following:

Modification No. 3 - Page 8 - New Section

The specific activities of the SDAs have been described in the Annual Report to the Governor on Employment and Training in Washington. However, it is possible to characterize the effort of Washington's SDAs generally. Both at the state and the SDA level, there is a strong emphasis on economic development. I[n] keeping with this emphasis, the Governor has designated this area as one of this year's target areas for 8% Education Coordination and Grants funds. Further, in keeping with this emphasis, the state has ruled that employment generating activities may be charged to support services.

(EX 7) (Emphasis

supplied)

76. On November 7, 1985 the Grant Officer Edward Tomchik approved the GCSSP as in overall compliance with the Act. (EX 8).

The GCSSP for Program Years 1986-1987

77. The GCSSP for program years 1986 and 1978 stated in pertinent part as follows with respect to 8% funds:

EDUCATION COORDINATION AND GRANTS (8%)

The Governor has assigned his role in planning, targeting, and oversight responsibility for education coordination and service activities to the Employment Security Department. A state education agency, the Commission for Vocational Education, has been designated by the Governor as the entity to administer the 8% funds. In compliance with the Act, the coordination funds, 20 percent of the Education Coordination and Grants funds, will be used to strengthen linkages between local education agencies, the Service Delivery Areas, and other employment and training providers.

The Council has identified three programs to be addressed by Program Year 1986 funds.

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1. Thirty percent of the funds to be distributed to the Service Delivery Areas (SDAs) by formula to address PIC designated level projects. The SDA grant agreement would support economic development efforts and/or deliver job training, educational services and participant support to individuals and groups who cannot be adequately served under other PIC administered programs.
2. Thirty percent of the funds for Governor's Discretionary Projects, including services in

coordination with Team Washington efforts for economically distressed communities and exemplary programs for distressed groups such as minority youth.

(EX 9 p. 12) (Emphasis supplied)

78. Dolores Battle, Administrator Office of Job Training Programs approved the GCSSP on December 10, 1986. (EX 10).

79. The GCSSP modifications for program year 1987 stated as follows with respect to 8% funds:

Funding for PIC designated local projects. Funds are to be made available to the 12 Service Delivery Areas using the Title II-A (78%) formula to establish the SDA allocations. The SDA grant agreement will provide for such services as basic education, vocational exploration, and skills training to economically disadvantaged with an emphasis on Family Independence Program (FIP) eligible participants. Employment generating and job creation activities in support of local economic development efforts are also allowable since most new jobs are at or near entry level.

(EX 11 p. 12) (Emphasis supplied)

The GCSSP for Program Years 1988 and 1989

80. The GCSSP for program years 1988 and 1989 was submitted to the Administrator of OJTP on May 20, 1988. With respect to 80% of the 8% funds, the GCSSP stated "Activities will be consistent with the Governor's economic development agenda strategy to develop the state's human resources." (EX 12 p. 13). No questions were raised by OJTP concerning the expenditure of 8% funds in the Administrator's response of July 1, 1988. (EX 13).

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81. On June 30, 1989, the State submitted a modification of the GCSSP for program year 1989. It stated in relevant part with respect to 80% of the 8% funds:

The State Job Training Coordinating Council supports the Governor's intent to fund discretionary statewide JTPA 8% projects designed to improve employment opportunities for targeted individuals.

The following criteria will be used to judge project funding:

* * *

Measuring results--outcomes can be measured and reported; results can be documented and can show that JTPA eligible individuals benefit from the expenditures.

(EX 15 p. 13) (Emphasis supplied)

82. On August 9, 1989, the Administrator OJTP approved the modification for program year 1989 in relevant part as follows:

We have reviewed the modification which:

* * *

added clarifying language under the eight percent Education Coordination and Grants Section;

* * *

In accordance with Section 627.2 of the Job Training Partnership Act regulations, we find the document to be in general compliance with the provisions of the Act. Enclosed is a copy of the modification with the State's identifying number.

Thank you for keeping us informed of the changes.
(EX 16)

Compliance Reviews

83. Compliance reviews were typically performed by the Regional Office staff of the Department of Labor reviewing the State's policies and procedures to ensure compliance with the Act. (Dunn 234).

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84. The purpose of compliance reports

. . . is to focus State level management's attention on systems, procedures, and policies that do not comply with Federal requirements. In this sense, the ultimate objective of the review and the report is State compliance with requirements.

(EX 33)

85. DOL procedures specify, moreover, that it is essential that the State receives prompt feedback from such reviews. (Id.).

86. As part of the compliance review, the Department of Labor staff reviewed Council minutes[24] and reviewed the contracts. The contracts involving the 8% funds were typically the ones that everyone had the most interest in. (Dunn 229).

87. Compliance review dated January 9, 1986 showed with respect to the 8% funding, "the 8% grants were in compliance with the Act." (EX 25 p. 2). A second 8% eligibility compliance review also done in December 1985 showed the following: "The State's policies and procedures concerning eligibility determinations for Titles II-A, II-B, and Other Programs (3% and 8%) are consistent with the Act and regulations." (EX 28).

88. No compliance review in the period 1984-1989 cited the Employment Security Commission or the State Board for Vocational Education for using the 8% funds inappropriately. The State's program pertaining to 8% funds was reviewed as part of the compliance review. (Dunn 230-231).

89. The Washington officials view the compliance reviews in the same light as they would audits. They looked for advice from the DOL staff and such information was relied on for subsequent planning efforts with respect to JTPA programs. (Dunn 233).

State-Job Training Coordinating Council Meetings

90. The linkage of 8% funds to economic development and employment and generating activities was frequently discussed at meetings of the State Coordinating Council in the relevant period and such discussions were recorded in the minutes of that organization. Such meetings were often attended by the area representative of DOL's Regional Office, Orville Arbogast, and by Region X's Regional Administrator. The minutes moreover were

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mailed to Orville Arbogast and at the Region's request another copy was sent directly to DOL's Regional Administrator. (See generally EX 17, Wiggins 391-393). On the basis of these SJTCC meetings and minutes the responsible Regional officials of DOL had to be aware of the expenditure of 8% funds for employment generating activities and for economic development of the type which were subsequently disallowed by the Grant Officer's Final Determinations in issue here.

Annual Reports

91. The State Job Training Coordinating Council submitted Annual Reports to the Governor on programs funded under the JTPA (EX 18). Among other topics the reports covered use of the 8% grants under the Act. The Annual Reports were submitted to the DOL Regional Office and to the DOL Employment Training Administration in Washington, D.C. (EX 18-23; Wiggins 421, 424). Orville Arbogast, DOL's Regional Area Representative complimented Ross Wiggins, a state official, on one of the reports. (Wiggins 423-424).

92. The Annual Report for 1985 stated in pertinent part as follows:

State Education Coordination and Grants (8%)

* * *

3. Employment and training services to economically distressed communities in coordination with the job creation efforts of the ESD, the Department of Community Development, and the Department of Trade and Economic Development.

Examples:

Funding support to a Training Network established to increase awareness and use of work force-related programs, and services available to Washington state employers through the outreach of a centralized marketing team.

(EX 19 p. 17; Wiggins 424-425) (Emphasis in original)

93. EX 20 is the 1986 Annual Report described use of 8% funds

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for the types of economic development and employment generating funding in issue here in particular detail. For example:

Private Industry Council of Snohomish County (SDA IV) - The PIC provided entrepreneurial training, business start-up and follow-up assistance to low income women living in rural areas of the county. The PIC also approved a project which increased job referrals for JTPA eligible participants by assisting small businesses compete for government procurement contracts.

* * * *

Southwest Washington Consortium (SDA VII) - A project was offered to increase employment opportunities for low income residents in a four-county area through support of employment generating activities.

The Pentad PIC (SDA VIII) - The PIC contracted with two regional economic development councils for employment generating services. Both projects created new private-sector opportunities for JTPA eligible individuals and helped business retain existing jobs.

The Tri-Valley Consortium (SDA IX) - The Kittitas-Yakima Resource Conservation and Economic Development District was contracted to conduct a market survey, analyze the need for a small business incubator and to work on tourism development with the aim of increasing job creation in the three-county area.

* * * *

Spokane City-County Employment and Training Consortium (SDA XII) - The PIC contracted with the Eastern Washington University for employment generating activities at the Spokane Incubator Center. The project helped to expand current businesses. It also created JTPA employment contracts and promoted export-oriented business development.

(EX 20 pp. 18-19) (Emphasis

supplied)

DOL Oversight of the State of Washington's
Administration of the JTPA

1. The Process

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94. Dolores Battle is the Administrator of DOL's Office of Job Training Programs (OJTP). Her office reviews the GCSSPs (Battle Deposition EX 94 pp. 4, 10).

95. Before 1987, when a GCSSP was received from a state, someone in OJTP would review the plan for compliance with the Act and make a recommendation to Mr. Tomchik, the Grant Officer's Supervisor as to whether the plan conformed to the requirements of the Act. Mr. Tomchik would then issue letters informing the states as to whether the plan was in compliance. (Battle Dep. EX 94 p. 52).

96. Compliance Reviews performed by Regional Offices go to

the Office of Regional Management who transmit it to the Office of Job Training Programs or the Office of Financial Administration and Management of which the grant officer is a part. (Battle EX 94 p. 43).

97. In the audit resolution process the DOL Regional Offices are asked for input on both initial and final determinations. (Grubb Dep. EX 96 pp. 11-12; Donahue 93). The process is that the Regional office will make a recommendation; the National Grant Office makes the decision. (Donahue 105).

Evolution of DOL's Position Re Economic
Development and Employment Generating Activities

The Regional Office

98. The DOL Regional Office's Draft of a Final Determination for the year ending June 30, 1987 stated in pertinent part:

The basic premise for ETA's determination is that there is great flexibility in the 25% of the 80% (of the 8% funds), which is not specifically designated for services and training of persons who are economically disadvantaged. Within the 25%, training and any of the services of Section 204 can be provided to individuals, regardless of income. Additionally, services authorized under Section 204 of the Act include several "non-participant specific" functions which can be supportive of economic development activities.

(EX 13 attached to Grubb Dep. EX 96)

99. The Region in that draft recommended approval of a number of activities including incubator projects as allowable activities.

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(Donahue 102-103). As conceded by DOL's sole witness at the hearing there was disagreement on these points across the board between DOL's National and Regional Offices. (Donahue 106).

100. On February 24, 1989 Ben Brown, the Regional Administrator wrote to David O. Williams, Administrator Financial and Administrative Management stating in pertinent part:

We find that many of the issues raised in this audit are not adequately covered in current policy; therefore, we highly recommend that the several key policy questions be addressed immediately. The questions which arise from this audit can be summarized as follows:

1. Section 123(c)(3) requires only that 75 percent of the 80 percent be spent for services and training for economically disadvantaged individuals. What constraints govern the remaining 25 percent? Is training for small business allowable? Is management assistance for new and/or expanding business permitted? Would the non-participant specific services permitted under Section 204 have to benefit the eligible population (since the 25 percent is an exception)?
2. Where are the outer edges of allowable employment generating activities? Under

what conditions should JTPA be permitted to fund development and operation of incubator projects? Are costs associated with building design and renovation permitted?

3. Can JTPA support activities generally carried out by the economic development system, if there is some connection between the jobs created and JTPA? Can JTPA fund loan packaging functions? Is tourism promotion appropriate?
4. Does the "end" of increased jobs for the eligible population (and the general population) justify almost any "means"? (EX 8 attached to Grubb Dep. EX 96) (Emphasis supplied).

101. The DOL policy on these points as late as December 1989 had not been clearly communicated to the Regional Office. (DOL EX

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2 p. 229; EX 14 attached to Grubb Dep. EX 96). In a memorandum dated December 7, 1989 to his superior, the Regional Administrator, referring to certain of the contracts in issue here, stated "we need to know under what policy we are to review these findings and make our recommendations for allowance/disallowance of the questioned costs." (Id.) In short, at that time the Regional Administrator stated he was unaware of Department policy prohibiting economic development with 8% funds. (Donahue 95).

102. As recently as July 1992, Region X of DOL recommended approval for the employment generating activities of the BRN. Terry Gribben of Region X in a memorandum to the DOL's National Office of Grants and Contract Management stated in pertinent part:

The review of the documents (sample of what the State could find in the limited time available) shows a clear correlation between the activity of BRN and the placement of JTPA participants (not JTPA eligible but actually enrolled JTPA participants) in a training activity and/or into unsubsidized employment. Therefore, we recommend that the Grant Office give strong consideration to allowing the questioned costs for the Business Resource Network for Programs Years 1988 and 1989 (\$88,757.18 and \$107,593.03 respectively). (Terry Gribben Memo to Donahue DOL EX 3 p. 125, July 13, 1992; Donahue Tr. 41-42) (Emphasis supplied).

103. Orville Arbogast, of DOL'S Region X, was contacted by Emily Duncan of the Private Industry Council for Snohomish County for advice on planned employment generating activities utilizing 8% funds. His advice in effect approved the project. Ms. Duncan recorded the contact as follows:

In late February or early March of 1987, but definitely prior to March 19, 1987, I called Orville Arbogast of the Department of Labor regarding a statewide procurement project which would assist Washington businesses in procuring government contracts in return for job development/referrals for JTPA-eligible participants.

I called Mr. Arbogast because Employment Security was involved in the project as well as other Service Delivery Areas, and I wished to make certain that the Department

of Labor felt comfortable with the project. I specifically asked Mr. Arbogast if the project was an allowable cost and he immediately referred me to Section 204 of the Job Training Partnership Act, "Use of Funds". He said (or words to that effect) that he knew it was

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allowable under Item 19 of Section 204. We also discussed its relevance to Items 18, 21 and 26 of the same section. The matching funds for this project were from a Defense Logistics Agency, Department of Defense, grant which was in fact awarded to Washington State University.

Mr. Arbogast's response was so positive that I felt quite comfortable in writing my letter of March 19, 1987, to Larry Malo outlining the Project for him as he had requested. It was my understanding that the outline was to serve as a briefing paper for Commissioner Turner and other Employment Security management personnel.

(Duncan 638-642; EX 84)

DOL's National Office

Office of Job Training Programs

104. Dolores Battle of OJTP conceded that approval of the State's GCSSP for 1986 and 1987 indicated that such approval of necessity embraced the economic development activities disclosed in the plan:

Q If a plan received from a state referenced the use of 8% money for economic development, would that plan today be approved?

A No.

Q If a plan in 1986 and 1987 referenced the use of 8% funds for economic development, would that plan have been approved?

A It might have been.

Q Why is that?

A As much of this discussion today has indicated, the concerns about economic development and employment generating assistance evolved over a period of time.

In the first couple of years that we received state plans I don't think our review was as detailed as it has become subsequently on those issues.

We tend to ask questions about activities that

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we have any questions about now. We asked questions then too, but we didn't ask as many about economic development and employment generating assistance or even the whole 8% area as we do now, as we have in recent years.

Q When you said that the plan may have been approved, doesn't that mean then that economic development would have been allowed? Isn't that the same thing?

A I guess. I mean what they said in there, I guess, would have been one could assume it was allowed, yes.

(Battle EX 94 pp 53-54) (Emphasis supplied)

105. In a letter dated December 10, 1992, Dolores Battle in commenting on Alabama's GCSSP stated in pertinent part as follows:

The Job Training Reform Amendments of 1992 establish new requirements which impact Alabama's use of 8 Percent State Education Funds. Effective July 1, 1993, the allocation of 8 Percent State Education Funds to employment generating activities under JTPA Section 204(19) is no longer permissible.

While employment generating activities which provide job opportunities for JTPA eligible persons are allowable up to that date, this does not include any economic development activities, which are presently prohibited under JTPA.

(EX 6 attached to Battle Dep. EX 94)

The Administrator of OJTP conceded this language implied that up to July 1, 1993 Alabama could utilize employment generating activities in connection with 8% funds. (Battle Dep. EX 94 p. 34).[25]

The Grant Officers

106. Grant Officer Wood on March 9, 1989 in his final determination allowed costs in the amount of \$363,186 stating,

Based on the assessment of the material supplied to the Regional Office, it was determined that the information was adequate to allow costs of \$363.186.

The basic premise for allowing the costs is the great

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flexibility in the 25% of the 80% (of the 8% funds), which is not specifically designated for services and training of persons who are economically disadvantaged. Within the 25%, training and any of the services of Section 204 can be provided to individuals, regardless of income. Additionally, services authorized under Section 204 of the Act include several "non-participant specific" functions which can be supportive of economic development activities.

(EX 7 attached to Grubb Dep. EX 96) (Emphasis supplied)

107. Grant Officer Wood's Final Determination was withdrawn almost a year later on February 27, 1990. He withdrew it on the ground that the case, 89-JTP-17, raised "novel" issues. (EX 12 attached to Grubb Dep. EX 96).

108. On the other hand, it is the position of Grant Officer Grubb, who succeeded Mr. Wood in these cases, that Wood's Determination was simply in error and the Final Determination was withdrawn to correct the error. (Grubb Dep. EX 96 p. 22).

109. ETA began to focus on the problem of 8% grants and employment generating activities after Mr. Woods' determination in 1989. (Donahue 98-99).

Stand-In Costs

110. The following is a breakdown of the 8% funds expended by the State in the relevant period in relation to all the disallowed contracts in question:

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(Blegen Tr. 748 et
seq.; EX 100)

111. For each of the years in question the disallowed costs are less than 25% of 80% of the Section 123 8% funds. (Blegen 753-756). This demonstrates the disallowed costs as within the 25% of the 8% funds and thus not a part of the 75% which is required to be allocated to disadvantaged individuals. (Blegen 756).

112. For every dollar of federal JTPA 8% funds received by the State, the State must supply matching funds from non-federal sources. (Blegen 757).

113. The following table summarizes the State's 8% expenditures and matching funds for the relevant period:

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(EX 103)

114. The State is only required to match 80% of the 8% funds. (Blegen 756-758). In each of the years in question the matching funds exceed the 80% of the 8% funds for that year. In this case the overmatch for the relevant periods is \$2,937,381. The overmatch may be used as a stand-in for disallowed costs. (Blegen 758, 761). The excess matching funds exceed the disallowed costs by \$297,753.00. (Blegen 761).

115. On the average the State of Washington has received JTPA funds in the amount of \$50 million a year. In the period 1983-1993, the State returned to DOL approximately \$105,000 to \$110,000. (Malo 774-775).

116. Stand-in costs are a method of satisfying a debt arising out of disallowed JTPA expenditures by using state or local funds as a stand-in for questioned or disallowed funds at the federal level. (Malo 775). Washington in the past has been permitted in the case of questioned JTPA expenditures to use stand-in costs as an alternative to paying sanctions in the amount of \$775,555. (Malo 775; EX 122A).

DISCUSSION

The State of Washington appeals from assessments totalling in excess of \$2,600,000.00 for misspent funds under the JTPA. Specifically, the questioned amounts involve contracts funded with 8% set aside money under Section 123 of the Act for employment generating activities or economic development.

The Grant Officer's Final Determinations of June 13, 1990, July 22, 1990, and November 21, 1990, questioned these contracts asserting that Section 123 8% funds must be expended for services directed to JTPA participants. It is the Grant Officer's position that 8% funds may not be used for services to businesses which might incidentally benefit participants or individuals eligible for JTPA benefits. The State contends that expenditures resulting in

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expanding businesses or creating new businesses with resultant job

openings for JTPA participants or JTPA eligible individuals are properly within the scope of Section 123.

The relevant statutory provisions provide as follows:

STATE EDUCATION COORDINATION AND GRANTS

Sec. 123. (a) The sums available for this section pursuant to section 202(b)(1) shall be used by the Governor to provide financial assistance to any State education agency responsible for education and training--

(1) to provide services for eligible participants through cooperative agreements between such State education agency or agencies, administrative entities in service delivery areas in the State, and (where appropriate) local educational agencies;

and

(2) to facilitate coordination of education and training services for eligible participants through such cooperative agreements.

(b) The cooperative agreements described in subsection (a) shall provide for the contribution by the State agency or agencies, and the local educational agency (if any), of a total amount equal to the amount provided, pursuant to subsection (a) (1), in the grant subject to such agreement. Such matching amount shall not be provided from funds available under this Act, but may include the direct cost of employment or training services provided by State or local programs.

(c)(1) Funds available under this section may be used to provide education and training, including vocational education services, and related services to participants under title II. Such services may include services for offenders and other individuals whom the Governor determines require special assistance.

(2)(A) Not more than 20 percent of the funds available under this section may be spent for activities described in clause (2) of subsection (a).

(B) At least 80 percent of the funds available under this section shall be used for clause (1) of subsection (a) for the Federal share of the cost of carrying out activities described in clause (1). For the purpose of this subparagraph, the Federal share shall be the amount provided for in the cooperative agreements in subsection (b).

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(3) Not less than 75 percent of the funds available for activities under clause (1) of subsection (a) shall be expended for activities for economically disadvantaged individuals.

(d) If no cooperative agreement is reached on the use of funds under this section, the funds shall be available to the Governor for use in accordance with section 121.

Section 204 under Title II of the Act provides in relevant part:

Sec. 204. Services which may be made available to youth and adults with funds provided under this title may include, but need not be limited to--

* * * *

(19) employment generating activities to increase job opportunities for eligible individuals in the area, ..

The State argues that Section 123(c)(1) permits funding to provide vocational education services and "related services under title II." This provision, read together with Section 204, the State asserts, permits Section 123 funding with the 8% set aside of "employment generating activities to increase job opportunities for eligible individuals." This is apparently the first litigated proceeding to deal with this issue.

The applicable regulation defines a participant as an individual determined eligible for participation upon intake, and who is receiving services under the Act. The Department of Labor considers an eligible participant also to be an individual enrolled in a JTPA program. (Finding 21). The State on the other hand urges that an eligible participant is one who is qualified for services under the Act but not necessarily enrolled. The State uses the terms "eligible individual" and "eligible participant" interchangeably.

"The starting point in every case involving construction of a statute is the language itself.' Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976) and "the language of a statute controls when sufficiently clear in its context'. Id. at 201. Moreover, "it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses [so that] .. .[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive."

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In the matter of the Commonwealth of Massachusetts, Final Decision and Order of the Secretary, 85-JTP-1 (1985).

The legislative reports, which are part of this record, do not specifically discuss the statutory provisions in question. Accordingly, these issues must be decided on the basis of the statutory text without the aid of extrinsic sources. However, "[unless] the language of a statute is plain and admits of no more than one meaning, the duty of interpretation arises as the statute will be considered ambiguous.' In the Matter of Salish and Koitenai Tribes of the Flathead Reservation, 82-CTA-107, 82-CTA-235 (1992) slip op. at 5.

A critical issue in this case is the meaning of the term "eligible participants' and whether 8% funds may be expended for the benefit of eligible individuals as opposed to participants. 20 C.F.R. 626.4 (1992) which defines "participants" does not define "eligible participants." Absent such a definition the issue should be decided on the basis of the ordinary meaning to be attributed to the words in the statute and the regulation. The regulation defines a participant as an individual who is enrolled and receiving services. Attributing the ordinary meaning to the term in question an eligible participant is accordingly one, who is enrolled and receiving services as well as meeting the statutory criteria prerequisite to receiving benefits under the Act.

Section 204(19) states that services which may be made available to youth and adults with funds provided under title II include job employment generating activities to increase job opportunities. This provision indicates that services under

Section 204(19) to individuals in the targeted population may be indirect as long as they confer a benefit on such individuals.

The language of Section 123(c)(1) expressly limits funding under that Section "to participants." [26] Section 123(c) (1) further provides that such funding may be used for training, including vocational education services "and related services to participants under title II." As already noted, Section 204 under title II provides for a variety of services including employment generating activities for "eligible individuals" in the area. Section 123 and 204 should be construed so that each will be effectuated without negating the other. Accordingly 8% funds expended under Section 123 on "related services" under title II should be limited to services benefitting participants.

The purpose of the Act is to overcome barriers to employment by providing training to targeted groups. Accordingly, employment

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generating activities to increase job opportunities under Section 204 should be considered "a related service" to training within the scope of Section 123(c)(1). Training for jobs which are unavailable would be an exercise in futility. In short, read together Sections 123(c)(1) and 204(19) provide for the funding of employment generating services as long as the expenditure of 8% funds benefits participants in accordance with the limitation in Section 123.

Section 204's provision for services including job employment generating activities to increase job opportunities compels the inference that services under that section to individuals in the targeted populations may be indirect as long as they confer a benefit on such individuals, i.e., increased job opportunities. [27]

The Grant Officer contends that the contracts in question should be disallowed on the ground that the intent of the contracts under consideration here was to provide services to businesses and not to participants and that the benefit to participants was fortuitous. The short answer is that Section 204(19) contemplates an indirect benefit to the targeted populations in the form of increased job opportunities from employment generating activities such as incubator projects or loan packaging. Benefits to businesses and participants under these contracts are not mutually exclusive. Moreover, the testimony of the State's witnesses that it was the intent to benefit participants with these contracts is uncontradicted. (Findings 37, 42, 45, 48). The utilization in the case of many of the contracts of first source hiring agreements corroborates the State's intention that participants benefit from the employment generating activities funded under such contracts. (Findings 26-27, 48).

The record shows that seventeen contracts resulted in the placement of 520 participants at an approximate cost of \$1,967.20 per participant. The \$1,022,943.58 previously disallowed in the case of these contracts should be allowed. (Finding 67).

The balance of the disputed funds in the amount of \$1,616,984.20 should be disallowed since no benefit to participants in the case of those contracts has been demonstrated. (See Findings 68 to 70). [28] That conclusion, however, does not end the inquiry. The State's due process and equitable arguments based on estoppel, laches, waiver and stand-in costs should be considered in connection with the disallowed contracts. Before turning to the specifics of those arguments, the Department of Labor's

administration of the Act and its officials' interpretation of the statute in the relevant period of the legal questions presented

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here should be reviewed.

The record shows that the Department of Labor did not begin to focus on the issue of 8% funds expended for economic development or employment generating activities until the period 1989-1990 some six to seven years after the State began implementing the Act. (E.g., Findings 101, 102, 109). The record further shows that DOL officials in the relevant period approved expenditures of the type now questioned and that Washington had reason to believe that DOL was aware of such expenditures and approved them. (Findings 71-93, 103-104).

The record shows that in March of 1987, Orville Arbogast of DOL's Region X assured a Private Industry Council official that 8% funding of employment generating activities was allowable under Section 204(19) of the Act. (Finding 103). Mr. Arbogast, it may be noted, was the State's major contact with DOL. (Wiggins 343).

The DOL Regional Office drafted a Final Determination for the program year ending June 30, 1987. That draft stated specifically that services under Section 204 such as employment generating activities need not be participant specific. In that draft the Region, moreover, recommended approval of a number of 8% funded functions such as incubators which are challenged in this proceeding which were nonparticipant specific. (Findings 98-99). The inference to be drawn from this draft is that Regional Office officials previously gave advice to the State consistent with that document.

On February 24, 1989 the DOL Regional Administrator stated that the issues concerning 8% funding raised in all of the Washington State audits were not adequately covered by current policy. (Finding 100). In December 1989, a memorandum from DOL's Regional Administrator indicated he was unaware of the DOL policy prohibiting economic development with 8% funds. (Finding 101). As recently as July, 1992 DOL'S Region X recommended approval for employment generating activities of the BRN on the ground that there was "a clear correlation between the activity of the BRN and the placement of JTPA participants." (Finding 102).

The Administrator of DOL's Office of Job Training Programs conceded that the approval of Washington's GCSSPs for 1986 and 1987 in effect approved expenditures for economic development. (Finding 104).

Similarly, OJTP's Administrator in her December 10, 1992 letter commenting on Alabama's GCSSP implied that prior to July 10,

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1993, that this state at least could fund employment generating activities with 8% funds. (Finding 105).

Grant Officer Wood, an official of DOL's National Office, in his Final Determination of March 9, 1989 essentially adopted the Regional Office's position:

The basic premise for allowing the costs is the great flexibility in the 25% of the 80% (of the 8% funds), which is not specifically designated for services and training of persons who are economically disadvantaged. Within the 25%, training and any of

the services of Section 204 can be provided to individuals, regardless of income. Additionally, services authorized under Section 204 of the Act include several "non-participant specific" functions which can be supportive of economic development activities.

(EX 7 attached to Grubb Dep. EX 96; Finding 106)
(Emphasis supplied)

Grant Officer Wood's reference to "non-participant specific functions" and the flexibility of the 25% of the 80% of the 8% funds permits the inference that up to that point DOL staff felt that expenditures for "economic development" to benefit eligible individuals was permissible. On February 27, 1990, Grant Officer Wood withdrew his Final Determination on the ground that it raised "novel" issues. (Finding 107). The record shows that ETA began to focus on the question of the allowable scope of 8% expenditures sometime in 1989 after Mr. Wood's Final Determination issued. (Finding 109). Evidently, after a 6-7 year hiatus, the Department policies precluding the type of expenditures under consideration here, finally crystallized, when one Grant Officer was substituted for another. At that point, however, the State had reached the point of no return with respect to the disallowed costs.

DOL contends the return payments assessed should not be excused on equitable grounds because the statute clearly prohibits the questioned payments. The confusion on this point at both the national and regional levels of DOL compels the conclusion that the issue despite the language of the statute is not as obvious as DOL now asserts. Clearly, the uncertain administration of the Act by DOL in the relevant time period obscured the issue for Washington. The statutory provisions under consideration here require interpretation and DOL's failure to timely formulate policy on these issues was obviously detrimental to the State.

The record as a whole shows that DOL on the basis of the

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approved GCSSPs, the compliance reports, the State's annual reports, the State Job Training Coordinating Council meetings, and the contacts of its Regional officials with State officials was aware of the nature of the subsequently disallowed payments, and approved such payments[29]. At a minimum the Department was on notice that the State's proposed expenditures involved 8% funding of economic development or employment generating activities of the type now disallowed. The record further compels the finding on the totality of the record that the State from the multiplicity of these contracts could reasonably conclude that the Department of Labor had approved the types of expenditures later disallowed.

The undisputed testimony of Susan Dunn of the Employment Security Agency sums up Washington's contacts with DOL officials in the relevant period:

Q How did they [DOL officials] know that:

A Everything from visits with our [DOL] field representative -- I mean, he came down on a regular basis to visit with us. And we were extremely proud of the Community Development Finance Program and the Business Resource Network. I mean, we told everyone about this because we thought we were really doing something in the spirit of the law, we thought we were doing something that was really making a difference. I mean, we had

newsletters, we had brochures, we even talked about it at national meetings where the Department of Labor was there. Not only that, but in their compliance reviews, they looked at the contracts that the Commission for Vocational Education had with the Department of Community Development and the National Development Council piece. That was all evident. Contrary to trying to keep this a secret or under wraps, we were out marketing this thing, you know, right and left, at council meetings where they came and listened to the debate about what would happen with the 8 percent funds. And I can remember standing up, explaining probably more than one year to council members exactly what the Community Development Finance Program did and why the Governor was so supportive of it, and the Training Network. There was no way they

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couldn't have known about it and the specifics of it.
 (Dunn 246-247) (Emphasis
 supplied)

The State through its evidence has established that DOL officials such as the OJTP Administrator and Regional officials were aware of and at various times approved the proposed 8% expenditures disallowed in 1990. The failure of the Department to elicit the testimony of the relevant Regional officials with first hand knowledge on this point compels the inference that had they been called to testify, their testimony would have been adverse to DOL on this point. Interstate Circuit v. U.S., 306 U.S. 203, 226 (1939).

The record as a whole further compels the conclusion that there was no way the responsible DOL officials could not have known about the nature of the 8% expenditures subsequently disallowed.

The State argues in effect that a contract arose from DOL's sanctioning of the disallowed expenditures. That contention should be rejected. For the reasons already stated, 8% expenditures for services not benefitting participants are beyond the scope of Section 123. Such a contract, even if it could be implied from the course of action of the parties, would be unenforceable. More importantly, this is essentially an argument that DOL is estopped, because of its prior actions, from insisting on repayment of the disputed expenditures. However, estoppel to preclude action by the federal government acting in its sovereign capacity is rarely granted. Heckler v. Community Health Services, 467 U.S. 51 (1984); Hicks v. Harris 606 F.2d 65 (5th Cir. 1979). The proper inquiry here is whether the Secretary should in the exercise of his discretion excuse repayment under Section 164 of the Act.

That section provides that equitable considerations are to be taken into account when sanctions under the Act are under consideration. DOL's approval of the types of expenditures now challenged and its inconsistent and confusing administration of the Act in the relevant period mandates a consideration of whether the Secretary should exercise his discretion in determining whether such sanctions should be imposed.

Section 164(d) and (e) governs the imposition of sanctions such as repayment of misspent funds and the equitable

considerations governing such decisions. Section 164(d) provides that every recipient should repay amounts not expended in accordance with the Act. It provides further that the Secretary may offset such amounts against any other amount to which the recipient is or may be entitled under the Act unless the recipient

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is held liable pursuant to subsection (e).

Section 164(e)(1) provides that the recipient shall be liable to repay such amounts from funds other than funds received under the Act upon a finding that the misexpenditure was willful, grossly negligent or due to failure to observe accepted standards of administration.

Section 164(e)(2) sets forth the equitable consideration applicable to waiving sanctions under the Act.[30]

The record shows that except for DOL's confusing and inconsistent administration of the Act, in approximately a 6-1 year period the State would not have misspent the funds subject to this action. Due to the actions and inaction of the responsible DOL officials, the State had reason to believe that the expenditures subsequently disallowed had in fact been approved. Under the circumstances, no finding can be made that the misspent expenditures were willful. To the extent that there was negligence, it was on the part of DOL in failing in a timely fashion to formulate policy concerning these issues for the guidance of its own staff and that of the State. At a minimum, the State is entitled to offset of the funds subject to repayment. The matching funds contributed by the State appear ample for that purpose. (See Findings 110-116). However, the record is not clear as to whether the matching funds are allocable to the relevant grants. A finding on this point is prerequisite to offset under Section 164. In the event waiver of repayment is refused on review, then the record should be reopened to permit the State to augment the record on the issue of the proper cost allocation of the matching funds. Cf. U.S. Department of Labor v. Steuben County New York, 83-CTA-162 (1993).

Turning to the criteria set forth in Section 164(e)(2) pertaining to waiver the record shows that the State established appropriate systems to award and monitor JTPA contracts with acceptable standards for ensuring accountability. The performance and monitoring reports required by Washington fulfill this requirement. A review of the contracts in the record shows that they stated the applicable goals and obligations with sufficient clarity. The State, moreover, acted with sufficient diligence to monitor the implementation of the subgrantee contracts both at the SBVE and provider level of the contracts. (Finding 31). When DOL's position finally became clear, the State discontinued use of 8% funding for contracts of the type challenged here. (Long 194-195). The four criteria for waiver under Section 164(e)(2) have been met. In addition, as already noted, the State had reason to believe that DOL was aware of and approved of the disputed funding.[31] Accordingly, the Secretary should as a matter of discretion waive the repayment by Washington of the sum of \$1,616,984.20. The criteria prerequisite to waiver have been met.

In view of the result reached herein, there is no need to review the State's due process arguments in detail. However, the argument that DOL violated its own rules by failing to timely issue a Final Determination in accordance with the regulatory deadlines has a jurisdictional aspect, and therefore requires discussion.

Citing 20 C.F.R. § 629.54(d)(3)(i) the State urges that DOL violated the provisions of that regulation by issuing its second final determination more than 180 days after the receipt of the final approved audit report. The record shows that this final determinations issued more than two years after issuance of the relevant final audit report. The contention is rejected. The regulation is not on its face a jurisdictional limitation on the Secretary's enforcement powers, if the deadline is not met. Rather, it is a procedural requirement providing a time table for the resolution of audits. Accordingly, failure to comply with the 180 day deadline of the regulation does not, without more, deprive the Secretary of jurisdiction to act after that time. See Brock v. Pierce County, 476 U.S. 253 (1986); In the Matter of Florida Department of Labor and Employment Security, Secretary's Final Decision and Order, 92-JTP-21 (1994) slip op. at 10.

ORDER

IT IS ORDERED that:

1. The sum of \$1,022,943.58 previously disallowed is allowed.
2. The State of Washington is excused from repayment of funds in the amount of \$1,616,984.20 pursuant to the provisions of Section 164 of the Act.
3. The Grant Officer's Final Determinations of June 13, 1990, November 21, 1990, and July 22, 1992, are vacated.

THEODOR P. VON BRAND
Administrative Law Judge

TPvB/jbm

[ENDNOTES]

[1] Section 202(b)(1) pertaining to the 8% funds provides:

(b)(1) Eight percent of the allotment of each State (under section 201(b)) for each fiscal year shall be available to carry out section 123, relating to State education programs under this Act.

[2] The Tacoma-Pierce Contract No. 85-8-40-404 resulted in 4-5 participant placements. (Conant 140).

[3] In one instance the Training Network laid out a hiring and training plan for a Japanese manufacturer interested in locating a television manufacturing facility in the State of Washington using the JTPA and a state funded skills program. The Training Network contracted with a community college to provide on-site training for the workers and all recruitment was done through the Job Service Centers. This facility still actively seeks JTPA people every time they fill a job. (Gallwas 538-541).

[4] The Grant Officer had the following objection to Contract No. 85-8-40-405:

The record is insufficient to conclude that the 24 individuals claimed by Washington as participants on page 37 of St. Ex. 247 were actual JTPA participants or even JTPA eligible individuals. The record only indicates that 24 jobs were developed and the JTPA Private Industry Council referred the 24 individuals, not that the individuals were JTPA participants or eligible individuals.

The objection does not encompass the placement of 36 and 40 individuals not verified as participants or JTPA eligible individuals.

[5] The Grant Officer objected as follows to Contract No. 89-8-77-503:

The record is insufficient to conclude that there were 30 JTPA participants hired as claimed by Washington. Page 1 of Exhibit 123 is a chart which simply indicates that 4 employers hire economically disadvantaged individuals, not how many individuals nor if those individuals were JTPA participants. The remaining 4 pages of Exhibit 123 is list of placements, but there is no way of correlating placements with the activities under the contract at issue.

[6] The Grant Officer objected as follows to Contract No. 89-8-77-501:

Six of the 12 participants claimed by Washington, St. Ex. 202 at 955, were hired prior to the period of the grant (7/88 - 6/89).

[7] The list of 19 individuals submitted refers to "eligible participants". The letter of transmittal refers to "participants". The record does not permit resolution of this conflict. (See EX 193).

[8] The Grant Officer objected as follows to Contract 89-8-77-408:

The record is insufficient to conclude that the 19 of the 52 individuals claimed by Washington, St. Ex. 196 at 1, as participants were actual JTPA participants or even JTPA eligible individuals. The record only indicates that the JTPA Private Industry Council referred the 19 individuals, not that the individuals were JTPA participants or eligible individuals. The remaining 33 of the 52 individuals were enrolled in a JTPA program which costs were not disallowed and are not at issue in this case. That JTPA program was a school funded for \$9,132, St. Ex. 191 at 5. The auditors questioned the EGA activities under two other programs funded by the contract, totalling \$40,000 of funding. St. Ex. 191 at 4. The amount disallowed by the Grant Officer is \$38,893, which corresponds to the funded EGA, and not the school program.

(Emphasis supplied)

[9] The Grant Officer objected as follows to Contract No. 86-8-

55-508:

The record is insufficient to conclude that the 17 individuals claimed by Washington as JTPA eligible individuals, St. Ex. 300 at 116-117, were actually JTPA eligible individuals. That these individuals were unemployed or partially employed is insufficient to establish that these individuals were JTPA eligible individuals.

[10] The Grant Officer objected as follows to Contract No. 85-8-40-410:

The record is insufficient to conclude that the 122 individuals claimed by Washington as participants were actual JTPA participants. St. Ex. 267 at 45. There appears to be some participants being counted twice. Calista Seafoods and Louis Kemp Seafoods were listed as having employed 45 and 44 JTPA participants, respectively. However, Calista Seafoods was bought out by Louis Kemp Seafoods. A similar situation occurs with Wood Fabricators, Inc. which was purchased by Select Wood Products. Both are listed as having employed 13 JTPA participants. It is highly improbable that two companies employing JTPA participants would purchase companies employing the same number of JTPA participants. There are at least 57 JTPA participants claimed by Washington for which Washington fails to meet its burden of proof. Moreover, given the apparent double-counting, the ALJ should [be] quite skeptical of the remaining claims by Washington regarding the JTPA participants benefitting from this contract.

[11] 76 jobs developed were not verified as JTPA participants or eligible individuals.

[12] 143 jobs developed were not verified as JTPA participants or eligible individuals.

[13] 596 jobs developed were not verified as JTPA participants or eligible individuals.

[14] 5 jobs developed were not verified as JTPA participants or eligible individuals.

[15] 76 jobs developed were not verified as JTPA participants or eligible individuals.

[16] 12 jobs developed were not verified as JTPA participants or eligible individuals.

[17] 210 jobs developed were not verified as JTPA participants or eligible individuals.

[18] Of the \$1,022,943.58 in disputed contract funds, 520 participants were placed at a cost of \$1,967.20.

[19] 52 jobs developed were not verified as JTPA participants or eligible individuals.

[20] 38 jobs developed were not verified as JTPA participants or eligible individuals.

[21] 63 jobs developed were not verified as JTPA participants or

eligible individuals.

[22] 852 jobs developed were not verified as JTPA participants or eligible individuals.

[23] The funds for the 33 participants that were placed were not in dispute. 19 of the 52 individuals placed were added to the 71 individuals as not being verified as participants or eligible participants.

[24] In the context of this record Council minutes referred to appear to be those of the PICs. (Dunn 229).

[25] Ms. Battle, almost four months later, on April 15, 1993 clarified her December 10, 1992 letter as follows:

It has come to my attention that my letter of December 10, 1992 (copy enclosed) lacked precision on the subject of employment generating activities (EGA) under the Job Training Partnership Act (JTPA). To clarify, 8 percent State Education Funds may currently be used for EGA only if those activities provide job opportunities for JTPA participants. (DOL EX 7).

[26] In urging that Section 123 sanctions expenditures of 8% funds for eligible individuals, Washington also relies on Sections 123(c)(1) and 123(c)(3) of the Act. In the case of Section 123(c)(1) providing:

(c)(1) Funds available under this sections may be used to provide education and training, including vocational education services, and related services to participants under title II. Such services may include services for offenders and other individuals whom the Governor determines require special assistance.

(Emphasis

supplied)

The second sentence of that section should, however, be read in conjunction with the first. The phrase "offenders and other individuals" requiring special assistance accordingly refers to participants who meet those criteria.

Section 123(c)(3) provides:

(c)(3) Not less than 75 percent of the funds available for activities for economically disadvantaged individuals.

A fair reading of that provision indicates that 25% of such funds may be expended on individuals not economically disadvantaged but who otherwise meet the eligibility criteria for participants. This provision is governed by Section 123(a)(1) referring to eligible participants.

[27] The benefit to individual workers of increased job opportunities from employment generating activities is of necessity indirect.

[28] The total amount in dispute for all three final determinations in issue was \$2,657,300.00. This is a discrepancy of \$17,372.22 with the total for disputed amounts in Appendix A. In making the calculations the decision herein has relied upon the

amounts listed in dispute for each contract as set forth by the parties in Appendix A.

[29] The Regional Office memoranda complaining DOL had no policy on this issue, as well as the Regional Office's draft of a Final Determination and Regional Office memoranda construing such reports as appropriate offer persuasive support for that finding.

[30] Has the recipient demonstrated that it has:

(A) established and adhered to an appropriate system for the award and monitoring of contracts with subgrantees which contains acceptable standards for ensuring accountability;

(B) entered into a written contract with such subgrantee which established clear goals and obligations in unambiguous terms;

(C) acted with due diligence to monitor the implementation of the subgrantee contract, including the carrying out of the appropriate monitoring activities (including audits) at reasonable intervals; and

(D) taken prompt and appropriate corrective action upon becoming aware of any evidence of a violation of this Act or the regulations under this Act by such subgrantee.

[31] In determining whether waiver is appropriate, the trier of fact must consider the specific equitable factors listed in Section 164(e)(2). However, equitable factors not covered by the regulation may also be considered. Cf. In the Matter of U.S. Department of Labor v. Bergen County, New Jersey CETA, 82-CTA-334 (1992) slip op at 7.