



Issue Date: 10 February 2004

CASE NO: 2002-WIA-0005

In the Matter of:

**ROLE MODELS OF AMERICA, INC.
Complainant,**

v.

**UNITED STATES DEPARTMENT OF LABOR,
Respondent.**

Before: PAMELA LAKES WOOD
Administrative Law Judge

ORDER DENYING COMPLAINANT'S SUMMARY DECISION MOTION

The above-captioned matter arises from a claim brought under title I of the Workforce Investment Act ("WIA" or "the Act"), 29 U.S.C. § 2801 *et. seq.*, with implementing regulations appearing at 20 C.F.R. Parts 660 to 671 and 29 C.F.R. Part 37.

The matter before me is the motion for summary decision or, in the alternative, dismissal of the audit findings (Final Determination) filed by Complainant Role Models of America, Inc. ("Grantee" or "Complainant") on June 13, 2003.¹ The motion is accompanied by nine exhibits (referenced herein as "CX 1" through "CX 9").² Opposition was filed by Respondent Department of Labor ("the Grant Officer" or "DOL") on June 26, 2003 and November 4, 2003. Both communications referenced the Audit Report transmitted to this Office on August 12, 2002 (which will be referenced herein as "AF" followed by the pertinent page number.) Complainant submitted multiple supplemental responses on July 9, 2003 (titled "Complainant's Response to

¹ The Grantee is not currently represented by counsel and its founder/President Dr. Robert L. Alexander has been acting on its behalf. *See* 29 C.F.R. § 18.34 (g) (limiting authority of administrative law judge to prevent an officer or employee from representing a corporation.) However, Grantee indicates that it intends to seek counsel to pursue litigation in other forums and such counsel may participate in this action or seek a stay of proceedings.

² In addition, miscellaneous papers were submitted along with the portion of the Grantee's submission responding to the Prehearing Order and additional documents were submitted along with correspondence of February 4, 2003. The documentation considered herein consists of the numbered exhibits submitted with the Grantee's various submissions, which have been renumbered as "CX 1" through "CX 17" for ease of reference (as the Complainant has submitted multiple documents labeled as "Exhibit 1.")

Grant Officer's Objection to Complainant's Motion / Request for Summary Judgment / Dismissal of DOL Audit Findings") with one exhibit (referenced herein as "CX 10"); August 1, 2003 (titled "Amended Response to Grant Officer's Objection to Complainant's Motion to Dismiss") with one exhibit (referenced herein as "CX 11"); and November 12, 2003 (titled "Memorandum of Points of Material Facts and Motion to Dismiss on Grounds of 'Invalidity' of Disallowed Indirect Costs Under the Grant") with four exhibits (referenced herein as "CX 14", "CX 15", "CX 16" and "CX 17.") Along with its August 1, 2003 amended response, Complainant filed a "Separate Supplemental Motion to Dismiss Audit of College Corps Management Services, Inc." with two exhibits (referenced herein as "CX 12" and "CX 13") Inasmuch as the same audit and Final Determination is involved, the "Separate Supplemental Motion" is subsumed in the Grantee's motion for summary decision and the arguments made therein will be considered in that context.

For the reasons set forth below, I am denying the Complainant's motion for summary decision and this matter will be noticed for a hearing.

STATEMENT OF THE CASE

On May 30, 2002, the Department of Labor ("DOL") issued a Final Determination finding that the disallowances determined during the audit conducted under authority of the Act were proper and ordered Grantee to pay back the expenditures found to be unlawful. Grantee requested a hearing on June 20, 2002, and the case was forwarded to the Office of Administrative Law Judges. After Associate Chief Administrative Law Judge Thomas Burke issued a Pre-Hearing Order on July 19, 2002, the DOL filed the Administrative File, followed by an amended Index. However, on September 26, 2002, DOL filed a motion for Stay of Proceedings because Grantee had filed a bankruptcy petition. This motion was granted until December 31, 2002 when this Office lifted the Stay of Proceedings upon DOL's request following the voluntary dismissal of Grantee's bankruptcy petition. At the same time, the parties were ordered to respond to the Prehearing Order. Grantee responded on February 4, 2003 and Respondent responded on March 25, 2003. On June 13, 2003, Grantee provided a supplemental response, which also moved for summary judgment, as discussed above, and the memoranda and supporting exhibits described above were filed. On October 6, 2003, this case was assigned to the undersigned administrative law judge for resolution of the summary decision motion and the conduct of a hearing, if necessary. A Notice of Assignment and Order was issued on October 6, 2003, which invited the parties to submit supplemental briefing or exhibits and to comment upon the advisability of a remand.³ No hearing was noticed pending resolution of Grantee's motion for summary judgment/decision.

FACTUAL BACKGROUND

Under the authority of the Act, the DOL's Department of Education and Training Administration ("ETA") awarded Grantee funds to provide education to out-of-school youth who

³ Neither party has sought a remand. In November 4, 2003 correspondence, counsel for the Grant Officer advised that "the Grant Officer does not believe that his matter should be remanded back to the Grant Officer for any purpose" and maintained that the disputed costs were unallowable regardless of whether they were construed as direct costs or indirect costs.

struggled to find permanent employment. In furtherance of this objective, Grantee sought to establish a residential academy (the National Role Models Academy project) located on the grounds of Ft. Ritchie in Cascade, Maryland which “would utilize a military-style model emphasizing leadership skills and discipline.” The curriculum was to include both vocational training and secondary school course work leading to a high school diploma or the equivalent. Grantee received a two year grant, in the amount of \$10 million, from June 5, 2000 through May 30, 2002. (AF 81-107 [Grant AZ-10612-00-60]; *see also* CX 7).

Budget Information provided by Grantee in connection with the approved grant application, which provided a breakdown by category of requested funds, reflected \$381,697 under “Indirect Cost (Rate 4%)” (CX 3, AF 95). That same amount was included as an “Indirect Cost ceiling” as a special clause in the grant. (CX 4; AF 101-102).

Audit Findings. After conducting an audit, the Office of Inspector General (OIG) made the following findings:

(1) *Indirect Costs Were Improperly Charged to the DOL Grant.* The OIG noted that Grantee had charged \$333,197 in indirect costs as administrative fees under the grant. Of these, the OIG questioned \$183,959 “because they were either personal expenses of RMA’s President and CEO, payments for services that did not benefit the DOL grant, or payments that lacked supporting documentation.” (AF 43). This finding was based upon the initial finding in the Assistant Inspector General’s report, which observed that the indirect costs were for payments to College Corps Management Services, Inc. (CCMS) for administrative services, but that, in view of the Grantee’s explanation that there was only one program and one source of funding, all costs should have been treated as direct costs.⁴ (AF 51). In response, the Grantee stated that the funds were used to compensate its CEO and President, who received compensation through indirect funds paid to CCMS rather than salary payments from Grantee. (AF 73). Addressing this response, the OIG stated that they were not questioning the salaries and appropriate fringe benefits paid to the CEO and President but, rather, were questioning the personal costs of the CEO and President charged to the grant. (AF 43).

(2) *Internal Control Problems Exist in RMA’s Accounting System.* The OIG determined that Grantee “had not recorded in its general ledger drawdowns, non-cash disbursements, nor any entries from its payroll and fund-raising bank accounts,” had posted a significant number of transactions to the wrong account, could not provide supporting documentation for more than \$2 million in accruals, maintained excessive cash balances, and had not reconciled its bank statements. (AF 44). Grantee essentially conceded that during its startup period its accounting practices were deficient, stating that the financial reports that it provided to DOL “were always acknowledged to be ‘best estimates’ using crude methods and incomplete data, and never represented to be ‘strict/exact’ accounting calculations, while RMA put the accrual accounting system in place.” (AF 76). However, it disputed that it had retained excess cash except for a period (lasting one to two months) when it maintained an emergency contingency due to litigation brought by its lessor, PenMar (AF 77, 79).

⁴ According to the Final Determination, Grantee contracted with CCMS for administrative services at a cost of \$32,051 per month and reported these costs as indirect costs. (AF 9).

(3) *Unsupported Direct Costs.* The OIG questioned \$77,912 charged as direct costs to the DOL grant (consisting of \$9,189 in consulting fees, \$1,223 in staff travel, \$52,439 in legal services, and \$15,061 in hotel expenses) because of lack of documentation. (AF 44). In response to the initial report, the Grantee acknowledged that the staff travel could not be documented because the persons that traveled were no longer employed by Grantee but provided additional documentation for the legal fees and hotel expenses; Grantee also indicated that it would seek to provide documentation for the consulting fees. (AF 78; *see also* AF 113-264.) The OIG rejected the documentation for the legal-fee expenses because it showed that the fees had been incurred prior to the grant period; the OIG also found that the documentation for hotel expenses was not in sufficient detail to resolve the validity of the costs. (AF 45). Based upon documentation provided by Grantee, the OIG accepted high school curriculum fees of \$10,000 that were originally questioned.⁵ (AF 45, 59, 78).

(4) *Travel Costs Were Incurred Prior to the Grant Period.* The OIG also questioned travel expenses in the amount of \$387, which the Grantee acknowledged were incurred prior to the grant period and were not approved. (AF 45, 60, 78.)

Initial Determination. Based upon the above audit, the Grant Officer issued an Initial Determination on October 19, 2001, disallowing \$262,258 in costs. (AF 26 to 29). First, \$51,515 was disallowed unless adequate documentation demonstrated “that the questioned costs incurred were not for personal use and that they were necessary and reasonable in order to meet the objectives of the grant.” The Grant Officer noted that since the grantee had only one grant, indirect cost charges were not applicable.⁶ (AF 30). Second, \$210,543 was disallowed “pending submission of adequate documentation showing how the DOL grant benefited.” (AF 34). Third, the Grant Officer determined that the administrative finding (concerning the accounting system and excessive cash balances) would remain uncorrected “until documentation is submitted showing that a corrective action plan specific to this finding has been implemented.” (AF 38). Grantee was contemporaneously advised of the findings and given the opportunity to resolve the matter informally within 60 days. (AF 24 to 25).⁷

Final Determination. On May 30, 2002, the Grant Officer made a Final Determination, again citing \$262,258 as disallowed funds. (AF 9 to 22). The expenditures claimed as indirect

⁵ The \$10,000 was not included in the Final Determination and is not at issue here.

⁶ Grantee now claims that it received funding from more than one source and for that reason was allowed to claim certain costs as indirect, but DOL maintains that its records reflect Grantee had only one source of funding. In a document submitted to this tribunal by Grantee on June 13, 2002 (in a letter from April 2001 that was attached), Grantee specifically asserted that RMA’s grant was not funded by multiple sources (CX 5); however, a letter from May 2003 shows that the Junior ROTC also provided funds to the program from May 2000 to the end of the school year in 2002. (CX 2).

⁷ In connection with its July 2003 response, Grantee submitted copies of contract modifications reflecting that its grant was initially frozen (by a unilateral modification of September 5, 2001) due to the OIG investigation; that it was unfrozen (by a unilateral modification of October 19, 2001) in the amount of \$330,000 for the payment of rent through January 1, 2002; and that, following a show cause letter proposing an emergency termination of the grant (by a modification effective December 20, 2001, signed by Robert L. Alexander, Grantee’s President, on January 11, 2002 and by the contracting officer Laura A. Cesario on January 18, 2002), the grant was modified to prevent Grantee from adding new participants funded by the grant or incur obligations relating to new participants, and that existing participants were to be advised that federal funding would expire on May 30, 2002 and would not be extended. (CX 10).

costs that were disallowed as costs incurred for personal reasons (\$51,515) include rent payments and a security deposit for a house in which Grantee's CEO and President lived, costs for putting a water conditioning system in the house, utility bills at the house and another residence, and furniture for the house, in addition to fees associated with obtaining a trademark and the cost of repairing an employee's vehicle. (AF 9 to 13) The Grant Officer also found certain costs to be improper because of inadequate documentation (\$210,543) including loan payments, mortgage payments, consultant fees, salaries and fringe benefit payments made to two employees and various travel expenses. (AF 13 to 18). Finally, the Grant Officer continued to find accounting deficiencies, including internal control problems in Grantee's accounting system, excessive cash balance, unreliable accounting records, and lack of support for reported accruals. (AF 18 to 22). The Grantee was advised of these findings and asked to remit \$262,258. (AF 6 to 8).

As noted above, on June 20, 2002, the Grantee requested a hearing on all sections of the Final Determination. *See* 20 C.F.R. § 667.800 (c) (providing that portions of a final determination not specified for review become final.)

LEGAL BACKGROUND

Statutory and Regulatory Basis

Under the authority of title I of the Workforce Investment Act of 1998 (the "Act") and its implementing regulations (20 C.F.R. Part 660 to 671), the Department of Labor's Employment and Training Administration provides funds to eligible recipients, including non-profit organizations.⁸ *See* 29 U.S.C. §2914 (relating to youth opportunity grants);⁹ 20 C.F.R. Part 664 (youth activities under title I of the Act), Part 667 (administrative provisions under the Act). The use of funds by organizations that are awarded grants are restricted and grantees must comply with uniform fiscal and administrative requirements for grants, including cost principles and audit requirements, as explained in OMB Circulars and Departmental regulations. 20 C.F.R. §667.200(a), (b), (c). The regulations specifically prohibit recovery of legal expenses for the prosecution of claims against the Federal Government. *Id.* at (c)(6). Nepotism is also prohibited. *Id.* at (g). A direct recipient is required to produce periodic financial reports and to continuously monitor grant-supported activities, consistent with the requirements of 29 C.F.R. Part 95 (for non-profits). 20 C.F.R. §§ 667.300, 667.400. The regulations also set forth procedures for the conduct of audits and investigations (citing OMB Circular A-133), as well as for the imposition of sanctions or corrective action. 20 C.F.R. §§ 667.500 to 667.510, 667.700 to 667.740. *See also* 29 C.F.R. Parts 96 and 99. As noted above, hearings are conducted under 20 C.F.R. §§ 667.800 to 667.860.

⁸ The Notification of Award references the Job Training Partnership Act, Title IV. (AF 81). WIA is the successor of JTPA. The Notification specifically references 29 C.F.R. Part 95 (uniform administrative requirements for non-profits), OMB Circular A-122 (cost principles for non-profits), and 29 C.F.R. Part 96 (Single Audit Act). (AF 81).

⁹ Public Law 105-220, title I, §169 (Aug. 7, 1998), codified as 29 U.S.C. §2914, specifically required the Secretary of Labor to use funds available for fiscal year 1999 to "provide assistance to an entity to carry out a project establishing a role model academy for out-of-school youth" and further required the entity to establish an academy on the site of a closed or realigned military installation.

OMB Circular A-122

One Office of Management and Budget Circular is of particular relevance here: OMB Circular A-122, “Cost Principles for Non-Profit Organizations.”¹⁰ The grant agreement specifically incorporates the requirements of that circular. (AF 81).

General principles relating to costs are addressed in Attachment A to OMB Circular A-122:

- Factors affecting allowability of costs are listed in section A.2. *Id.*
- Costs must “be reasonable for the performance of the award and be allocable thereto. . .” *Id.* at § A.2.a. A cost is allocable to a particular grant “in accordance with the relative benefits received.” *Id.* at § A.4.¹¹
- Costs must be adequately documented to be allowable. *Id.* at § A.2.g.
- Direct costs are those costs that can be identified specifically with a particular final cost objective, i.e., a particular award, project, service, or other direct activity of an organization. *Id.* at § B.1.
- Indirect costs on the other hand, are defined as “those [costs] that have been incurred for common or joint objectives and cannot be readily identified with a particular final cost objective.” *Id.* at § C.1.
- Typical examples of indirect costs for many non-profit organizations include overhead expenses such as depreciation or use allowances on buildings and equipment, the costs of operating and maintaining facilities, and general administration and general expenses (including salaries and expenses of executive officers, personnel administration, and accounting expenses.)¹² *Id.* at § C.2.

Attachment B of OMB Circular A-122 addresses specific cost items:

- Section 18 provides that costs of goods or services for personal use of the organization’s employees are unallowable regardless of whether the cost is reported as taxable income to the employees.
- Section 19 provides that costs of housing, housing allowances and personal living expenses for the organization’s officers are unallowable as fringe benefits or indirect costs regardless of whether the cost is reported as taxable income to the employees. If, however, these costs are deemed direct costs, necessary for the performance of the activities carried out by Grantee and approved by the Grant Officer, then they are allowable.
- Section 38 provides that pre-award costs -- those costs incurred prior to the effective date of the award dealing with the anticipation or negotiation of the award -- are allowed only

¹⁰ Applicable portions of OMB Circular A-122 appear at the Grant Officer’s Appendix, at Tab D. (AF 108-112). As revised, the circular is available at <http://www.whitehouse.gov/omb/circulars>. References herein are to the current version of the circular.

¹¹ Methods for allocating indirect costs and determination of indirect cost rates are addressed in section D of Attachment A to OMB Circular A-122.

¹² Indirect costs are generally classified within the broad categories of “facilities” and “administration.” OMB Circular A-122, Attachment A, Section C.3.

to the extent that they would be allowed if incurred after the award and if they are approved in writing by the awarding agency.

DISCUSSION

Because Grantee made this summary decision motion, and DOL has not made a cross-motion for summary decision or dismissal, the only issue to be determined in this Order is whether this case should be summarily decided in favor of Grantee.

Summary judgment or summary decision is appropriate when it has been established by pleadings, affidavits, other evidence, or matters officially noticed that there is no genuine issue of material fact and the moving party is entitled to decision or judgment as a matter of law. 29 C.F.R. §18.40(d); 28 Fed. R. Civ. P. §56(c). *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Under subsection (a)(1) of 20 C.F.R §18.41, Summary decision:

(a) *No genuine issue of material fact.* (1) Where no genuine issue of a material fact is found to have been raised, the administrative law judge may issue a decision to become final as provided by the statute or regulations under which the matter is to be heard. Any final decision shall conform to the requirements for all final decisions.

However, subsection (b) of that section provides:

(b) *Hearings on issue on fact.* Where a genuine question of material fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing.

When the moving party has made an affirmative showing of facts through affidavits, the party opposing the motion may not rest upon mere allegations or denials but must set forth specific facts showing that there is a genuine issue of fact for the hearing. 29 C.F.R. §18.40(c). A motion may also be denied when the moving party has denied access to information by means of discovery to the party opposing the motion. 20 C.F.R §18.41.

Here, Grantee alleges several grounds on which it asserts the case should be summarily decided. While each discernible issue will be examined in turn, the particular issues being argued by the Grantee are not easily decipherable from the rambling and somewhat incoherent motions and briefs submitted by the Grantee's principal, who is unrepresented.¹³ The bulk of the issues raised are not properly before me. For the reasons set forth below, I find that the remaining issues present actual material issues of fact, which preclude summary decision.

¹³ The Notice of Assignment and Order of October 6, 2003 urged Grantee to seek counsel and provided: "Complainant is further advised that the only issue before the undersigned concerns the validity of the audit's disallowance of costs under the grant and shall confine any further submission to that issue." Grantee has, however, ignored that direction and has focused on irrelevant issues in its most recent submission. Grantee indicates that it is represented by counsel in other forums for the purpose of filing a complaint "for the violations and irreparable harm and damages caused by DOL, et al." Memorandum of Points of Material Facts and Motion to Dismiss on Grounds of "Invalidity" of Disallowed Indirect Costs Under the Grant, filed November 12, 2003, at p. 8, ¶ 27. The Grantee is again urged to retain counsel to represent it in these proceedings.

Issue # 1 – Whether Grant Officer Wrongly Disallowed Certain Grant Expenditures

At the outset, I note that the Grantee has challenged all findings in the Final Determination. Thus, the primary issue before me is whether the expenditures being disallowed were allowable costs under the grant, as well as whether the findings concerning the Grantee's accounting deficiencies were valid. The costs were essentially disallowed on two bases: (1) the costs constituted personal expenses of Grantee's officers or employees and (2) the costs were not adequately documented and/or the available documentation failed to establish that they were properly allowable under the grant (e.g., because they predated the grant period and had not been approved).¹⁴

Most of the disputed items (\$51,715 of which were disallowed as personal costs and \$132,244 of which were disallowed for lack of documentation) relate to payments for administrative expenses made to the College Corp Management Services, Inc. (CCMS) (which Grantee has indicated is a for-profit organization organized by the Grantee's principals to manage the National Role Models Academy – College Corps Program).¹⁵ Grantee argues that DOL had no authority to audit CCMS or look behind the payments to CCMS, as there was no privity of contract between DOL and CCMS.¹⁶ Apparently in the context of these indirect fees, CCMS paid amounts that were charged to the grant as indirect costs.

On this point, there exist genuine issues of material fact.

First, there is a dispute as to the applicability of indirect costs to this grant, although it does not appear that this issue is outcome determinative. The Grant Officer asserts that indirect cost rates are inapplicable (because only a single grant is involved) but whether indirect costs are used makes no difference (because the disputed items are not allowable either as direct or indirect costs.) However, the Grantee argues that indirect cost rates have been applied to grants involving similar entities and appears to be arguing that such a classification would mandate allowance of the costs. Grantee's own submissions are contradictory, as at one point it asserted that there was a single source of funding while at another point it asserted that it received funding from another federal source, as discussed above.

Second, factual issues arise as to the nature of the payments made to CCMS as administrative expenses, the authority for such payments, and their allowability under the grant. The Grantee has taken the position that inclusion of the indirect cost fees of \$381,697 (over the grant period) as a ceiling in the grant documents was tantamount to pre-approval of a 2% per

¹⁴ Although the audit disallowances were broken down based upon whether the disputed costs were "indirect costs" or "direct costs", the Final Determination categorized the costs based upon whether they were questioned because they were incurred for personal reasons or because they were not adequately documented.

¹⁵ See "Separate Supplemental Motion to Dismiss Audit of College Corps Management Services, Inc." dated August 1, 2003.

¹⁶ CCMS was apparently operated by Dr. Alexander's family, and specifically by his son and daughter (Marissa Alexander and Robert Alexander, Jr.), who were students at the time they were so employed. On their resumes, however, they listed Role Models of America, Inc. or National Role Models Academy as their employer during the pertinent period and did not list CCMS. (CX 12, CX 13).

annum indirect cost/management fee payable to CCMS.¹⁷ In addition, the Grantee maintains that the indirect cost rate claimed was far below that allowed to similar organizations¹⁸ and that Grantee was unfairly discriminated against by the Grant Officer. However, the arrangement between Grantee and CCMS is not sufficiently clear for an assessment to be made as to the reasonableness of the administrative costs charged to the grant. The documentation submitted by Grantee does not provide a basis for summary decision in its favor.

Third, there is dispute over whether the challenged expenditures made by Grantee (which were disallowed as personal expenses) would be allowable if they were considered as direct costs, and material factual issues surround these expenses:

(1) Grantee claims that some of the disallowed costs included compensation for work by various officers within the organization who were paid through CCMS but were not otherwise compensated for their employment. The Grant Officer, on the other hand, asserts that the officers' salaries and fringe benefits were allowed but that compensation received in the form of payment of living expenses was not compensable under the grant.

(2) The Grant Officer specifically objects to the salaries received by two employees of CCMS (Dr. Alexander's son and daughter) who were compensated for 80 hours of work per two weeks, despite the fact that these particular employees were full time students at out of state universities during the period in which they received compensation. Thus, the Grant Officer disallowed the salaries to the extent it reflected payment for more than 20 days, the number of days that school was not in session at the university during the time period Grantee claims they worked. There was no other evidence, according to the Grant Officer, to establish that these employees made a greater contribution than 20 days worth of work. Grantee argues that these employees were engaged in the accepted practice of telecommuting and fully earned the wages claimed.

(3) Grantee maintains that certain mortgage payments (relating to a Mitchellville, Maryland residence), rent payments (relating to a Waynesboro, Pennsylvania house), contractor expenses for a water conditioning system (for the Waynesboro house), furniture (for the Waynesboro house), and utility and other bills (for both locations) were work-related, as they were necessitated by the need for personnel to move to the area where the grant was performed. Grantee argues that these expenses were properly paid for with grant funds; however, the Grant Officer disagreed and disallowed all of them under the provisions of OMB Circular A-122 as personal expenses or due to lack of documentation that they were reasonable and necessary grant expenses.

In addition to the CCMS costs, other costs disallowed (in the amount of \$78,299) included payments such as travel and hotel costs, legal fees, and consulting services. The Grant Officer asserts that some of these expenditures were not sufficiently documented in Grantee's

¹⁷ Of the \$333,197 claimed for indirect costs, only \$183,959 were questioned by the auditors. (AF 43). Thus, the remainder were apparently accepted as direct costs.

¹⁸ Grantee alleges that other Job Corps operators were allotted a 5.87% indirect cost rate and were even allowed to adjust that amount to an acceptable level if determined to be outside an appropriate range, compared to Grantee's own situation in which the substantially lower 2% indirect cost rate was outright rejected.

records to justify use of the DOL grant while others were incurred prior to the grant and therefore improper. Grantee has acknowledged that \$387 in travel costs were improperly claimed and that it cannot document some of the other travel costs. In addition to predating the contract, some of the legal fees appear to relate to litigation against other federal agencies and would not be allowable under the grant under OMB Circular A-122.¹⁹ Grantee has not provided a basis for me to grant summary decision in its favor on any of these costs.

In short, the documentation before me is insufficient to support the disputed costs. Because material factual issues exist, this case is not ripe for summary judgment.

Issue # 2---Whether the Grant Officer Properly Found Grantee's Accounting Practices to Be Deficient.

As noted above, Grantee has disputed all of the findings in the Final Determination. Grantee acknowledged that during its startup period its accounting practices were deficient and that the financial reports that it provided to DOL were only best estimates using crude methods and incomplete data. Grantee also conceded that excess cash had been retained for a period of one to two months. However, Grantee asserted during the audit period that its accounting system had improved and the excess cash was only maintained for a short period. On summary decision, Grantee has offered nothing new and there is no basis for granting summary decision in its favor.

Issue # 3—Whether the Grantee Can Assert Other Defenses and Claims in this Forum.

Some of the other claims that Grantee argues before this tribunal are not properly before the undersigned administrative law judge and therefore not ripe for summary decision or determination at hearing, regardless of their merits. The administrative law judge's jurisdiction is restricted to the issues set forth in 20 C.F.R. §667.800, which is confined to the DOL's determination not to award financial assistance in whole or in part to a recipient or the imposition of sanctions or corrective actions against a recipient, as set forth in the Final Determination. *See generally Hitek Learning Systems, Inc. v. South Carolina Employment Security Commission*, 2001-JTP-0002 (ALJ Jan. 25, 2002) (dismissing JTPA claim for lack of jurisdiction when no final determination was issued.) Twenty C.F.R. §667.860 specifically provides that the regulations do not prejudice a party's pursuit of remedies and sanctions available outside the Act's jurisdiction. Any claim based upon the award or denial of WIA grant funds initially lies before the administrative law judge and, on appeal, the Administrative Review Board. *See Narragansett Indian Tribe of Rhode Island v. Chao*, 248 F.Supp.2d 49 (D.R.I. 2003). However, to the extent that the arguments do not relate to disallowances under the grant or other matters addressed in the Final Determination, they are outside of the Act's jurisdiction.

¹⁹ It is also unclear whether some of the litigation expenses have recently been reimbursed, which would amount to double recovery. *See Role Models America, Inc. v. White*, 353 F.3d 962 (D.C. Cir. 2004) (awarding Equal Access to Justice Act fees in litigation between Grantee and the Secretaries of Army and Education and PenMar Development Corp.)

Accordingly, some of the arguments raised by the Grantee are not properly before me and should be raised in other forums.²⁰

First, Grantee's claims for monetary damages are not cognizable in the context of a case brought under the Act and Part 667. In this regard, Grantee alleges that it is entitled to damages suffered as a result of DOL's withholding of grant money consistent with consequential damages. However, the pertinent regulations discussed above do not provide for monetary damages. Moreover, some of these claims sound in tort and are not within the jurisdiction of this tribunal.²¹ Therefore, in order for Grantee to prevail on this claim, it must be pursued in a court that has jurisdiction.

Second, Grantee's claim of racial discrimination -- based upon its allegedly worse treatment by DOL than other fund recipients (specifically, the Job Corps) based upon racial considerations -- is not properly before this tribunal (except to the extent that it is subsumed in the denial of specific costs under the grant). Again, the pertinent regulations do not address such a claim. Although 29 C.F.R. Part 37 relates to nondiscrimination, the regulations apply to organizations that obtain funds through WIA and do not address the issue of discrimination in the administration of the WIA program by DOL. Therefore, a claim of alleged discrimination in procedures relating to the administration of grants funded under the Act would not properly lie before this tribunal. To proceed with this allegation, Grantee must file a complaint in the proper forum.

Third, the issue of whether DOL provided needed and requested technical assistance is not properly raised in this forum. In this regard, Grantee faults DOL for not assisting it in obtaining better terms on its lease with PenMar (which in turn leased the property from the Department of the Army) or obtaining an outright "no-cost benefit conveyance" of the Ft. Richie base closure property. Grantee also faults the Grant Officer for failing to respond via letter or telephone response to Grantee's inquiries about how to fill out certain forms in accordance with the regulations governing disbursement of grant funds set forth by the Act.²² Grantee argues that had the Grant Officer responded to his letter, the misunderstanding about indirect costs may have been avoided and the grant funds would have been distributed properly. Based upon DOL's actions and inactions, the Grantee argues that the audit results have been invalidated (and, implicitly, DOL cannot recover the grant funds that have been expended.)²³

²⁰ Although the Grantee apparently acknowledges that these claims should be pursued in other forums, in its most recent Memorandum filed on November 12, 2003, at page 8, it has argued that the instant case is "part and parcel" of a "larger instant case to be filed before a federal judge and jury." The claims that Grantee intends to pursue consist of "breach of contract, discrimination, civil rights violations, wrongful eviction, *inter alia*, Contempt of Congress and violation of the Congressional statute, which funded RMA's College Corps Program." *Id.*

²¹ Grantee argues that because DOL withheld money, it was unable to take advantage of business opportunities, particularly obtaining certain property by lease, for use by Grantee.

²² Specifically, the Grant Officer never responded to a letter in which the Grantee asked what amount, if any, would be allowed for indirect costs.

²³ Grantee's most recent Memorandum filed on November 12, 2003 states, at page 2: "The Complainant's intent in this matter is to finally demonstrate to the Court that DOL officials have engaged in a pattern of statutory violations and that their actions serve to collectively invalidate the audit results (disallowed indirect costs under the grant) which are part and parcel to a larger conspiracy to disrupt and destroy the Complainant's program."

In support of this claim, Grantee cites the language in Public Law 105-220 §§169(g), 170 (approved August 7, 1998), now codified at 29 U.S.C. §§2914(g), 2915. Section 2914(g) of title 29, United States Code, provides that, using funds made available for fiscal year 1999, the Secretary of Labor “shall provide assistance to an entity to carry out a project establishing a role model academy for out-of-school youth.” The following section, relating to technical assistance, provides that the Secretary shall “provide, coordinate, and support the development of appropriate training, technical assistance, staff development, and other activities” and the form of such assistance may include awarding grants or entering into contracts. Though the regulations generally provide for oversight at various levels of the program, they do not specifically extend the obligation to the Department of Labor to directly assist grantees. 20 C.F.R. §§667.400 and 667.410.

It is unnecessary for me to address the merits of this argument as Grantee has cited no basis for jurisdiction in this forum over its duty-to-assist claim. Moreover, the Grantee’s suggestion that it need not be accountable for grant funds because DOL did not provide it with sufficient assistance is meritless. Grantee has cited no authority for this suggestion, which is contrary to the requirements of OMB Circular A-122.

Issue # 4 – Whether this Case Should be Remanded for Further Development

In an Order issued on October 6, 2003, the undersigned asked the parties in this case to advise whether this matter should be remanded back to the federal Grant Officer. The Grant Officer, in a letter dated November 4, 2003, advised that this matter should not be remanded back for any purpose. The Grantee has not specifically addressed the matter of remand, although both parties were invited to state their positions on the issue. Thus, neither party wants a remand. Pursuant to the parties’ request, the case will not be remanded and will proceed to a hearing confined to the matters addressed in the Final Determination.

CONCLUSION

In summary, there are genuine issues of material fact, precluding a grant of summary decision in favor of the Grantee. Therefore, this case will proceed to a hearing to be noticed by the undersigned administrative law judge in a forthcoming Order.

ORDER

IT IS ORDERED that the Grantee's motion for summary decision be, and hereby is, **DENIED.**

A
PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.