

services to prepare disadvantaged young people and adults for, and assist them in securing, permanent employment. 29 U.S.C. §§ 1601-1605. Part B, "Summer Youth Employment and Training Programs," is a summer jobs program for economically disadvantaged young people, providing counseling and training services as well. 29 U.S.C. §§ 1631-1634.

Funds appropriated for Title II programs are allotted among states on the basis of a formula which is applicable to both Part A and Part B. 29 U.S.C. §§ 1601(b), 1631(b). The Act also establishes formulae for the allocation of funds in each state among **SDAs** and for the operation of certain programs at the state level. 29 U.S.C. §§ 1602-1631(b). It is the proper interpretation of the statutory language establishing the formula for Title II-B which is at issue in this case.

The facts and procedural history of the case are not in dispute and are well summarized at pages 1-4 of the Administrative Law Judge's **decision.**^{2/} The crucial facts are that the Governor of Massachusetts received over \$20 million for SYETP for the summer of 1984. He allocated some \$19 million to the **SDAs** and retained five percent, just over \$1 million, for state administration and monitoring. Massachusetts takes the position that the Act permits the Governor to retain that

^{2/} Decision and Order of Administrative Law Judge (ALJ) David W. DiNardi, issued April 19, 1985.

amount of funds for those purposes, and that the legislative history of JTPA supports that interpretation. The state also asserts that the position of the Deputy Assistant **Secretary^{3/} (DAS)**, if followed, would force the state to violate both the Single Audit Act of 1984, 31 U.S.C.A. §§ 7501-7507 (West supp. 1985), and Office of Management and Budget (OMB) Circular A-87 (A-87) on Cost Principles for State and Local Governments. 46 Fed. Reg. 9,548, Jan. 28, 1981. The DAS argues that the language of the statute itself is clear that 100 percent of a state's Title II-B allotment must be allocated among the **SDA's**, and that nothing in the legislative history suggests any other interpretation. This interpretation creates no conflict with either the Single Audit Act or A-87, but if it did, the DAS argues, the more specific language of JTPA would govern.

STATUTORY CONSTRUCTION

The starting point here, of course, as in any case of statutory construction, is the language of the statute itself. As the Supreme Court has emphasized repeatedly "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.'

^{3/} Deputy Assistant Secretary of Labor for Employment and Training.

North Dakota v. United States, ___ U.S. ___, 103 S.Ct. 1095, 1102-1103, 75 L. Ed. 2d 77 (1983) (quoting Consumer Product Safety Commission v. GTE, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980).)" Escondido Mutual Water Co. v. La Jolla, 104 S. Ct. 2105, 2110, (1984).

Section 251(b) of JTPA provides that "sums appropriated [for SYETP] . . . shall be allotted among States in accordance with section 201(b) and allocated among service delivery areas within States in accordance with section [sic] 202(a)(2) and (3)." Sections 202(a)(2) and (3) provide for allocation of the total amount in three shares of one third each, based on various ratios for unemployed and economically disadvantaged individuals in the state and its SDAs. On its face, the statute's simple division of the SYETP pie into three pieces leaves no share for any other purpose.

Massachusetts argues, however, that the introductory phrase in section 202(a)(2), "[o]f the amount allocated under this subsection" refers back to section 202(a)(1). That **section** requires that only 78 percent of the state's allotment be allocated under the formula of thirds in section 202(a)(2), leaving 22 percent for other purposes, one of which is a five percent share for auditing, administration and monitoring, as provided in section 202(b)(4).

Many problems of logic and draftsmanship are raised by the state's argument. First, it does not explain what happens

to the remaining 17 percent of the **state's** SYETP allotment. It is clear that it cannot be **used** for the purposes in section **202(b)(1), (2),** and (3) which provide, respectively, for state education programs, for training older individuals, and for incentive grants to the SDA's. SYETP is exclusively a youth jobs program. Massachusetts would tie down this loose end by passing the 17 percent on to the **SDA's**. But I find it highly doubtful that Congress would leave 17 percent unallocated, entrusting to the unfettered discretion of each state whether these funds would be made available to the **SDA's**. Moreover, this construction would leave unresolved **the** question whether the state could keep the 17 percent if it chose. When Congress carefully and **explicitly** divided the Title II-B funds by referring to sections 202(b)(2) and **(3),** I find it highly unlikely that Congress intended to leave so significant a portion of the funds in limbo.

Moreover, Congress demonstrated in section 251(b) that, when it chose to do so, it knew how to pick out specific portions of the statute from one part for use in another. It is much more logical to assume Congress simply would have referred to section 202(b)(4) in section 251(b), if it had wanted to carve out five percent for administration and monitoring by the state under Title II-B. That approach would have left no uncertainty about the fate of the remaining 17 percent. A much more logical and consistent interpretation of the introductory phrase in section 202(a)(2) is that it is to be read, along

with the rest of that section and paragraph (3), as part of section 251(b). "Of the amount allocated under this subsection" means that of the amount of Title II-B money allotted to the state under section 251(b), that money is to be allocated according to the terms of section 202(a)(2) in thirds totaling 100 percent.

Massachusetts also argues that section 254 of JTPA supports its interpretation that five percent may be retained by the Governor for administration and monitoring. Section 254 provides that "Governors shall have the same authority, duties, and responsibilities with respect to planning and administration of funds available under this part as . . . Governors have for funds available under part A of title II." Massachusetts contends this language incorporates section 202(b)(4), which makes five percent available for auditing and administration. But this argument confuses allocation of funds (which makes them "available" as that term is used in section 254) with planning and administration of funds. Section 254 makes clear that Governors have the same role, i.e., the same duties and responsibilities, and the same relationship with the other planning and administering bodies designated in the statute (e.g. private industry councils) for carrying out Title II-B as they do under Title II-A. But just as section 202 allocates funds for Title II-A purposes, only section 251 allocates funds for Title II-B. If Congress had intended to allocate some Title II-B funds for

administration and monitoring **it would have said so explicitly** in Title II-B, or made a specific reference to section 202(b) (4).

LEGISLATIVE HISTORY

Massachusetts' main point drawn from the legislative history of JTPA is based on a statement in the Conference Report, H.R. Rep. No. 889, 97th Cong., 2d sess. 84, reprinted in 1982 U.S. Code Cong. & Ad. **News** 2705, 2706, on the bill which became JTPA. The report said:

The Senate bill provides that 5 percent of the amount appropriated for Titles I to III and the Job Corps shall be allotted among the States and be available to the Governor for costs of auditing and administration of Statewide programs. The House amendment provides that 10 percent of the funds appropriated for Title II shall be available for the Governor's coordination and special services plan, for the State employment and training coordinating council, and for coordinating employment related education and training programs. The House recedes with an amendment to conform to the fund allocations in the bill.

H.R. Rep. No. 889, 97th Cong., 2d sess. 84. Massachusetts' reliance on this portion of the report is misplaced. The provisions establishing SYETP were contained in Title VII of the Senate bill. Titles I, II, and III in the Senate bill (S. 203'6) were "Title I - State Job Training Program", "Title II - National Job Training Programs", and "Title III - Administrative Provisions" Thus the statement quoted above did not apply to funds appropriated for the SYETP program.

The "fund allocations in the bill" (S. 2036) to which the

House of **Representatives** was agreeing did not provide for retention of five percent of SYETP funds by the State for **administration** and monitoring. By following the course of the provision which became section 202(b)(4) through numbering changes, title shifts, and amendments, the intent of Congress to provide funds for administration and monitoring only out of funds appropriated for Title II-A of the Act becomes clear. In the original Senate bill, S. 2036, 97th Cong., 2nd Sess., 1982, 128 Cong. Rec. S247 (daily ed. Feb. 2, **1982**), Title I established the "State Job Training Program" which did not include a Summer Youth Program. There was no Summer Youth Program at all in the original bill. Section **101(a)** of S. 2036 allotted seven percent of the amount appropriated for Titles I, II, and III (Title II was National Job Training Programs, and Title III was Administrative and General Provisions) to the states for use by the Governor. Only 10 percent of that amount (i.e., 0.7 percent of the amount appropriated for titles I, II, and III) could be used for auditing and statewide administrative activities.

The Senate bill as reported, 128 Cong. Rec. **S7808** (daily ed. July 1, **1982**), permitted the use of 0.75 percent (15 percent of five percent) for auditing and administrative activities out of money appropriated for Titles I, II, and III. A Summer Youth Program had been added to the bill as Title VII, and it required that all the funds appropriated for that Title (with the exception of an amount not relevant here) be "suballocated among

service delivery areas within states in accordance with section **101(c)(1).**" 128 Cong. Rec. S7819 (daily ed. July 1, 1982).

At this point in the legislative process section **101(c)(1)**, which was the predecessor of section 202(a) of JTPA, required that 84 percent of the **state's** allotment for Titles I, II, and III be allocated among service delivery areas (according to a specified ratio). The remaining 16 percent of Title I, II and **III** money was to be used for various specified programs, with no portion set aside for administration and **auditing**.

Since none of the programs specified in that 16 percent could be part of a summer youth program (e.g. job training for older persons), the illogic of Massachusetts' argument as to section 202(a)(1) of JTPA becomes apparent. To read the Senate bill (as reported) the way Massachusetts would read JTPA would mean the Senate intended Title VII (Summer Youth) money to be divided into two portions of 84 percent and 16 percent. The 84 percent would be allocated immediately to the **SDAs**; the 16 percent would be retained by the Governor, but upon discovery that there was nothing he could permissibly do with the money, he would then allocate it to the **SDAs** as well. Obviously this would have been a meaningless procedure which the Senate never intended occur. Thus, review of the history of the fund allotment and allocation provisions of JTPA affords no support for Massachusetts' contention that

Congress intended the Governor first to retain 22 percent of **SYETP** funds, retain five percent and then transfer 17 percent to the **SDAs**.

In fact, the provision which became JTPA section 202(b)(4) was added to the Senate bill on the floor in an amendment offered by Senators Kennedy and Quayle. The stated purpose of their amendment was to respond to comments received from Governors that the bill as reported did not provide enough resources for monitoring and oversight. The amendment, therefore, struck the 15 percent of five percent limitation, and made the full five percent available for auditing and administration. 128 Cong. Rec. S7827, **S7664-65** (daily ed. July 1, 1982). It is significant that when this change was made, SYETP was still in Title VII. The five percent the Kennedy-Quayle amendment made available for auditing and administration was to come from "the amount appropriated pursuant to section 301(a)" which authorized appropriations only for Titles **I, II, and III.**^{4/}

^{4/} At the time this amendment was introduced and **passed** Senator Kennedy had printed in the Congressional Record comments from the Department of Manpower Development of the Commonwealth of Massachusetts. While pointing out the need for more resources to carry out the Governor's responsibilities, Massachusetts did not mention the SYETP program or the fact that the reported bill made no separate provision for funds for administration and monitoring of that program. 128 Cong. Rec. S7827 (daily ed. July 1, 1982).

THE SINGLE AUDIT ACT AND OMB
CIRCULARS A-87 and A-102

Massachusetts asserts that generally accepted accounting principles incorporated in the Single Audit Act of 1984, 31 U.S.C.A. §§ 7501-7507 (West Supp. 1985), and Office of Management and Budget (OMB) Circulars A-87, 46 Fed. Reg. 9,548 (1981), and A-102, 49 Fed. Reg. 50,134, (1984), prohibit the shifting of the cost of administration and monitoring of Title II-B to Title II-A. Although not required to do so, Massachusetts adopted the principles and procedures of A-87 and A-102 in reliance on the assurance provided in the preamble to the JTPA implementing regulations that "[r]ecipients . . . electing to adopt . . . A-87 and A-102 . . . would be considered in compliance with their accountability obligations under [JTPA]." 48 Fed. Reg. 11,078 (1983).

The Single Audit Act was passed "to establish uniform requirements for audits of Federal financial assistance provided to State and local governments." 31 U.S.C.A. § 7501 note (West Supp. 1985). It delegated authority to the Director of OMB to issue implementing guidelines. 31 U.S.C.A. § 7505(a). Pursuant to his authority under the Single Audit Act, the Director of OMB issued Circular A-128, "Audits of State and Local Governments."^{5/} 50 Fed. Reg. 19,114 (1985). He also issued OMB Circular A-87

^{5/} Circular A-128 is the final version of the circular referred to in Massachusetts' briefs as A-102. A-102 was published in the Federal Register on Dec. 26, 1984 for notice and comment.

"Cost Principles for State and Local Governments", which provides "principles for determining allowable costs of programs administered by State [and] local . . . governments under grants from and contracts with the Federal Government." 46 Fed. Reg. 9,548 (1981). Circular A-87 is cross-referenced in Circular A-128.

The Single Audit Act prohibits any recipient required to conduct an audit "from charging to any such program [of Federal financial assistance] ... more than a reasonable proportionate share of the cost of any such audit . . ." 31 U.S.C.A.

§ 7505(b)(1) (emphasis added). Circular A-128 provides:

"16. Audit Costs. The cost of audits made in accordance with the provisions of this Circular are allowable charges to Federal assistance programs."

a. The charges may be ... determined in accordance with . . . Circular A-87 ..."

50 Fed. Reg. 19,119 (1985) (emphasis added). Circular A-87 provides:

"C.2. Allocable costs."

a. A cost is allocable to a particular cost objective to the extent of benefits **received** by such objective.

b. Any cost allocable to a particular grant or cost objective . . . may not be shifted to other Federal grant programs ..."

46 Fed. Reg. 9,549 (1981) (emphasis added).

The crucial question, therefore, is what constitutes a "program." In other words, does JTPA constitute one "program", or are each title and subtitle separate programs. "Program",

"grant", and "cost objective" seem to be used interchangeably. Circular A-87 defines "Grant" as "an agreement between the Federal Government and a State ... whereby the Federal Government provides funds . . . to carry out specified programs, services or activities." 46 Fed. Reg. 9,549, ¶B.7 (1981). The record here reveals only one agreement between Massachusetts and the Federal Government and it covers all of the provisions of JTPA. Administrative File, Tab E.

The only further guidance on what constitutes a "program" is a reference in the section of OMB Circular A-128 on the required contents of audit reports, to "Federal assistance **program[s]**... identified in the Catalogue of Federal Domestic Assistance." 50 Fed. Reg. 19,118, ¶13.a.(1) (1985). The **Catalogue of Federal Domestic Assistance 1985** lists all of Titles I, II and V of JTPA together under one catalogue number, and describes SYETP as simply one among several "Uses and Use Restrictions" of Title II. I conclude, therefore, that the services provided by the states under JTPA constitute one program and that it would not violate either the Single Audit Act or the principles of OMB Circulars A-87 and A-128 to pay for the costs of auditing, monitoring and administration of Title II-B of **JTPA** out of funds made available under section 202(b)(4) of that Act.

It is incongruous that Massachusetts raises as a defense this potential violation of the Single Audit Act and the **OMB**

Circulars. The agency responsible for resolution of audit findings of questioned costs under JTPA, the Department of Labor, 31 U.S.C.A. § 7502(g) and A-128, 1114. Audit Resolution, has stated clearly that the use of Title II-A funds for monitoring and administering Title II-B is not a violation of either JTPA or the Single Audit Act. If an independent auditor engaged by Massachusetts to meet its obligations under the Single Audit Act questioned such use of Title II-A funds, Massachusetts would submit a corrective action plan to the Department of Labor, which would then determine the proper action under the procedures provided for in JTPA and its implementing regulations. The House Report on the bill which became the Single Audit Act made clear that "the provisions [of 31 U.S.C.A. § 7502(g)] are-not intended to replace Federal agencies' current audit resolution policies and procedures; they are intended to complement agencies' existing systems." H.R. Rep. No. 708, 98th Cong., 2d Sess. 12, reprinted in 1984 U.S. Code Cong. & Ad. News 3955, 3966. Obviously, the Department of Labor would not pursue any such finding or require any corrective action. Massachusetts' concern that 'it would be in violation of the Single Audit Act and OMB Circulars therefore is unfounded and cannot form the basis of a defense to the Deputy Assistant Secretary's charge.

SANCTIONS

The ALJ found that Massachusetts' refusal to allocate all Title II-B funds to its **SDA's** after a number of requests

by Department of Labor officials to do so was a *willful* disregard of the requirements of the Act. Under JTPA section 164(e), he ordered the repayment, with interest, of the misspent funds from funds other than those received under JTPA. Massachusetts takes exception to this order, arguing that the ALJ applied the wrong standard of "willfulness."

In addition, Massachusetts maintains that there is no authority in the Act or any other statute for the assessment of interest, and that the Debt Collection Act of 1982, 31 U.S.C. §§ 3701-3717 (1982), prohibits charging state and local governments interest on debts due to the United States. I do not find Massachusetts' arguments persuasive and I affirm the order of the ALJ.

Massachusetts cites a Supreme Court decision interpreting "willfulness" under a criminal provision of the tax code, United States v. Pomponio, 429 U.S. 101 (1976), as establishing the standard which should be applied under section 164(e) of JTPA. I do not think the standard of "willfulness" applicable in proving the commission of a felony is the standard to be followed under the noncriminal repayment provisions of section 164(e).^{6/} In Laffey v. Northwest Airlines, 567 F.2d 429, (D.C. Cir. 1977), for example, the court distinguished between "willfulness" for purposes of the criminal provisions of the Fair Labor Standards

^{6/} The legislative history of JTPA is silent on what Congress meant by "willful" in section 164(e).

Act (FLSA), 29 U.S.C. § 216(a) (1982), and "willfulness" as that term is used in section 6(a) of the Portal-to-Portal Act of 1947, as amended, 29 U.S.C. § 255 (1982), which establishes a three year statute of limitations for recovery of back wages.

In Laffey the Court of Appeals for the District of Columbia Circuit rejected the claim that "willful" simply means "[d]id the employer know the [statute] was in the picture?" The court said:

[T]he employer's noncompliance is 'willful' when he is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt. [An employer acts willfully] when he consciously and voluntarily charts a course which turns out to be wrong."

567 F.2d at 461-462 (footnotes omitted).

Laffey was a challenge under the Equal Pay Act, 29 U.S.C. § 206(d) (1982), to differences in pay between male pursers and female stewardesses which Northwest Airlines (NWA) defended as justified by differences in job duties. The court noted that NWA knew about the Equal Pay Act, had reviewed its policies in light of the Act, and had concluded there were differences in the jobs which supported differences in pay. The court found that action willful, saying "the company consciously though erroneously concluded that its treatment of pursers and stewardesses was unaffected by the Act. We deem that sufficient to comprise willfulness . . ." 567 F.2d at 463. See also Marshall v. Union Pacific Motor Freight Co., 650 F.2d 1085, 1092-1093 (9th Cir. 1981).

There is no doubt Massachusetts was aware Of the provisions of JTPA, and at least as of November 10, 1983, it (as well as all other states) was specifically notified that "100% of Title II-B funds must be allocated to **SDA's** within a state." (Administrative File, Tab C-8.) Thereafter, throughout 1984, Massachusetts was repeatedly notified, by telegrams, letters, and in face-to-face meetings, that the Department of Labor considered the state's position on use of Title II-B funds **erroneous**. (See Administrative File, Tabs A, B-3, B-6, B-7, C-3 and **C-5**.) Massachusetts' reliance on the vagueness of the statute and arguably implicit approval of its practices in a report by the Department of Labor Inspector General (Administrative File; Tab C-9, p.17) cannot withstand these explicit, repeated notices by the responsible officials of the Department of Labor that Massachusetts was violating **JTPA**.^{7/} (See discussion above, pp. 13-14.) In any event, as the court said in Marshall v. Union Pacific Motor Freight Co., supra, "[u]ncertainty is no defense to an allegation of 'willfulness'." 650 F.2d at 1093. Massachusetts withheld funds for administering and monitoring in **violation** of JTPA section 164(e)(1) and those funds must be repaid.

^{7/} I find circular Massachusetts' argument that I should consider as an "equitable factor" that the activities performed by the Commonwealth with Title II-B funds, i.e. administration and monitoring, were *only* activities required by JTPA and were not unnecessary, unreasonable or frivolous. Whether any Title II-B funds may be used for administration and monitoring is precisely the issue in this case, and I have found they cannot.

The ALJ ordered Massachusetts to repay the **\$1,013,382.00** withheld with interest. As a general rule, interest is awarded on monetary obligations to compensate for the lost use or time value of the money. Massachusetts claims that because there is no explicit authority in JTPA for the Secretary to award interest, that I may not do so. However, In Rodgers v. U.S., 332 U.S. 371 (1947), the Supreme Court noted that:

[t]he failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest. (citation omitted.) For in the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in light of general principals deemed relevant by the Court. (citations omitted.)

332 U.S. at 373. See also Hodgson v. American Can Co., 440 F.2d 916 (8th Cir. 1971). Thus I do not believe that the absence in JTPA of explicit authority to award interest is an absolute bar.

The Debt Collection Act of 1982 made it mandatory for Federal agencies to charge interest on outstanding debts at the minimum rate specified. 31 U.S.C. § 3717 (1982). State and local governments were excluded from that requirement. 31 U.S.C. § 3701(c). But the Debt Collection Act does not prohibit an award of interest on an **obligation of a State to the** Federal government. It simply requires that Federal agencies

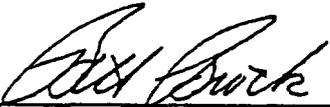
charge at least the minimum rate of interest specified on obligations which are covered by the Act. This legislation leaves to the discretion of agency heads the question of charging interest on obligations of State and local governments. The legislative history of the Debt Collection Act reflects Congress' concern over the failure of many agencies to collect debts at all, and their practice of charging interest below market rates if it was assessed at all. S. Rep. No. 378, 97th Cong., 2d Sess., 3-4, reprinted in 1982 U.S. Code Cong. & Ad. News 3377, 3379-80. There was no statement of intention to relieve states entirely from the payment of interest.

This interpretation of the Debt Collection Act accords with that of the Department of Justice and the General Accounting Office in their regulations implementing the Act. 4 C.F.R. § 102.13(i)(2) (1985). See also 29 C.F.R. § 20.51(b) (1985). Those agencies rejected the argument that the Debt Collection Act totally preempts the common law and that the Act's exemptions therefore amount to prohibitions. 49 Fed. Reg. 8,891 (1984). They said "the common law right to charge interest continues to exist [but] the limits, procedures, and other requirements of the Debt Collection Act do not apply to those debts

that are exempt from the interest provisions of the act . . . " Id., at 8,894.^{8/} See also Decision of the Comptroller General B-212222, Aug. 23, 1983, Comp. Gen..

Here, Massachusetts has had the use of money which should have been allocated to the service delivery areas, the use which Congress intended, or returned to the Treasury of the United States where it would have earned interest. In these circumstances, I think the ALJ's order assessing simple interest at nine percent a year was reasonable and I adopt it.^{9/}

For the reasons discussed above, I adopt the ALJ's Decision and Order in its entirety.


Secretary of Labor

Dated: NOV 26 1985
Washington, D.C.

^{8/} Erie Railroad Co. v. Thompkins, 304 U.S. 64 (1938) cited by Massachusetts is inapposite. It only established a rule that there is no federal common law in actions in federal court based on diversity of citizenship. U.S. Const., art. III, § 2, cl. 7.

^{9/} I would note that 9 percent is the rate established by the Comptroller of the Department of Labor for assessing interest charges on debts due the Government and has been the rate in effect during the entire period of this dispute. It is based on the current value of funds to the Department of Treasury announced each calendar quarter in Treasury Fiscal Requirements Manual bulletins.

CERTIFICATE OF SERVICE

Case Name: Commonwealth of Massachusetts

Case No. : 85-JTP-1

Document : Decision and Order

A copy of the above-referenced document was sent to the following persons on NOV 26 1985.

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