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U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
Suite 700-1111 20th Street, N.W.  
Washington, D.C. 20036



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In the Matter of  
  
KENTUCKY DEPARTMENT OF  
HUMAN RESOURCES,  
FRANKFORT, KENTUCKY \*  
  
.....

Case No. 82-WPA-28

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20036

APPEARANCES:

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For the Regional Administrator

BEFORE: RHEA M. BURROW  
Administrative Law Judge

DECISION AND ORDER

I

Background Information and Statement of the Case

This proceeding arose under the Wagner-Peyser Act, as amended, [29 U.S.C. §49, et seq.], which established a national system of public employment offices. The Kentucky Department of Human Resources, 1/ hereinafter referred to as KDHR, operated

\*The terms Kentucky Cabinet of Human Resources (KCHR) and the Kentucky Department of Human Resources (KDHR) are used interchangeably in this decision.

1/ Formerly known as the Bureau of Economic Security.

the employment system in the State of Kentucky with funding through the Employment and Training Administration, (hereinafter ETA), U.S. Department of Labor. As a result of two audits covering the period of 1971 through 1976, ETA issued two revised Final Determinations dated December 3, 1982, disallowing various costs totaling \$1,335,818.97 for KDHR's violations of the Act, grant agreements or applicable regulations. KDHR timely appealed both Final Determinations.

As a state agency receiving federal funds to operate in part the employment system in the State of Kentucky, KDHR was audited by the Office of Inspector General, U.S. Department of Labor during the Spring of 1973 and again during the Fall of 1976. Based on these audits, two reports were prepared -- Audit Report No. 04-75-633-L issued September 25, 1975 2/ and Audit Report No. 04-7-1119-L-0005 issued July 27, 1977 3/ both of which questioned various grant costs charged by KDHR.

Based on a review of the audit findings and after several meetings between ETA and KDHR, the parties were able to resolve over \$3 million in questioned costs. On or about August 1981, ETA issued two Final Determinations identifying the costs remaining disallowed. 4/ On September 11, 1981 KDHR requested a hearing.

An issue of merit system coverage was involved in both of the above Final Determinations. This issue was separately heard before Administrative Law Judge, Robert L. Ramsey, who by a Decision and Order dated September 29, 1981, allowed the costs. 5/ Based on Judge Ramsey's decision, ETA amended both Final Determinations by letter dated December 7, 1981. 6/

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2/ Regional Administrator Exhibit No. 1, Tab G hereafter shown as RA-1, etc.

3/ RA Exh. No. 2, Tab G.

4/ RA Exhs. Nos. 1 and 2, Tabs D. These determinations were later revised in December 1982 following the October 1982 hearing.

5/ RA Exhs. 1 and 2, Tabs C.

6/ RA Exhs. 1 and 2, Tabs B.

As to the remaining disallowed costs, a hearing was held on October 19-20, 1982, before the undersigned Administrative Law Judge. Based on the hearing before me certain stipulations and amendments were arrived at by the parties and incorporated into Revised Final Determinations issued December 3, 1982. The Revised Final Determinations reflect that the Regional Administrator found there were \$148,248.97 unallowable costs under Audit Report No. 04-75-633-L and \$1,187,570.00 under Audit Report No. 04-7-1119-L-0005, or a total for both audits of \$1,335,818.97. The unallowed costs reflected in the Revised Final Determinations on December 3, 1982 are those currently in issue on this appeal. The disallowed costs are as follows:

A.

Audit Report #04-75-633-L covering the period July 1, 1971 through June 30, 1974 - \$148,248.97.

1. Win Contract 2600-21, reduced from \$113,326.60 to \$86,791.00 based upon final close out papers submitted at October 1982 hearing (Transcript p. 260). <u>Agreed to by KDHR</u> - Tr. p. 259 subject to ruling on legal issues.	\$ 86,791.00
2. Disallowance of costs for employment of private attorney, Edward H. Pritchard by KDHR without approval. (Finding #4, RA Exhibit No. 1, Tab D).	\$ 6,323.00
3. Unapproved office space. (Finding #6, RA Exhibit No. 1, Tab D).	\$ 53,723.97
4. Excess Insurance Premium. <u>Agreed to by KDHR</u> subject to ruling on legal issue.	\$ 1,411.00
Total	<u>\$148,248.97</u>

B.

Audit Report No. 04-7-1119-L-0005 covering the period from July 1, 1974 to June 30, 1976 - \$1,187,570.00

5. Disallowance of amount expended in excess of obligational authority for FY 1975 and 1976. (Finding #1, RA Exh. No. 2, Tab D.).	\$798,342.00
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6. Disallowance of costs for unapproved office space. (Finding #4, RA Exh. 2, Tab D).	\$ 253,238.00
7. Disallowance of costs expended for non-approved professional services. (Finding #5, RA Exh. 2, Tab D).	
a. Dr. Willard	\$80,006.00
b. James Childers (Agreed to by KDHR subject to ruling on legal issue. Tr. p. 34.)	\$ 1,470.00
c. Kentucky Manpower Development Inc. (Agreed to by KDHR subject to ruling on legal issue)	\$ 4,969.00
	<u>\$86,445.00</u>
	\$ 86,445.00
8. Disallowance of costs for failure to meet audit requirement on an audit performed by Touche-Ross. (Finding #6, RA Exh. No. 2, Tab D).	\$ 48,402.00
9. Disallowance of excess costs expended for fire and tornado. Self insurance premiums. Agreed to by KDHR subject to legal equitable defenses. Tr. p. 34.	\$ 1,143.00
	<u>\$1,187,570.00</u>

The total disallowance in both audits amounts to \$1,335,818.97. 7/

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7/ During the October 1982 hearing the parties agreed and stipulated that subject to an adverse ruling on legal defenses (estoppel, laches and lack of authority of DOL to require payment of disallowed costs), that (a) KDHR would agree to accept the amount of \$86,791.00 with regard to Finding #1 of Audit #04-75-633-L concerning the WIN Contract; (b) the disallowance in both audits for the costs expended for insurance premiums which were disallowed would be paid in full by KDHR to DOL (Finding No. 8, RA Exhibit #1, Tab D, and Finding #7, RA Exhibit #2, Tab D); and (c) the disallowance of \$1,470.00 and \$4,969.00, respectively, expended for professional services of an attorney, one James Childer, and a Contractor, Kentucky Manpower Development, Inc., shall be paid by KDHR. (Tr. p. 340).

II

Related or Collateral Matters and/or  
Issues Raised by KDHR

A. Burden of Proof

This proceeding was initiated by KDHR when it requested a hearing on the Final Determinations by the Regional Administrator disallowing costs.

Title 20 C.F.R. §658.709(a) provides that hearings conducted under the Wagner-Peyser Act be conducted in accordance with §§5-8 of the Administrative Procedure Act [5 U.S.C. §§553-557]. Section 7 of the APA provides in part that:

except as otherwise provided by statute the proponent of a rule or order has the burden of proof [5 U.S.C. §556(d)].

Judge Ramsey in the Matter of Kentucky Department of Human Resources, Case No. 79-WPA-1 (September 29, 1981; RA Exhs. 1 and 2, Tabs C) after reviewing KDHR's same arguments as in this case determined that KDHR was the proponent of the Order and, concluded that:

It is consistent with this position that the burden of making out a prima facie case and the ultimate burden of persuasion in this proceeding be placed on Kentucky.

KDHR argues that I should hold that the burden of proof rests with the Department of Labor, and cites among other cases The State of Maine CETA Petitioner v. The United States Department of Labor, 669 F.2d 827 (1982), in support of its position. In the State of Maine CETA case, the Court at page 829 stated: "The general provision regarding the burden of proof at administrative hearings is found in the Administrative Procedure Act (APA), 5 U.S.C. §556(d); 'Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.' This has been interpreted to refer to the burden of production and not the ultimate burden of persuasion; the latter may be on the party challenging the Order. Environmental Defense Fund, Inc. v. EPA, 548 F.2d 998 (D.C. Cir. 1976); Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25, 39 (7th Cir. 1975) (opinion on Motion for rehearing). In its thorough opinion in Environmental Defense

Fund, Inc., supra, the Court examined the legislative history of 5 U.S.C. §556(d) canvassed the case law and concluded that the burden on the proponent is one of producing sufficient evidence to make out a prima facie case. 548 F.2d at 1012-1018 (supplemental opinion on petition for rehearing).

"While the APA relates to the burden of production, the substantive statute and its regulations govern the allocation of the ultimate burden of persuasion. Environmental Defense Fund, Inc., Old Ben Coal Corp., supra. The burden of persuasion in a proceeding under the CETA Act is set forth at 20 C.F.R. §676.90(b) 1979 and provides: 'Burden of Proof'. The party requesting the hearing shall have the burden of establishing the facts and entitlement to the relief requested: Relying on this regulation the Administrative Law Judge correctly assigned the burden of persuasion to OMC." 8/

In this case, the Regional Administrator in making his determination that a violation of the Wagner-Peyser Act had occurred warranting disallowances of various cost items relied upon a set of documents contained in and referred to as the administrative files. 9/ The administrative files comprehended and included the documents and information upon which the findings relating to the cost items in issue were predicated. The files had been furnished to the parties before the hearing and were officially introduced into the record at the beginning of the hearing without opposition. Over an extended period of time initial amounts alleged as unallowable costs were adjusted and the amount claimed by ETA was reduced by more than \$3,000,000.00. In this case when the comprehensive administrative files were produced containing the final determinations at various times including the Revised Final Determinations dated December 3, 1982, the Department's burden of production was met and it was incumbent upon KDHR to prove compliance with the Act. Further, since the record shows that adjustment negotiations over an extended period resulted in the amount of the alleged cost disallowance being reduced by more than \$3,000,000.00 it does not appear KDHR was prejudiced in the matter; nor is it shown KDHR was prejudiced by having been required to proceed with its burden of persuasion after ETA had satisfied its burden of production by submission of the administrative files. It follows that KDHR had the burden of persuasion and proof after ETA satisfied its burden of production.

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8/ Office of Maine CETA.

9/ There is a separate file for each of the two audits.

B. Estoppel and Laches

KDHR apparently bases its claim of estoppel and laches on the fact that the audit reports were initially issued on September 25, 1975 and July 27, 1977, respectively, and the Final Determinations were not issued until August 1981. 10/ Since Audit No. 04-75-633-L covered the period July 1, 1971 through June 30, 1974 and Audit 04-7-1119-L covered the period from July 1, 1974 to June 30, 1976, KDHR cannot well argue that it was not timely informed as to the various items and amounts then considered questionable.

A review of the administrative files indicates that Audit Report 04-75-633L questioned a total of \$2,344,279.50 in costs 11/ and Audit Report 04-7-1119-L-0005 questioned a total of \$1,928,717.00 in costs. 12/ The Final Determinations in August 1981, however, disallowed only costs of \$248,616.57 and \$1,418,767.00 respectively. 13/ This reflected a reduction of more than \$3,000,000.00. Such substantial reduction was due to meetings and negotiations between the parties prior to issuance of the Final Determinations and clearly a benefit to KDHR. Further, the KDHR at the time the audits were being conducted by what is now the Cabinet of Human Resources, was an umbrella agency during a transition period where the various departments were being joined under the umbrella agency then called the Department of Human Resources. KDHR and KCHR are used interchangeably in this decision. It was noted we got four departments which were previously individual bureaus or departments within the State Government and difficulties were experienced in finding people and records who personally knew about the audits and what had happened. 14/ The substantial reduction of more than \$3,000,000.00 shown in the audit reports inured to the benefit of KDHR and far outweighs any alleged prejudice.

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10/ Revised Final Determinations were later made the last being in December 1982 and after a hearing had been held in October 1982.

11/ RA Exh. 1, Tab G.

12/ RA Exh. 2, Tab G.

13/ RA Exhs. 1 and 2, Tab G.

14/ Tr. p. 9. Of course, the difficulties occasioned by the Reorganization may not be attributed to ETA to show prejudice on a basis for claiming laches.

As a general rule, the defense of estoppel may not be asserted against the Government. Utah Power and Light Co. v. United States, 243 U.S. 389 (1916). In those extraordinary cases in which estoppel against the government may be recognized, the defendant must establish, in addition to the traditional elements of estoppel defense, that the Government's wrongful conduct threatens to work serious injustice and that the public interest will not be unjustly damaged. United States v. Lazy F. Ranch, 481 F.2d 985 (9th Cir. 1973). Even then, however, equitable estoppel may not be invoked against the Government in its sovereign capacity unless the conduct constitutes "affirmative misconduct." Simon v. Califano, 593 F.2d 121 (9th Cir. 1979). Also see, United States v. Ruby, 557 F.2d 218 (9th Cir. 1977), cert. den. 99 S. Ct. 2838.

Four elements must be present to establish the traditional defense of estoppel: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon or not acted upon; (3) the party asserting the estoppel defense must be ignorant of the time facts; and (4) he must reasonably rely on the former's conduct to his detriment. See United States v. Georgia Pacific Co., 421 F.2d 92 (9th Cir. 1970); Simon v. Califano, supra. KDHR has not established its burden in this case. The delay in issuing Final Determinations is not estoppel. There clearly was no reliance or expectation shown by KCHR that ETA had abandoned the audit findings. See Fresno Employment and Training Co., Case No. 80-CETA-69, (September 10, 1980).

While KCHR argues presently that it has been difficult to locate witnesses and documents, it could or did not provide any additional information and documents when requested at the time of the audits. <sup>15/</sup> It was required to retain records supporting documents and all other pertinent records for a period of three years from date of final expenditure or until audit findings were resolved. <sup>16/</sup> Estoppel as a defense is not found to be warranted.

With reference as to whether or not the disallowed costs and claim for repayment are barred by laches counsel for ETA notes that laches should not be a defense against the Federal

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<sup>15/</sup> Tr. 270, 273, 295, 297, 304 and 307.

<sup>16/</sup> OMB Circular No. A-102, October 19, 1971.

Government. Costello v. U.S., 365 U.S. 534, 542-543, (1961); International Telephone and Telegraph v. General Telephone and Telegraph, 518 F.2d 913 (9th Cir. 1975); and U.S. v. Overman, 424 F.2d 1142 (9th Cir. 1970). This principle is based upon the important public policy of preserving public rights and revenues from loss due to negligence of public officers. In U.S. v. Overman, supra, at p. 1147 the Court stated: The United States is not subject to the defense of laches in enforcing its rights. (citing United States v. Summerlin (1940) 310 U.S. 414, 416, 60 S. Ct. 1019, 84 L. Ed. 1283.) Further, there are two elements necessary to the recognition of laches as a defense: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. See, Galliher v. Caldwell, 145 U.S. 368, 372, 12 S. Ct. 873, 874, 36 L. Ed. 738; Southern Pacific Co. v. Bogert, 250 U.S. 483, 488-490, 39 S. Ct. 533, 535, 63 L. Ed. 1099; Gardner v. Panama R. Co., 342 U.S. 29, 31, 72 S. Ct. 12, 13, 96 L. Ed. 31.

It is only when agency inaction is coupled with a demonstrated showing of actual prejudice that judicial dismissal may be appropriate. See EEOC v. Liberty Loan Corp., 584 F.2d 853, (8th Cir. 1978); Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978). As previously indicated, KCHR has not established any substantial or undue prejudice by delay between the issuance of the audit reports and the Final Determinations. In fact, the parties were able to resolve over 3 million of questioned costs beneficial to KDHR. The defense of estoppel and laches is found to be without merit in this proceeding.

### III

#### Authority of DOL-FTA to Require Repayment of Disallowed Costs

KCHR argues in substance, that this proceeding arises under the Wagner-Peyser Act, 29 U.S.C. §49 et seq., Title III of the Social Security Act, 42 U.S.C. §501 et seq., and Title IV-C of the Social Security Act, 42 U.S. §630 et seq. and since none of the above provisions of federal law provide for a prepayment of disallowed funds by KCHR to DOL, the Secretary of DOL has no authority to demand or collect a repayment of misspent funds or to promulgate regulations requiring a repayment. Federal Trade Commission v. National Lead Company, 352 U.S. 419, 428 (1957) and Civil Aeronautics Board v. Delta Airlines, Inc., 367 U.S. 316, 322 (1961) were cited to support its contention).

In addition, it is asserted that DOL has no common law right outside the statutory scheme to recover funds from a grantee where the grant is funded, on the basis of advanced payments. State of New Jersey, Department of Education v. Hufstedler, 662 F.2d 208, 217 (C.A. 3, 1981), cert. Granted No. 81-2125 (U.S. October 4, 1982). Any attempt to apply existing regulations to require KCHR to repay DOL for funds allegedly misspent, in some cases almost a decade ago, is also asserted to be without authority. KCHR argues that: it is well settled that a regulation or statute cannot be applied retroactively where antecedent rights are involved. United States v. Davis, 132 U.S. 334 (1889) and Green v. United States, 376 U.S. 149 (1964).

ETA takes a contra position and argues (1) that the stated purpose of an audit is to assure that funds were used in accordance with the Act's provision and recovery of misspent funds discovered by the audit is an obvious means to achieve this goal. (20 C.F.R. §601.9-15 FR 5886, August 31, 1950). Otherwise the audit would be a fictive formality without fiscal accountability; (2) while the Wagner-Peyser Act does not state any express authority to order grantees to repay misspent funds, such authority is certainly not barred by statutory language and may be implied from its provisions Section 49h [29 U.S.C. §49h] which allows ETA to revoke or withhold any certificate if it was found that the State Agency had not properly expended the monies paid to it to operate the program. Clearly, such sanction would be extreme and rarely imposed because of the tremendous burden on the State and the public; (3) given the mutuality of obligations, grant in aid statutes are considered to be "much in the nature of a contract". Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981). See, also, United States v. City of San Francisco, 310 U.S. 16 (1940); Burke v. Southern Pacific R.R., 234 U.S. 669, 1914. Under settled principle of contract law, a contracting party may recover monies paid for services that were contracted for, but either never provided or provided in a manner so substantially inconsistent with the terms of the agreement between the parties that the default results in failure of consideration. It would be against "equity and good conscience" to allow the non-performing party to retain monies advanced to induce its performance. United States v. Barlow, 132 U.S. 271 (1889). The government's inherent right to recover federal funds from one who has no right to retain them is not barred unless and until Congress "clearly manifested its intention to raise a statutory barrier." United States v. Wurts, 303 U.S. 414, 416 (1938). See, also, Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979); Isbrandtean Co. v. Johnson, 343 U.S. 779 (1952). Indeed,

the conclusion that the government has been denied rights that it could otherwise properly claim will only be "warranted if exacted by such overwhelming implication from the text as would leave no room for any other reasonable construction." Murry v. Wilson Distilling Co., 213 U.S. 151, 171, (1909); United States v. United Mine Workers, 330 U.S. 258 (1947). The absence of express administrative recoupment authority in a grant statute is not such an equivocal expression of Congressional intent. Barlow v. Collins, 397 U.S. 159, 166 (1970). On the contrary, the lack of express authority in the individual grant statute is more likely to reflect the view of Congress that it was unnecessary to confirm the agency's well settled power of recoupment.

Moreover, the nature of the federal grant process itself implied the authority to recoup grant-in-aid funds awarded on the condition that they will be spent for specific purposes when the grantee has failed to abide by that condition. In exchange for federal funds, the grant recipient has voluntarily acquiesced in the obligations and conditions of the grant statute and implementing regulations. King v. Smith, 392 U.S. 309 (1968); Rosado v. Wyman, 397 U.S. 397 (1970); Harris v. McRae, 448 U.S. 297 (1980); and (4) the Federal Claims Collection Act of 1966, 31 U.S.C. 951, et seq., is strong evidence of Congressional belief in the existence of the government's right to recover federal funds from one who has no right to retain them, and is itself sufficient to grant the right of recoupment, if an express statutory provision is necessary. Section 3(a) of this Act [31 U.S.C. 952(a)] provides:

The head of an agency or his designee, pursuant to regulations prescribed by him and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General, shall attempt collection of all claims of the United States for money or property arising out of the activities of, or referred to, his agency.

As required by the Federal Claims Collection Act, government wide regulations have been promulgated jointly by the Attorney General and the Comptroller General. 4 CFR Parts 101-105 (1980). These regulations provide, in part, at 4 CFR §102.1 that:

The head of an agency or his designees shall take aggressive action, on a timely basis with effective followings, to collect all claims of the United States for money or property arising out of the activities of...his agency in accordance with the standards set forth in this chapter.

Therefore, ETA can independently of specific statutory authority on Wagner-Peyser recover funds which were granted to KCHR for specific purposes and misspent in contradiction of those purposes. See, Mount Sinai Hospital of Greater Miami, Inc. v. Weinberger, 517 F.2d 329 (5th Cir. 1975) cert. denied, 425 U.S. 935 (1976); Disilvestro v. U.S., 405 F.2d 150 (2nd Cir. 1968); State of West Virginia v. Secretary of Education, 667 F.2d 417 (4th Cir. 1981); Collins v. Donovan, 661 F.2d 705 (8th Cir. 1981).

By regulations at 20 C.F.R. §658.703(b), the Secretary has specifically provided that:

If the matter involves the misspending of grant funds, the RA may issue a disallowance of the expenditure and may either demand repayment or withhold future funds in the amount in question.

It is thus clear that ETA's authority to recover misspent funds under Wagner-Peyser is well within common law and statutory authority of ETA. 17/ To hold otherwise would call into question the accountability of federal funds.

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17/ It is the Administrative Law Judge's position that final jurisdiction to pass on constitutionality of a statutory act or order and regulations promulgated thereunder is the prerogative of the judicial branch of Government. Although constitutional arguments are properly raised at administrative proceedings, an administrative tribunal is without jurisdiction to resolve these arguments and must assume the validity of the legislation it administers.

Similarly, I do not consider myself empowered to decide questions of whether the Secretary has authority under an Act to issue applicable regulations. Like the issue of

On the basis of the foregoing, I conclude that ETA has the authority to collect those audit costs found to be established as disallowable in this proceeding.

Two recent cases, in the Third and Fourth Circuits, have discussed the Government's recovery rights under a statutory grant scheme similar to CETA, with opposite results. State of New Jersey, Department of Education v. Hufstedler, 662 F.2d 208 (CA 3, 1981) cert. granted No. 81-2125 (U.S. October 4, 1982, and, State of West Virginia v. Secretary of Education, 667 F.2d 417 (4th Cir. 1981). The two cases involve identical questions of the Secretary of Education's right to recover funds distributed to states under Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. §2701, et seq., and determined by audits to have been misapplied under the terms of the Act and its implementing regulations. In both cases, the funds at issue were granted and spent prior to the statutory amendments, which specifically authorized the Secretary to order the repayment of misspent Federal grant funds from non-federal sources.

The State of West Virginia case, *supra*, held that the Secretary had a common law authority to recover misspent funds following an administrative hearing; and, that the 1978 amendment granting the Secretary specific authority to require repayment had retroactive applicability. There was no legislative indication that the authority to order repayment was to be

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17/ (continued) constitutionality the resolution of this question, is, in my opinion, reserved to the judicial branch. While the question is not free of doubt, it is my considered opinion that administrative tribunals are bound by duly promulgated rules and regulations. In assuming this position the administrative law judge in his decision should refer to precedent court and agency decisions to aid the Secretary in resolving the matter or issues in controversy and declaring the Department's position and policy. In this connection I note that 20 CFR 658.710(a) provides that:

The Hearing Officer shall have jurisdiction to decide all issues of fact and related issues of law and to grant or deny appropriate motions, but shall not have jurisdiction to decide upon the validity of Federal statutes or regulations. (underscoring supplied)

effective only prospectively and the Court held that the statutes for remedial purposes would be more fully served by applying the 1978 amendments retroactively. It was further held that even if this were not so, the Secretary can, independently of specific statutory authority, recover funds which were granted for a specific purposes and misspent in contradiction of those purposes. See, Mt. Sinai Hospital of Greater Miami, Inc. v. Weinberger, 517 F.2d 329, 337 (5th Cir. 1975) cert. den. 425 U.S. 935, 96 S. Ct. 1665 (1976).

The State of New Jersey case, *supra* came to the opposite conclusion and held that although there is a common law right for the Government to recover misspent funds, such right which did survive the specific statute, could be exercised only in a court of competent jurisdiction or by administrative setoff, but not by ordering repayment from non-federal funds following an administrative hearing.

There have been numerous cases in which repayment of funds granted under the 1973 Act have been ordered by the Secretary and upheld by U.S. Courts of Appeals: Office of Maine CETA, Case No. 80-CETA-53 (February 25, 1981), affirmed No. 81-1352 (1st Cir., January 25, 1982; Orange County, New York, Case No. 79-CETA-104 (February 29, 1980, affirmed 636 F.2d 889 (2d Cir. 1980), cert. den., 450 U.S. 966 (1981); City of New Orleans, La., Case No. 80-CETA-123 (May 28, 1980), affirmed No. 80-3603 (5th Cir., May 29, 1981); Fresno Employment and Training Commission, Case No. 80-CETA-69, Sept. 10, 1981, affirmed No. 80-7565 (9th Cir. October 29, 1981); and Kemebec Co., Case No. 79-CETA-191 (May 1, 1980), affirmed, No. 80-1453 (1st Cir., November 19, 1980).

I find that the facts in this case relating to exceptions of the audit reports does not establish or raise a constitutional issue for determination.

#### IV

Having found the claim of estoppel, and laches to be without merit and that DOL-ETA has the authority to require repayment of disallowed costs, I hereby make the following findings of fact and conclusions of law:

A. Audit Report No. 04-75-633-L	Amount
1. Pursuant to a stipulation made at the hearing in October 1982 subject to a ruling on legal issues raised, and herein overruled, the amount of disallowed costs on Win Contract 2600-21 was reduced from \$113,326.60 to \$86,791.00 which remains as a disallowed cost subject to recovery.	\$86,791.00
2. Pursuant to a stipulation made at the hearing in October 1982, subject to a ruling on legal issues raised and herein overruled, the disallowed excess insurance premium costs were agreed to by the parties to be in the amount of \$1,411.00 and remain as disallowed costs.	\$ 1,411.00
3. The KCHR disputes the disallowance of costs for employment of Edward H. Pritchard, a private attorney in the amount of \$6,323.00.	\$ 6,323.00

One reason given by KCHR for questioning disallowance of attorney fee costs by the Regional Administrator was that it was based upon the wrong lawsuit, i.e., the lawsuit for which the costs were disallowed was not the lawsuit for which costs were charged to DOL. (See p. 44 of KCHR brief).

I find the disallowance to have been warranted for the following reasons:

Attorney fees ordinarily are not recoverable in the absence of a statute or enforceable contract providing therefor. Fleishman Distilling Corporation v. Maeir Brewing Company, 386 U.S. 714, 717 (1967); George Lamb, 80-CETA-471 (8/3/81). The Supreme Court consistently has refused to deviate from the traditional rule that each litigant bears the expense of his own litigation. Runyon v. McCrary, 427 U.S. 160 (1967). Since there is no explicit authorization under the Wagner-Peyser Act, it must be assumed that Congress did not intend to make an exception to the rule. Various CETA cases have also held that awarding

attorney fees is impermissible under the Act and regulations. Marie Hernandez, 80-CETA-157 (12/5/80); In the case of Tommie Broome, 80-CETA-214, (6/30/80) it was held that even where a CETA grievant elects to ignore the procedures delineated by the Secretary of Labor for the resolution of grievance and invokes prematurely the jurisdiction of the local courts and the Department's formal hearing procedures and subjects the CETA grantee to heavy costs of defending such claims in numerous forums, it is clear that neither the Act nor the regulations authorize the award of counsel fees under any circumstances; In the case of Mark Knudson, 79-CETA, (6/30/80), the Complainant was subjected to an extended delay in payment of his back pay award due to a frivolous claim by the Prime Sponsor. He had to suffer the burden of litigating whether the recipient or subrecipient was responsible for payment of his award. It was held, he was not entitled to any additional payment in the form of punitive or exemplary damages, including attorney fees.

In this proceeding KCHR made no request for prior approval of the attorney fee before the attorney was employed; did not establish that such employment or fee was within its cost allocation and budget or that it benefited the Department of Labor as distinguished from KCHR. In any event, prior approval by ETA of the private attorney's employment was essential before consideration of payment. Absent a showing that its own legal staff was unable to represent KCHR or a request for ETA assistance, the denial by the Regional Administrator of payment for private legal fees in the amount of \$6,323.00 is sustained. 18/ In the absence of a statute, enforceable contract or prior approval by the Department of Labor-ETA, there was no entitlement established, whatever may have been the reason.

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18/ CETA and Wagner-Peyser Acts are similar in that neither provide for payment of attorney fees and cases seeking recovery have been uniformly denied.

4. The remaining disallowed cost in Audit Report 04-75-633-L relates to unapproved office space costs amounting to \$53,723.97. The amount was erroneously referred to as \$52,622.73 in the Audit Report but corrected in the Regional Administrator's findings. The space consisted of four state-owned offices and five privately owned offices that were obtained without DOL approval prior to acquiring such space. Since the Employment Security Manual requires the agency to obtain DOL approval prior to acquisition of such space, the \$53,723.97 disallowance is sustained.

Further, the stated purpose of an audit is to assure that funds were used in accordance with the Act's provision and recovery of misspent funds discovered in an audit is an obvious means to achieve this goal. (20 CFR §601.9-15 FR 5886, August 31, 1950). Otherwise the audit would be a mere formality without fiscal accountability. It would also be required for KCHR to show that it was operating within its budget allocation to establish entitlement under its grant for nonapproved office space.

I conclude that the finally disallowed costs amounting to \$148,248.97 reflected by the December 3, 1982 Revised Final Determination of the Regional Administrator relating to Audit Report No. 04-75-633-L including the \$53,723.97 costs for office space are sustained and such debt is subject to appropriate collection action in accordance with Federal debt collection procedures or Federal claims collection standards.

B. Audit Report No. 04-7-1119-L-0005 represents disallowed costs totalling \$1,187,570.00 comprised of the following.

5. Obligational Authority. Based upon the second audit covering the period July 1, 1974 to June 30, 1976, the DOL found and determined that KCHR had exceeded its \$798,342.00

obligated spending authority in the amount of \$798,342.00. 19/ KCHR gives three reasons for the obligation authority, hereafter referred to as OA, disallowance.

(1) KCHR increased expenditures for employment security grants due to increased costs for state centralized computer services;

(2) An EDP video terminal network was installed which had not been approved by the Employment Training Administration (ETA); and,

(3) The "Notification of obligational authority, form MA2-134, dated June 30, 1975 overstated the approved operating plan for fiscal year 1975 grants.

In his Revised Final Findings and Determinations of December 3, 1982 the Regional Administrator noted that funds were expended in excess of obligational authority provided by the Department of Labor in both fiscal years 1975-1976. The total amount overexpended was \$798,342.00 20/ after adjustments to obligational authority and expenditures were made 21/ in December 1982.

It was noted in the December 1982 revised determination that KCHR raised a question as to whether ETA increased or should have increased the obligation allowance after it

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19/ RA Exh. #2, Tab G, pp. 14-19. The amount of \$1,259,910.00 which appears in the audit report was reduced by \$461,568.00 because of adjustments to the obligational authority and expenditures following the October 1982 hearing.

20/ The amount of \$1,259,910.00 was reflected in the June II, 1981 initial findings and determination but was reduced by \$461,568.00 because of OA adjustments and expenditures.

21/ The December 3, 1982 decision was after the October hearing and additional evidence was then of record that did not appear to have been previously considered and resulted in the \$461,568.00 adjustment to the OA.

retroactively approved questioned costs of \$509,950.00 for procurement of ADP equipment. It was held that the approval to procure equipment does not in and of itself assure that additional obligation authority will be issued. In fact, just the opposite is true. Unless ETA specifically agrees that additional funds are available and agrees to provide them to a Grantee, it is understood that procurement will be made from funds currently available to the agency and that the agency will stay within the limits of the obligational authority issued.

The Manager of Fiscal Management for the Cabinet for Human Resources, Kentucky, read from paragraph 0741 of Employment Security Manual at the hearing defining obligational authority as follows:

"An obligational authority is an amount or sum of amounts allocated by the Assistant Regional Director of Manpower to a State agency and supported by certifications against which the State agency is authorized to incur obligations." 22/

It is not disputed that Kentucky exceeded the obligational authority for fiscal years 1975 and 1976. 23/ However, KDHR does argue that in 1975 after the fiscal year ended on June 30, it received an increased obligational authority on July 22, 1975 in the amount of \$12,112,000.00; 24/ thereafter on September 22, 1975 the obligational authority was reduced to \$11,511,000.00 and, on November 19, 1975 it was increased to \$11,629,000.00.

The budget plan submitted by KDHR at the beginning of the fiscal year was agreed to by both parties. 25/ It was stated on the face of the obligation that:

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22/ Transcript p. 48; also see Employment Security Manual par. 0741 HR Exh. No. 1 which was incorporated by reference at 20 C.F.R. § 602.16.

23/ Tr. pp. 65, 67.

24/ Tr. p. 64, HR Exh. #2.

25/ Tr. p. 107.

This obligational authority authorizes funding for the approved operating plan only. Reimbursement is restricted to the obligational authority or approved operating plan whichever is less. You may not exceed the individual target amounts shown. 26/

Employment Security Manual Part IV, paragraph 0740 (KDHR Exh. No. 1) provides that "obligations in excess of the approved Obligational Authority will not be considered necessary for proper and efficient administration." This Employment Security provision has the effect of regulation. (20 C.F.R. § 602.16) (16 FR 9142; September 8, 1951).

I agree with the KDHR witness who testified that obligational authority is a contract or grant between ETA and KDHR on the level to which funds may be expended. 27/ It follows that the same would be true as to any established modified obligational authority determination. The record establishes that the modified changes made in the obligational authority in this case were after the end of the fiscal year on June 30, 1975 and could not have been relied upon to justify excess spending beyond the obligation authority. An increased obligation authority in the amount of \$12,112,000.00 was initiated and authorized by the Regional Administrator on July 22, 1975; it was reduced to \$11,511,000.00 on September 22, 1975 and increased to \$11,629,000.00 on November 19, 1975 as the delineated obligational authority for fiscal year 1975.

KDHR argues that because of the higher obligational authority received on July 22, 1975, it expended funds and was later prejudiced when the authority was reduced on September 22, 1975. The argument ignores the fact that changes in the fiscal year 1975 obligational authority occurred after the end of the fiscal year and KDHR had already obligated the money. See Manpower Program Analysis Consultation and Training Inc., Case No. 80-BCA-113, November 4, 1981. KDHR admitted that it had already expended the funds prior to the July 22, 1975 authorization 28/ and that its expenditures even exceeded the then \$12,112,000.00 obligational authority, 29/ later adjusted to \$11,629,800.00.

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26/ KDHR Exh. No. 3.

27/ Tr. p. 47.

28/ Tr. pp. 88, 95

29/ Tr. p. 60.

With respect to fiscal year 1976 obligational authority there were no changes and KDHR still exceeded that authority by \$642,966.00. 30/

KDHR next argues that the subsequent approval by ETA of EDP equipment amounting to \$509,950.00 was not reflected in the obligational authority and therefore the obligational authority should be increased by that amount. In this connection it is pointed out that: (1) the notification of obligational authority, (form MA2-134) dated June 30, 1975 represented an increase of \$955,370.00; 31/ this increase took place within the 45 day period after the close of the state fiscal year and during this 45 day period KCHR used the increase in the obligational authority to pay costs for fiscal year 1975. 32/

On September 16, 1975, a notification of obligational authority was issued by DOL which lowered KCHR's obligational authority \$601,230.00. 33/ The reasons given by DOL for the decrease was stated in the notification of obligational authority under the paragraph entitled "comments" as follows:

To adjust OA to accepted state plan  
for FY 1975 subsequent adjustments  
will be made when cost overruns are  
resolved. 34/

It was evident that the EDP video terminal network had been purchased and installed without approval by ETA. Likewise costs of computer services had increased without ETA approval. Since the EPA video terminal network system had not been approved by ETA, it would not have been in the approved operating plan for fiscal year 1975 or comprehended within the obligational allowance for the 1975 fiscal year. Adjustment was therefore mandated and the additional obligational amount established on November 19, 1975 was \$11,629,000.00.

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30/ Tr. p. 67.

31/ Tr. p. 50.

32/ Tr. p. 65.

33/ Tr. p. 55; RA Exh. #5, pp. 6-7.

34/ RA Exh. #5, p. 7.

The Regional Administrator in a letter dated May 10, 1977 to the agency gave retroactive approval to October 1, 1976 as to funds expended to procure video terminal network amounting to \$509,950.00 without prior DOL approval. <sup>35/</sup> The determination was: "Cost questioned for the purchase of video network in the amount of \$509,950.00 is an allowable cost." The finding and determination was reiterated on December 3, 1982 and stated to be a revision to my final Findings and Determination issued August 14, 1981.

It is my finding and conclusion that the \$509,950.00 item for video network was an allowable cost; however, it was not within the original contract or modified changes as to grant obligation authority. Since the record indicates the obligation authority grants have been overexpended and ETA has not agreed that additional funds are available to provide to the Grantee, any procurement provided would have to be from funds currently available in order to require the agency to stay within the limits of the OA issued.

The Regional Administrator held that there is no evidence that ETA agreed to additional funds. No modifications were made to the obligational authority to provide for the purchase of EDP equipment. KDHR was thus bound to remain within its obligational authority for fiscal years 1975-1976 and because its expenditures exceeded this authority, KDHR violated the applicable regulations and its grant agreement.

The total expended funds item amounting to \$798,342.00 in excess of Obligational Authority is disallowed.

6. Disallowance of costs for unapproved office space (Finding #4, RA Exh. 2, Tab D). Audit Report No. 04-7-119-L-0005.	\$253,238.00
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Unapproved office space costs were previously discussed in paragraph 4, supra, in connection with Audit Report No. 04-75-633-L

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<sup>35/</sup> See, Ltr. dated June 11, 1981 from the R.A. to W. Grady Stumbo, Secretary of Dept. of Human Resources (Finding and Determination No. 3, marked RA Exh. No. 1, 2 9 (tab F)).

In this Audit Report No. 04-7-119-L-0005 there were six offices rented by KDHR at a rate exceeding the rate approved by ETA and thirty-five other offices were rented when no rental or amortization rate was approved. 36/

20 C.F.R. § 602.16 (16 FR 9142, September 8, 1951) provides that:

Each state agency shall comply with the Manpower Administration Fiscal Standards set forth in Part IV of the Employment Security Manual.

The Manual, Part IV, Section 2510 37/ provides:

Standard. Granted funds may be used for rental space in privately owned buildings, needed for employment security operations, provided the following conditions are met.

A. ...the space is consistent with Manpower Administration guides.

B. Prior approval is obtained from the appropriate Assistant Regional Director for Manpower for expenditures from granted funds for leases.

(1) For more than 1 year, including leases which have a renewal option that could extend the period of such leases for more than one year....

Section 2511 states:

(c) Submittal. Submit an original and two copies of MA 2-133 to the appropriate regional office at least 30 days prior to the date of execution of the lease or of a supplemental lease when there is a change in space requirement....

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G-4. 36/ R.A. Exh. No. 2, Tab G, pp. 32-37; also see schedule

37/ R.A. Exh. 4A

Section 2535 of the Employment Security Manual provides:

Submittal of Purchase on Construction Proposals. Requests for the use of funds granted for rental of space to meet the cost of purchase or construction of space to provide quarters for the employment security agency should be submitted to the appropriate MA regional office, for prior approval.

...If there is necessity for an increase or a decrease in the space requirements during the amortization period, the regional office should be advised accordingly. If an increase in the amount of space is required the State Agency will submit a request with justification to the regional office for the approval of the use of additional funds for rental of space.

KDHR admitted that it did not request nor get prior approval for any of the office space identified in the audit report. 38/ Nor is there a showing that KDHR received any approval for such space. 39/

There has been no showing by KDHR that each office space identified was necessary or required for the operation of the program but even if such evidence had been presented funding for such space cannot be assumed.

For the foregoing reasons and those previously stated in connection with Audit Report No. 04-75-633-L it is apparent that since the Employment Security Manual requires the agency to obtain DOL approval prior to acquisition of such space the \$253,238.00 disallowance is sustained.

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38/ Tr. p. 141

39/ Illustrative of cases on prior approval are: Grand Rapids Inter & Tribal Council, Case No. 81-CETA-A/122, October 14, 1982; City of Phoenix and Maricopa County, Case No. 81-CETA-10 (July 15, 1982); Alabama Migrant and Seasonal Farm Workers Council, Inc., Case No. BCA/CETA-100 (January 18, 1982); Kennebec County, Case No. 79-CETA-191, May 1, 1980.

I conclude that the finally disallowed costs amounting to \$253,238.00 reflected by the December 3, 1982 Revised Final Determination of the Regional Administrator relating to disallowance of office space costs amounting to \$253,238.00 in Audit Report No. 04-7-119-L-0005 are sustained and that such debt is subject to appropriate collection action in accordance with Federal debt collection procedures or Federal claim collection standards.

7. Disallowance of costs expended for non-approved professional services amounting to \$86,445.00. The disallowed costs expended for the non-approved professional services are comprised of

- (a) Dr. Willard \$80,006.00.
- (b) James Childer 1,470.00.
- (c) Kentucky Manpower Development Inc., \$4,969.00.

Pursuant to a stipulation made at the hearing held in October 1982, subject to a ruling or legal issues raised and herein overruled, the disallowed costs for non-approved professional services as relates to James Childer in the amount of \$1,470.00 and Kentucky Manpower Development Inc., in the amount of \$4,969.00 remain disallowed and are subject to repayment as represented by KCHR counsel at the hearing.

As to the disallowed costs expended for non-approved professional services for Dr. Norman Willard, KDHR argues that lack of prior ETA approval of his services was a violation of the Employment Security Manual, Part IV, Section 1090 in that Dr. Willard is not covered by this section which states:

Standard: Granted funds may be used to pay for the cost of surveys, studies and other professional services by universities (whether public or private) nonprofit organizations, commercial firms, and other non-governmental agencies, if the Manpower Administration is unable to furnish needed assistance and the State agency obtains prior MA regional office approval to contract for such service. 40/

Also, it is argued by KDHR that Dr. Willard was hired "to serve as Commissioner of the Bureau of Manpower in the Department of Human Resources." 41/ The position was exempt from the merit system. 42/ It concedes that Dr. Willard's salary was \$10,000.00 per year more than the basic pay for other Commissioners. 43/

In order to secure services of Dr. Willard KDHR had to contract with the University of Kentucky. 44/ Dr. Willard was a university professor who apparently took a leave of absence. His contract period with KDHR was from November 16, 1973 to December 31, 1975. The second audit covered the period from July 1, 1974 to June 30, 1976. During the audit period relating to his tenure of employment he received his salary from the University of Kentucky who in turn billed KDHR for it. 45/ ETA argues that this was clearly a contract for services and was even shown in KDHR expenditures as consultant services. 46/ Since KDHR concedes that it did not request or obtain the approval of ETA for the expenditure, 47/ ETA claims that it clearly violated Section 1090 of the Employment Security Manual. The requirement of approval is claimed to be necessary in order for ETA to determine need, benefit and reasonable costs. 48/

In my opinion, there are certain, definite, basic, essential requirements for consideration of grants to be funded by the Federal government or its agencies. Among these are:

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41/ R.A. Exh. 2, Tab G p. 40; KDHR Exh. 8, Tr. pp. 177, 178.

42/ Tr. p. 182.

43/ Dr. Willard's annual salary was \$38,000.00 per year. Generally Commissioners were receiving between \$24,000.00 - \$28,000.00 per year. Tr. p. 196, 197.

44/ R.A. Exh. 7.

45/ Tr. p. 199.

46/ Tr. p. 292.

47/ Tr. pp. 197, 198.

48/ Tr. pp. 339.

(a) There must be an operating plan setting forth the purpose of the grant request and what the plan seeks to accomplish. Sufficient information must be supplied for the granting agency to ascertain and evaluate contents of the program and the benefit to be derived, other words, there must be prior approval of the submitted operational plan.

(b) There must be obligational authority setting forth the cost limitations for the project or projects encompassed in the operational plan including administrative costs for salaries of personnel employed to administer the program.

(c) Changes or modification in the operational plan or projects must require prior approval by the funding agency.

(d) The grant is limited by the obligational authority and may not be exceeded without approved change or modification of the obligational authority.

In this case, it is undisputed that Dr. Willard's salary was received from the University of Kentucky who in turn billed KDHR quarterly for it; it was shown in KDHR expenditures as consultant services under the contract which KDHR insists should be termed as a Memoranda of Agreement. KDHR concedes it did not request or obtain approval of ETA for the expenditure nor did it establish that there remained within the obligational authority grant unexpended funds comprehended within the approved operational plan. It is unnecessary to discuss the merits of an expenditure not included or comprehended within the operational plan and its obligational authority. The record reflects that KDHR had exceeded its obligational authority during the period here in issue.

But in this instance KDHR insists Dr. Willard was exempt from the provisions of Part IV of the Security Manual and it was entitled to bill the Department of Labor for costs expended for his services. The Memorandum of Agreement and the appointment notification dated January 31, 1974 and approved by the

Governor 49/ establish that he was appointed as Manpower Commissioner and functioned as such until his term expired on December 31, 1975. William D. Esenbock, Manager of Fiscal Management, Kentucky Cabinet of Human Resources testified "There was a Commissioner of the old Department of Economic Security which was one of the departments for Human Resources and the Commissioner's salary, for the Department of Security was paid for by the Department of Labor...." The subsequent Commissioner to Dr. Willard was paid for by the Department of Labor and the Department of Labor is currently being charged the cost of the Commissioner's salary. 50/ It was stated there has been no question in subsequent audits on the Commissioner's salary.

With regard to salary, the cost of a Commissioner during Dr. Willard's tenure was \$29,000.00 per year. 51/ Dr. Willard was paid \$38,000.00. 52/ In its brief KDHR claimed the \$80,006.00 disallowance should be reduced by at least the amount of a Commissioner is paid (two years times \$29,000.00) or \$58,000.00. The actual cost of \$80,000.00 for Dr. Willard minus the cost of a regular Commissioner (\$58,000.00 for the two year period) amounts to \$22,006.00 for which KCHA claims is the correct amount of disallowance.

Since the record establishes that the classification position of Commissioner was recognized both before and after Dr. Willard's tenure and the salary for such position was paid by the Department of Labor, I find the correct amount of disallowance is \$22,006.00 instead of \$80,006.00 indicated in the audit report. Since the records establish the position was considered and treated in fact as an exempt position and paid for by the Department of Labor before and after Dr. Norman's tenure, I find the overall disallowance was more appropriately reduced to \$28,445.00.

In summary the disallowance for costs expended for non-approved professional services are revised to show:

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49/ KCHR Exh. No. 7, Tr. p. 194, 363.

50/ Tr. p. 198.

51/ Tr. p. 180.

52/ Tr. p. 196.

(a) costs for Dr. Willard	\$22,006.00
(b) James Childer	\$ 1,470.00
(c) Kentucky Manpower Development, Inc.	\$ 4,969.00
	<u>\$28,445.00</u>

The total disallowance costs for the item described as non-approved professional services has been found to be \$28,445.00 instead of \$80,006.00 for the two year period comprehended in the audit. 53/

8. Disallowance of costs for the Touche-Ross Outside Audit \$48,402.00.

The cost of the subject audit totalled approximately \$300,000.00 of which \$48,402.00 was charged as being attributable to Department of Labor (DOL) programs. The remaining costs were charged to other Federal agencies including the United States Department of Health and Human Services (HHS) and the United States Department of Agriculture, both of which eventually allowed the costs for which they were charged. DOL disallowed the \$48,402.00 charged against it and in its brief referred to Employment Security Manual, Part IV, Section 1100 54/ which provides:

Expenditures of granted funds for financing audits other than those conducted by the Department of Labor is considered necessary under the following conditions:

A. The audit performed must follow an audit plan developed by the U.S. Department of Labor;

B. The audit performed must not duplicate an audit performed by U.S. Department of Labor auditors; and

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53/ Certainly the record does not provide a basis for disallowing \$40,000.00 per year for Dr. Willard's salary and in its brief, page 25, KCHR submitted that \$22,006.00 was the correct amount.

54/ R.A. Exh. No. 9.

C. The audit is necessary for the administration and management functions of the employment security agency.

While KDHR admits that the outside audit firm of Touche-Ross and Company was not approved by ETA, 55/ it argues that the audit was necessary for its internal controls after its reorganization. 56/ Both ETA and the Department of Health and Human Services were charged for this audit 57/ but KDHR has not shown any benefit derived by ETA for this outside audit. It is noted that a copy of the audit was not furnished to ETA until after the November 1982 hearing despite prior repeated requests of KDHR. 58/ Also, the Touche-Ross audit was being conducted simultaneously with the Inspector General's office 59/ and appeared to be duplicative.

Insofar as the audit related to ETA, the \$48,402.00 disallowed cost, for the Touche-Ross audit is affirmed.

#### Conclusion

In view of the foregoing, the disallowed costs in the Revised Final Findings and Determinations issued on December 31, 1982, relating to Audit Report 04-75-633L, amounts to \$148,248.97 and are hereby sustained and affirmed.

As to Audit Report 04-7-1119-L-0005 the disallowed costs are likewise sustained and affirmed except that the disallowed costs expended for Dr. Norman Willard is reduced from \$80,006.00 to \$22,006.00. 60/

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55/ Tr. pp. 150, 168.

56/ Tr. p. 151.

57/ Tr. pp. 151, 153.

58/ Tr. p. 297.

59/ Tr. 294.

60/ The position of Commissioner was treated as an exempt position and paid for both prior to and after Dr. Willard's term.

The disallowed costs expended for the item non-approved professional services is now more appropriately found and reflected to be \$22,006.00 for Dr. Willard. \$1,470.00 for James Childer; and, \$4,969.00 for Kentucky Manpower Development, Inc., or a total of \$28,445.00. Based on the foregoing adjustment the total disallowance on Audit Report No. 04-7-1119-L-0005 amounts to \$1,129,570.00 in lieu of \$1,187,570.00 as previously reported. The total combined disallowed costs on the two audits amount to \$1,277,818.97.

Order

The determination of the Grant Officer is affirmed as to Audit Report No. 04-75-633L resulting in liquidated disallowed costs of \$148,248.97; and, modified as to Audit Report No. 04-7-1119, resulting in liquidated disallowed costs of \$1,129,570.00. The total combined disallowance based on the two Audit Reports is \$1,277,818.97.

The KCHR shall within thirty (30) days from the effective date of this Order submit to the Regional Administrator from non-Federal funds, a certified check payable to the Employment Training Administration, U.S. Department of Labor in the amount of \$1,277,818.97. 61/



RHEA M. BURROW  
Administrative Law Judge

Dated: *September 8, 1983*  
Washington, D.C.

RMB:kat

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61/ The amount of the debt will be considered delinquent if not repaid within 30 days and thereafter subject to interest at a rate determined by the Department of Labor's Office of Administration and Management.