

7/1/85

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

In the Matter of)	
CITY OF GARY, INDIANA,)	
Petitioner)	
v.)	Case No. 79-CETA-164
U.S. DEPARTMENT OF LABOR,)	
Respondent)	

DECISION AND ORDER
of the
SECRETARY OF LABOR

Before me for **review^{1/}** is the July 16, 1980, Decision and Order (DO) of Administrative Law Judge (ALJ) Glen Robert Lawrence in this matter. Both the United States Department of Labor (DOL) and the City of Gary, Indiana (City), request review and modification of the ALJ's decision.

Judge Lawrence's decision states,

This proceeding arises under the Comprehensive Employment and **Training** Act of 1973, as **amended**, 29 U.S.C. § 801 et seq., (hereinafter referred to as the "Act" of "CETA"), and the regulations issued pursuant thereto, including the new regulations at 20 C.F.R. § 656.88, 44 Fed. Reg. 20035-36 (1979).

DO at 1. The ALJ's decision, attached hereto, **accurately** states the issues that were before the ALJ and the facts of the case. Therefore, only an abbreviated statement of facts is provided here.

^{1/}**Jurisdiction** was asserted over this case on August 14, 1980, pursuant to 20 C.F.R. § 676.90(f).

In 1974 DOL granted \$2,060,613 to City to operate a Summer Program to Employ Disadvantaged Youth (SPEDY), authorized under Title III of the Act. City subsequently subcontracted with School City of Gary (School City) to operate the SPEDY program. In response to allegations that ineligible individuals were being allowed to participate in the program, in 1974 and 1975 DOL conducted an audit of the program, using accepted statistical sampling methods. The audit report recommended a total amount of \$993,853 be disallowed. As the ALJ explained,

In response to this audit, the City of Gary caused a 100 percent survey to be taken in an attempt to determine participant eligibility. A team of five individuals, headed by the then Manpower Administration, reviewed all of the applications, interviewed school social workers who were actually involved in the program's participant intake, and reviewed school records and city welfare records in order to determine the total number of ineligible participants (Tr. 215). The audit divided the applications into three classifications: 1) eligible, 2) ineligible, and 3) undetermined (Tr. 216). These categories were further divided into: 1) those participants who were terminated early because of ineligibility, and 2) those participants who completed the program. The findings of the City's audit were as follows:

<u>ineligible participants</u>
399 terminated early
540 completed program
939 total

<u>undetermined participants</u>
80 terminated early
290 completed program
370 total

DO at 4. Under the results of this audit, completed in May 1975, the maximum amount that would be recoverable was \$462,515. City also further responded to the government audit in the Fall of 1975.

The Grant Officer reviewed the evidence on both audits. In May 1976 he found the government audit generally acceptable and disallowed costs of **\$641,824.33**. City requested a hearing, which was held in November 1979 and January 1980.

At the hearing evidence on the audits was submitted. City also submitted a ten per centum sample survey taken in November 1979. The parties stipulated that \$367.63 was to be disallowed for any ineligible participant and also stipulated an additional amount of \$8459.46 to cover unallowed expenditures.

Judge Lawrence accepted the stipulations of the parties. He found City's May 1975 audit credible and that it refuted the DOL audit findings. Accordingly accepting the figures from City's audit, he further determined that he would allow the costs for the 479 ineligible and undetermined enrollees who were removed from the program prior to its completion. A disallowed cost of **\$305,132.90** for the 830 ineligible and undetermined enrollees who completed the program plus the disallowed costs of \$8459.46 for other expenses brought the total disallowed costs to **\$313,592.36**. The ALJ also rejected contentions of City that liability should only lie with the subgrantee School City and that City could not be ordered to reimburse DOL out of non-CETA funds.

City contends that it is not liable for School City's failure to comply with the CETA regulations. City argues

that, because it subcontracted the administration and implementation of the program, its only remaining duty was to monitor the program. City's argument is not supported by the regulations. The ALJ properly determined,

The City as prime sponsor is responsible for all costs incurred in violation of the Act, its regulations and applicable program policies pursuant to the regulations at 29 C.F.R. §§ 97.11, 95.31 and 97.19 (June 4, 1974, Federal Register). Further, the prime sponsor agreed to such liability in the Assurances and Certifications provision under the grant agreement. The City cannot avoid liability by assigning the program operation to a third party.

DO at 9. Moreover, the ALJ's decision is consistent with decisions of the United States Courts of Appeals, including the circuit in which this case arises, see Milwaukee County v. Peters, 682 F.2d 609 (7th Cir. 1982), that under the Act a prime sponsor must accept responsibility for the actions of its subgrantees and that it can be held accountable for those actions.

The CETA program is a two-way street. The prime sponsor receives funds to distribute in its geographic area, but must also accept the supervisory role envisioned by the Act. [See 29 U.S.C. § 815(a)(1) (B) (1973).] It cannot passively sit by while the subgrantees and contractors violate the Act and regulations. It must police and enforce those regulations and ensure that the program within its geographic area runs smoothly and according to law.

Commonwealth of Kentucky, Department of Human Resources v. Donovan, 704 F.2d 288, 293-4 (6th Cir. 1983). Accordingly, City's argument is rejected.

City next argues that the 1978 amendments to CETA cannot be applied in this case since they were not in effect in the

summer of 1974 and the Act of 1973 does not authorize the Secretary to require repayment for misspent funds from non-CETA sources. The ALJ relied on 29 C.F.R. § 98.48 (1974)^{2/} for determining that reimbursement from non-CETA funds "effectuate[d] the purposes" of the Act and therefore was a proper remedy. DO at 9. It is axiomatic that a regulation can grant no broader authority than that granted by the act it implements. Dixon v. United States, 381 U.S. 68, 85 S.Ct. 1301 (1965).

The ALJ's conclusion that reimbursement from non-CETA funds is a proper remedy is correct. The Third, Fourth, Eighth and

^{2/}Section (f) of the regulation provides,

Content of orders. The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, under the program involved in accordance with the Act, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and regulations issued thereunder, including provisions designed to assure that no Federal financial assistance will thereafter be extended under such program to the respondent determined by such decision to be in default in its performance of an assurance given by it pursuant to the Act or regulations issued thereunder, or to have otherwise failed to comply with the Act or regulations issued thereunder, unless and until it corrects its noncompliance, and satisfies the Secretary that it will fully comply with the Act and regulations issued thereunder.

[Emphasis added] 29 C.F.R. § 98.48(f).

Ninth Circuits have recently held that the Secretary had the **authority** under the 1973 Act to require repayment for misspent **CETA** funds. Atlantic County, New Jersey v. United States Department of Labor, 715 **F.2d** 834 (3d Cir. 1983); North Carolina Commission of Indian Affairs v. United States Department of Labor, 725 **F.2d** 238 (4th Cir. 1984); Texarkana Metropolitan Area Manpower Consortium v. Donovan, 721 **F.2d** 1162 (8th Cir. 1983); California Tribal Chairman's Association v. United States Department of Labor, 730 **F.2d** 1289 (9th Cir. 1984). My holding is consistent with those decisions.

In Atlantic County, the seminal decision, the court found controlling the decision of the Supreme Court in Bell v. Jersey and Pennsylvania, ____ U.S. ____, 103 S.Ct. 2187 (1983).^{3/} In Bell, the Court held that the Secretary of Education was entitled to order recoupment of misspent grant funds under the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. § 2701 et seq. (1976 ed. Supp. V), prior to its amendment in 1978, when that authority was made explicit. See 20 U.S.C. 2835(b).

^{3/}The Fourth Circuit relied on Bell and stated that its decision was "in accord" with the Third Circuit's decision. 725 **F.2d** at 239. The Eighth Circuit found the Third Circuit's reasoning "compelling," 721 **F.2d** at 1164, and the Ninth Circuit's reasoning closely followed the Third Circuit's, 730 **F.2d** at 1291. The Eighth Circuit also ruled that its conclusion "is also consistent with earlier decisions of this circuit in which we have recognized a common law right of government to recover improperly spent federal funds." 721 **F.2d** at 1164.

In Atlantic County, the court centered on the language of Section 602(b) of the 1973 Act, 29 U.S.C. 982(b), which, inter alia, authorizes the Secretary to make "necessary adjustments in payments on account of overpayments and under payments" and ruled that in Bell the Supreme Court had found a similar provision "plain[ly]" allowed the federal government to demand repayment. 715 F.2d at 835-6. Moreover, **the** argument which City makes to me, that 29 U.S.C. §§ 818(b)(2) and 982(b)^{4/} by their terms limit the sanctions available to the Secretary, can be rejected on the basis of the rulings in Atlantic County and California Tribal Chairman's Association that the 1973 Act by its terms did not make the specified sanctions exclusive. Indeed, Section 982(b)'s use of the permissive "may" ("may also withhold funds") supports a conclusion that withholding of funds is not an exclusive remedy. 715 F.2d at 837; 730 F.2d at 1291. Accordingly, City's argument that the language of the 1973 Act restricts the Secretary's right to recover misspent funds must be rejected.

The courts also rejected the contention, made here, that Congress intended a change in law in passing the provision of the 1978 Act which expressly provides that the Secretary may require repayment for misspent funds from non-CETA sources, 29 U.S.C. § 816(d)(1). The courts concluded that the legislative

^{4/} Sections 818(b)(2) and 982(b) mandate the Secretary make no further CETA payments, revoke the sponsor plan and require the return of any unexpected funds. They further allow the Secretary to withhold funds for other programs.

history of CETA and administrative practice prior to **CETA's** amendment support a conclusion that the 1978 amendments of **CETA** were intended only to clarify what had been authorized and practiced under the 1973 Act. 715 **F.2d** at 836; 730 **F.2d** at 1291.^{5/} The courts, again finding the Bell decision controlling, **concluded** that the legislative **history** and administrative interpretation of CETA closely paralleled **ESEA's**, on which the Supreme Court had relied, and therefore ruled that they, along with the language of the 1973 Act, support a conclusion that the Secretary was authorized under the 1973 Act to require repayment for misused funds.

The courts found that it had been administrative practice under the programs that CETA superseded and CETA, prior to the amendment, for the Secretary to require recoupment.^{6/} The courts also found that the debates on the 1978 amendments support a

^{5/}City makes the following argument:

The legislature was aware of the limitations of the 1973 Act and sought to remove them by enacting the 1978 amendments. Senate Report No. 95-891, 95th Cong., 2nd Sess. 15 reprinted in [1978] U.S. Code Cong. and Ad. New 4480, 4495, which discusses the 1978 amendments, specifically states that "the complaints and sanction section expands...existing law."

[emphasis added by City] City's Brief at 13. City elided the crucial phrase "and clarifies," thereby materially altering the import of the sentence. Accordingly, rather than supporting City's claim that Congress changed the law with the 1978 amendments, the report is consistent with the view that Section 816(d)(1) merely clarified prior administrative practice.

^{6/}In arguing that it was administrative practice to require repayment prior to the 1978 amendments, **DOL** relies on a decision of the Comptroller General of the United States, "In the Matter of Emergency Employment Act of 1971 -- Recovery of Grant Funds,"

conclusion that Congress was presumptively aware of the **Secretary's** interpretation of the 1973 Act and that Congress's failure to indicate any disapproval of that interpretation evidences that Congress ratified the Secretary's interpretation when it specifically provided for recoupment in the 1978 amendments.

I therefore affirm the ALJ's finding repayment a proper remedy on the basis that recoupment was authorized by the 1973 Act. However, I alternatively rule that, even if the 1973 Act did not authorize requiring reimbursement from non-CETA funds, I would apply Section 816(d)(1), as enacted in 1978, and approve the ALJ's requiring City to reimburse **DOL.**^{7/} See 29 C.F.R.

^{6/} (Continued)

dated February 10, 1978. The pertinent provision of the Emergency Employment Act of 1971, which CETA superseded, was exactly like 29 U.S.C. § 982(b) in that it explicitly provided only for withholding of funds. The Comptroller General held that DOL had a responsibility to seek recoupment. I find this decision persuasive and City's attempt to discredit it misplaced. City relies on a report by the Comptroller General, Information on the Buildup in Public Service Jobs, issued March 6, 1978, to establish "the Comptroller General either realized he had erroneously interpreted the 1971 Act or did not interpret the 1973 CETA statute in the same manner." City's Brief at 13. City also argues that, since this report was relied on by Congress in passing the 1978 amendments, Congress was aware of the need to include in the amendments the sanction of requiring reimbursement from non-CETA funds. City's argument is not supported by the report. The report addressed problems in administering Title VI of CETA. The part referred to by City, pages 21 through 22, only states that there was no sanction when a sponsor terminated an ineligible participant from a Title VI program within the 60 days allowed by the Title VI regulations to determine eligibility. See 29 C.F.R. § 99.43(b).

^{7/}The courts did not address the contention that the 1978 amendment could be applied retroactively to a case arising under the 1973 Act. I address the issue here because the Seventh Circuit has not yet addressed whether it agrees with the Third, Fourth, Eighth, and Ninth Circuits that the 1973 Act authorized repayment.

§ 676.91(c).^{8/} DOL properly contends that the decision of the United States Supreme Court in Bradley v. School Board of City of Richmond, 416 U.S. 696, 947 S.Ct. 2006 (1974), would control here.^{9/} In Bradley the Court held that, if the law which controls a case is changed while the case is pending, to decide the case,

a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

Id. at 712.

There is no statutory direction on whether Section 816(d)(1)'s sanction of requiring reimbursement from non-CETA sources should

^{8/}The regulation provides in pertinent part,

The Administrative Law Judge shall have the full authority of the Secretary in ordering relief, including direct action against the subrecipients as authorized by section 106(d)(1) of the Act. Orders for relief provide for suspension or termination of, or refusal to grant or continue federal financial assistance in whole or in part, and may contain such terms, corrective action, conditions, sanctions (including awards of back pay), reallocations, and other provisions as are consistent with and will effectuate the purposes of the Act and regulations issued thereunder, including provisions designed to insure that no federal financial assistance will thereafter be extended under such program unless and until the prime sponsor, recipient or **subrecipient** correct its noncompliance and makes satisfactory assurance that it will fully comply with the Act and regulations.

29 C.F.R. § 676.91(c).

^{9/}See Justice White's concurring opinion in Bell that he would have decided the case on the basis that the 1978 amendments of ESEA could be applied retroactively under the principles of Bradley. 103 S.Ct. at 2198.

be applied retroactively. Moreover, contrary to City's argument, there also is no legislative history on the **issue**.^{10/}

10/City argues that comments of Senators Schweiker and Javits, 124 CONG. REC. S14445 (Daily ed. August 25, 1978), establish that Congress intended no retroactive effect of the sanction at issue here. City quotes the following exchange:

Mr. SCHWEIKER.... [My] amendment is very similar to one adopted by the House....

I want to make clear in response to some concern expressed on the House floor, that this amendment would have no retroactive application.

Mr. JAVITS. Mr. President, will the Senator yield?

Mr. SCHWEIKER. I yield.

Mr. JAVITS.. That was the only thing I was going to ask the Senator. The amendment deals with strict application of the law, but I think retroactivity would be very unfortunate. The Senator makes that clear, that there will be no retroactivity.

Mr. SCHWEIKER. I thank the Senator for that suggestion. We have incorporated that. I agree with him. As a matter of basic fairness, I feel enforcement standards and policy should be clear in advance. Therefore, only conduct occurring after enactment of this bill would be specifically covered by this amendment.

[City's emphasis] Id. The amendment being discussed, while including the specific reimbursement sanction provided in Section 816(d)(1), also specified certain proscribed abuses. In the words of Senator Schweiker, the amendment "deal[t] with the problem of substitution of regular local government employees with CETA workers and other flagrant abuses, such as kickbacks, political patronage, nepotism, and the like." Id. Because this conduct, which was not proscribed by the 1973 Act, was made illegal by the 1978 Act, the Senators were remarking that, if such conduct predated the 1978 Act, it should not be sanctioned. They were not saying that the sanctions specified in the amendment should not be applied to conduct which was illegal under the 1973 Act, as in this case.

Since the legislative history does not direct me to apply Section 816(d)(1) only prospectively, I must examine whether it would result in manifest injustice, under Bradley, to apply it to this case. In City of Great Falls v. U.S. Department of Labor, 673 F.2d 1065 (9th Cir. 1982), the court examined whether the 1978 amendment when specifically provided for back pay awards, 29 U.S.C. § 816(f) (1978), could be applied to a case arising under the 1973 Act. It applied the principles of Bradley and decided that applying the back pay provisions of the 1978 Act to the 1973 Act case before it would result in manifest injustice. However, the court found the issue "close." Id. at 1069. Using the decision of Great Falls to guide me in applying the standards of Bradley I conclude that no manifest injustice would result from applying 29 U.S.C. § 816(d)(1) and 29 C.F.R. § 676.91(c) to this case.

The court in Great Falls stated,

In determining whether it would work an injustice to apply a change in law to a pending case, the Supreme Court has directed courts to consider "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law on those rights." Bradley v. School Board of City of Richmond, supra, 416 U.S. at 718, 94 S.Ct. at 2019. No one factor is dispositive, and there is a general presumption that changes in law apply to cases being reviewed on appeal. See Dobbins v. Schweiker, 641 F.2d 1354, 1360 n.8 (9th Cir. 1981).

In discussing the first factor, the Supreme Court has distinguished litigation involving "great national concerns," and parties who are public entities, from private cases

between individuals. Id., 416 U.S. at 718-19, 94 S.Ct. at 2019-20[.]

673 F.2d at 1068. As in Great Falls, that City and DOL are public entities favors application of the 1978 amendment. In Great Falls, however, the court determined that there was no "great national concern" involved in the litigation before it. Regarding the issue in **this** case, however, I believe it is of great national concern whether DOL is denied its only remaining sanction under the Act simply because CETA has been discontinued. It would be contrary to public policy to allow sponsors who misused CETA money under the 1973 Act to escape any sanction for that misuse no matter how great the abuse or how much funding was involved. Accordingly, application of Bradley's first factor would militate applying Section 816(d)(1) retroactively.

The other two factors can best be discussed together here. The Ninth Circuit stated these factors thus:

The second factor requires us to consider the nature of the rights affected by the retroactive application of the change in law. In this regard, the issue is whether application of the new law "would infringe upon or deprive a person of a right that had matured or become unconditional." United States v. Fresno Unified School District, 592 F.2d 1088, 1094 (9th Cir. 1979)....

The third factor focuses on whether the new law effected a change in the "substantive obligations of the parties" such that there would have been a difference in behavior which would have rendered the litigation unnecessary. Bradley, 416 U.S. at 721, 94 S.Ct. at 2021.

673 F.2d at 1069. The court, while stating that a sponsor has "no vested or unconditional right to CETA funds," id., found it crucial in considering both factors that implementation of back pay awards would subject CETA sponsors to unanticipated liability. No such consideration applies here. Under the 1973 Act City would have been liable for the same amount. The Secretary could have reduced the monetary level of a subsequent grant but required that City retain the full program activity despite the reduced funding level. Requiring reimbursement from non-CETA funds neither infringes any right of City nor changes any "substantive obligation of the parties." Accordingly, consideration of all three factors would mandate applying Section 816(d)(1) to this case.

The final issue before me is whether I should approve the amount disallowed by Judge Lawrence. City's brief makes no contention that the ALJ erred in his assessment of **costs.**^{11/} Its brief merely delineates its financial difficulties and states, "Even if the City of Gary was ordered to repay the **disallowed** costs, it could not do **so.**" Brief p. 17. **Its** brief does not indicate how or why its legal liability would

^{11/}City does direct arguments against DOL's audit. The quality of DOL's audit is not at issue on appeal since the ALJ accepted City's audit and DOL does not contest that determination of the ALJ.

be affected by its financial problems^{12/} and I find no support for its argument.

DOL's only contention is that the ALJ overstepped the authority provided by the applicable regulation, 29 C.F.R. § 676.96(c), in allowing the costs of those ineligible and undetermined enrollees who were terminated prior to the end of the SPEDY program.^{13/} Section 676.91(c) provides in pertinent part,

Contents of decisions. The decision of the Administrative Law Judge shall state the factual and legal bases for the decision and shall state the relief to be ordered....

29 C.F.R. § 676.91(c). DOL urges that the ALJ failed to state any legal basis-for allowing the costs for the terminated participants and that 20 C.F.R. § 676.91(d) "clearly requires that when CETA funds are improperly spent, they must be returned

12/In its exceptions City argued that I should waive all alleged disallowed costs pursuant to 29 C.F.R. § 676.88(c), which allows certain costs when five conditions are fulfilled, but made no such argument in its subsequently-filed brief. In response, DOL argued first that Section 676.88(c) applies only to the Grant Officer. Alternatively, DOL argued that, even if it were applicable, the fifth condition of Section 676.88(c), "[t]he magnitude of questioned costs or activities is not substantial," was not fulfilled. I need not address whether the Grant Office alone can waive costs under Section 676.88(c) because I agree with DOL that, in any case, the fifth condition of the regulation was not fulfilled.

13/DOL states that the costs the ALJ allowed City for the participants who were terminated is \$325,325.92. I find no support for this figure. Inasmuch as the stipulated cost per enrollee was \$367.63 and DOL does not dispute that the number of ineligible and undetermined participants who were terminated was 479 (399 ineligible plus 80 undetermined), I find that the disputed amount of allowed costs is \$176,094.77.

to the federal government." DOL Brief at 15. The ALJ reasoned as follows:

With respect to disallowed costs associated with 1) ineligible participants, and 2) those participants whose eligibility was undetermined and who were terminated early as the result of the Cities [sic] internal investigation, it is my decision to allow these costs. It is inherent in a program such as the one at hand that ineligible participants are going to slip by the intake officers despite efforts to weed them out. Through monitoring procedures, however, these ineligible enrollees were discovered and terminated before the program's end. Further, the money spent on these enrollees was not wasted. The enrollees, although technically ineligible, did work for the program while they were paid. Therefore, I do not feel as though the City should be penalized for costs associated with these ineligible enrollees resulting from a program laden with problems.

DO at 8.

DOL **miscontrues** Section 676.91(d). The regulation provides that the ALJ "may" order "that unexpended funds be returned or that funds otherwise payable under the Act be withheld...." DOL recognized the permissive nature of the word "may" when arguing that 29 U.S.C. § 982(b) did not preclude the sanction of requiring reimbursement from non-CETA **funds**.^{14/} The same reasoning applies here.

Moreover, **DOL's** argument that the ALJ erred in failing to state a "legal basis" for his allowing costs for the terminated

^{14/} Section 982(b), 29 U.S.C., provides that the Secretary may withhold funds in order to recover any amounts expended in violation of CETA in the current or immediately prior fiscal year. The use of the permissive term "may" instead of the mandatory "shall" implies that the Secretary has the discretion whether or not to apply this remedy. This clearly was not the sole remedy available to the Secretary.

DOL's Brief at 7.

participants is misplaced. Under the regulation 20 C.F.R. § 676.91(c), see n. 8, the ordering of a remedy is not an issue of law; rather, the ALJ exercises "broad remedial **discretion**" in ordering relief thereunder. Milwaukee County, 682 F.2d at 612. DOL has provided no argument as to why I should determine that the ALJ abused his discretion in allowing the costs.

Accordingly, the ALJ's decision is affirmed.


Secretary of Labor

Dated: JUL 1 1985
Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: CITY OF GARY, INDIANA v. USDOL
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Document: DECISION AND ORDER

A copy of the above mentioned document was sent to the following parties on July 1, 1985.

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