

until April 18, 1985,^{2/} however, that the Tribe requested a hearing before the Office of Administrative Law Judges, pursuant to 20 C.F.R. § 676.88(f). Letter of Charles G. Preston to Honorable Nahum Litt, April 18, 1985. In July, 1985, the Grant Officer moved to dismiss the request for hearing; the Tribe responded to the motion; and the ALJ entered an Order of Dismissal on November 25, 1985.

On December 16, 1985, the Tribe, through its counsel, filed a statement of exceptions to the ALJ's order dismissing its request for a hearing (Exceptions), alleging, inter alia, that the Grant Officer's final determination was issued beyond the 120-day period required by Section 106(b) of CETA. 29 U.S.C. § 816(b). The issue of whether the Secretary was barred from recovering misused CETA funds if a final determination concerning those funds was issued after the statutorily required period was at that time before the Supreme Court. Pierce County v. United States Department of Labor, 759 F.2d 1398 (9th Cir. 1985), No. 85-385, cert. granted, 54 U.S.L.W. 3293 (U.S. Nov. 4, 1985). On January 6, 1986, jurisdiction over this

^{2/} The Tribe, asserts before me that a request for a hearing on the final determination was received by the Office of Administrative Law Judges on October 30, 1984, Reply Brief of St. Croix Tribal Council at 5, but the document cited has not been offered as an exhibit. Even if a request had been made on October 30, 1984, that date was more than two years past the 10-day period for requesting a hearing required by 20 C.F.R. § 676.88(f), and more than six months after the Tribe's CETA Director wrote to the Department's Office of Program and Fiscal Integrity. See [Unexecuted] Affidavit of Donna J. Bell, Respondent's Exhibit 1.

case was asserted and the proceedings were stayed pending the Court's disposition in Pierce County. On May 19, 1986, the Court unanimously ruled that the Secretary does not lose the power to recover misused CETA funds when the final determination is issued after expiration of the **120-day** period specified in Section 106(b) of CETA. Brock v. Pierce County, ___ U.S. ___, 106 sup. ct. 1834.

The Court's decision in Pierce County foreclosed the Tribe's contention that the Secretary lacks authority under section 106 to pursue the recovery of the misspent CETA funds. Accordingly, on July **17**, 1986, the stay in this case was lifted and the parties were invited to brief the remaining issues.

The Tribe claims that various equitable considerations should excuse it for its failure to timely request a hearing on the April **26**, 1982, Final Determination. It suggests in the **unexecuted**^{3/} affidavit of its comptroller, Donna J. Bell, that "[w]e are not convinced that we ever received the 'final determination' when first issued": that this grant audit was confused with another; and that the fault lies with the Department for not helping the Tribe with the audit and for generally

^{3/} Although the Tribe's counsel's letter submitting the Bell **Affidavit** noted that "the executed original will be substituted when received from Wisconsin," apparently the executed document has not been offered. Letter of Preston to Thomas, July **15**, 1985. For the purpose of considering the underlying motion to dismiss, these averments have been accepted.

failing to provide adequate technical assistance. These arguments are reiterated in the Tribe's other filings.

However, none of these arguments confronts the explicit language of the notice letter from the Department's Director, Grant and Audit Closeout Task Force, to Nancy Webster, the Tribe's CETA Director that:

This final determination . . . establishes a debt owed . . . in the amount of \$95,771.

* * *

In accordance with U.S. Department of Labor regulations 44 Fed. Reg. 20035 (April 3, 1979) (codified at 20 C.F.R. § 676.88), you have the opportunity to request a hearing of this final determination. If you choose to request a hearing, the regulations require you to file your request with the Chief Administrative Law Judge, U.S. Department of Labor, Room 700, Vanguard Building, 1111 20th Street, N.W., Washington, D.C. 20036, with a copy to the Grant Officer. The request must be mailed by certified mail return receipt requested not later than 10 days after receipt of this letter and final determination. The request for hearing must be accompanied by a copy of the final determination and must state specifically those provisions of the determination upon which a hearing is requested.

Enclosure, Letter of Preston to Litt, supra at 2.

The notice in this letter is explicit concerning the hearing request, as is the regulatory requirement at 20 C.F.R. § 676.88(f). Further, there is no denial that the Tribe received the series of demand letters beginning in June of 1982, and, indeed, when a representative of the Tribe, William H. Arbuckle, Tribal Chairman of the St. Croix Tribal Council, finally responded to the April 30, 1984 demand, he acknowledged awareness of the

hearing procedure by stating that "[i]t has always been our policy to request a hearing on any unresolved audit finding...." Bell Aff., Respondent's Exhibit 1.

This assertion by the Tribe's representative indicates that the Tribe was not unfamiliar with procedures for resolving disputed audits. Moreover, the requirement at issue here, that, as set forth in both the Final Determination letter and in the regulations at Section 676.88(e) and (f), and as alluded to in each of the demand letters, see Grant Officer's Motion to Dismiss, **or**, In the Alternative for an Order to Show Cause Why Appeal Should Not Be Dismissed, Exhibits 1, 2 and 3, that the grantee must request a hearing within 10 days of the Grant Officer's final determination, is hardly the kind of technical, complex procedure which, arguably, might warrant special assistance or technical advice.

Thus, even were I to agree with the Tribe that pursuant to the decision in Quechan Indian Tribe v. United States Department of Labor, 723 F.2d 733, 736 (9th Cir. 1984), I should review this case based on equitable considerations, specifically including the alleged failure of the Department to provide the Tribe with assistance, the specific failure here -- to timely seek review -- is not one which would warrant such assistance. Thus the absence of assistance to advise about so straightforward a provision as this 10-day hearing request would not constitute a basis for excusing the Tribe.

As the ALJ correctly observed, the **10-day** limitation may be waived upon a showing of good cause or for extraordinary and exceptional circumstances, citing Illinois Migrant Council v. United States Department of Labor, 773 **F.2d** 180, 182483 (7th Cir. 1985). The Tribe failed to heed the notice in the Final Determination, as appears from the Tribe's submissions, and although the Tribe received multiple demand letters to which it failed to respond for over two years, it then delayed an additional year before requesting a hearing. These facts do not begin to approach the "showing of good cause or ... 'extraordinary and exceptional circumstances'" which the Seventh Circuit accepted as the appropriate standard to be met before finding that the **10-day** time limit "may be waived." Illinois Migrant Council, 773 **F.2d** at 182.

The Tribe's December 16, 1985 statement of exceptions characterizes the Tribe's failure to timely appeal the Grant Officer's final determination as being purely a procedural failing. That is correct. Under subsection 676.88(f), which has remained unchanged from April 13, 1982, to the present, the dissatisfied party must request a hearing before the Office of Administrative Law Judges within 10 days of receipt of the Grant Officer's final determination. Subsection (g) also provides that:

those provisions of the determination not specified for hearing, or the entire determination when no hearing has been requested, shall be considered resolved and not subject to further review.

Thus the procedural failure has an announced, explicit consequence, and a consequence that is intended as part of the overall scheme for carrying out the grant program.

The Tribe's Exceptions also tie this proceeding to a pending appeal of nondesignation of the Tribe under a later Job Training Partnership Act grant, St. Croix Tribal Council v. U.S. Department of Labor, Case No. 85-JTP-9. The Memorandum of the Grant Officer in Opposition to Assertion of Jurisdiction by the Secretary which was filed in this case pointed out that after the Grant Officer declined to designate the Tribe as a grantee under JTPA in March of 1985, with the \$95,771 debt from this audit still unpaid, only then, did the Tribe request a hearing on this audit. It seems apparent that not until the consequence of failing to pay the three year old debt - i.e., the loss of the later JTPA grant - became plain,^{4/} did the Tribe respond to the claimed 'debt. This circumstance undercuts the plea that this debt should be forgiven, see Exceptions, at 1, Memorandum of St. Croix Tribal Council at 5, 17. It also renders even less viable the claim that the Tribe was merely

4/ Again, the Department's regulations and the intended consequences of ignoring them are spelled out in the Designation Procedures for Native American Grantees, 20 C.F.R. Part 632, Subpart B (1986). Subsection 632.10(c) directs that "[t]he Department will not designate an organization in cases where it is established that: (1) the Agency's efforts to recover debts (for which three demand letters have been sent) established by final agency action have been unsuccessful." The realized **consequences** of the Tribe's failure to respond to the indebtedness was entirely predictable.

confused and needed technical assistance to assert a request for a type of review with which it was admittedly familiar.

The Tribe faults the Department for pursuing the **collec-**tion of the debt without providing technical assistance to the Tribe to assist it in overcoming its delinquent response to the debt that had been uncontested for more than three years. This contention is without merit. A grantee may request technical assistance to assist it in overcoming problems in operating a program. There is **no obligation**, however, to assist a defaulting grantee in avoiding the repayment of duly established debts. See 20 C.F.R. § 688.76(d).

Finally, the absence of any allegation of fraud does not mean that funds were not misspent under the terms and provisions of the grant. The Final Audit expressly found that grant funds were used to pay ineligible participants and for improper **admini-**strative costs. Such expenditures, if not consistent with the terms of the grant, including the extant regulations, may constitute misexpended funds. The fact that they were wrongly expended through mistake rather than fraud, does not preclude their recovery.

It is conceivable that a "good cause" case could be established to justify a three year delay in seeking to challenge and overcome a validly established CETA debt. But, upon review of the meager evidence proffered by the Tribe here, and upon

consideration of each argument articulated,^{5/} there has not been demonstrated either a basis for me to forgive this duly established debt, or to warrant the remand which the Tribe alternatively requests. To reopen unappealed audits after such prolonged delay on so fragile a reed as the Tribe alleges, would wreak havoc on the audit process and would significantly impair the Department's responsibility under CETA to "assure that funds provided under [the] Act are used in accordance with its provisions." 29 U.S.C. § 835(a).

The order of the ALJ is AFFIRMED and this case is DISMISSED.
SO ORDERED.


Secretary of Labor

Dated: NOV 12 1986
Washington, D.C.

^{5/} Each of the arguments raised by the Tribe in its various briefs and submissions has been considered in this review.

CERTIFICATE OF SERVICE

Case Name: St. Croix Tribal Council

Case No. : 85-CPA-41

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following persons on NOV 12 1986.

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