

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: February 19, 1987
CASE NO.: 84-CTA-32

IN THE MATTER OF
U.S. DEPARTMENT OF LABOR

v.

STATE OF OREGON DEPARTMENT
OF HUMAN RESOURCES

BEFORE: THE SECRETARY OF LABOR

DECISION AND REMAND ORDER

This case arose from an audit by the Department of Labor Grant Officer of the expenditure of funds by a prime sponsor, the Oregon Department of Human Resources, granted under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§ 801-999 (Supp. V 1981).^{1/} The Grant Officer disallowed certain costs and the prime sponsor requested a hearing. After a hearing, Administrative Law Judge (ALJ) Edward C. Burch upheld the Grant Officer's determination in part and reversed it in part. The Grant Officer filed exceptions to the ALJ's decision and I asserted jurisdiction under 20 C.F.R. § 676.91(f) (1985).

^{1/} CETA was repealed effective October 12, 1982. The replacement statute, the Job Training Partnership Act, 29 U.S.C. §§ 1501-1781 (1982), provided that pending proceedings under CETA were not affected. 29 U.S.C. § 1591(e).

East Central Oregon Association
of Counties audit cost

The Grant Officer disallowed \$1,345, the cost of an **audit of a portion** of CETA funds of the East Central Oregon Association of Counties, because it had been designated an indirect cost but should have been designated a direct cost. The ALJ reversed this determination because the Grant Officer's representative conceded that, if it had been designated a direct cost, it might have been allowed. The Grant Officer's representative stated further at the hearing, however, that this cost would have been allowed as a direct cost only if it did not cause the administrative cost pool to exceed the allowable limit, that is 20% of the CETA annual plan allocation. 20 C.F.R. § 676.40-2(a) (1985).

The parties in their briefs essentially are battling over who has the burden of going forward after this cost has been disallowed for this particular reason. It seems reasonable under the circumstances, however, to require the prime sponsor, as the party with control of the relevant documents and most familiar with all administrative costs under its CETA program, to come forward and show what the total was and whether this cost would have caused the total to exceed 20%. This issue will be remanded to the ALJ for that purpose.

Ineligible Participants of the Eastern
Oregon Manpower Consortium

The Grant Officer found, and the prime sponsor does not take issue with the finding, that certain participants enrolled

by the Eastern Oregon Manpower Consortium (**EOMC**), a subgrantee of the prime sponsor, were ineligible to participate in **CETA** programs for a variety of reasons. The prime sponsor made a request, however, that the disallowance of costs for these participants be waived by the Grant Officer under 20 C.F.R. § 676.88(c) (1985). The Grant Officer denied the request and disallowed the costs.

The regulations at 20 C.F.R. § 676.88(c) delegate discretion to the Grant Officer, in cases where costs for ineligible participants in public service employment programs have been disallowed, to allow the costs if he finds that each of five specified factors has been met. The Grant Officer found here that one factor -- "[e]ligibility determination procedures, or other such management systems and mechanisms required in these regulations, were properly followed and monitored," 20 C.F.R. § 676.88(c) (3), -- had not been met. He based that conclusion on a finding that the eligibility determination system of EOMC was "flawed".

Under the CETA regulations when individuals applied for participation in CETA programs, they provided detailed information about themselves, their income and economic status. See 20 C.F.R. § 676.75-3(b) (1) (ii). The recipient initially made a determination whether an applicant was eligible based on the information provided by the applicant and his attestation that it was true. 20 C.F.R. § 676.75-3(b) (1) (ii). Within 30 days after enrollment, all applications had to be reviewed by

another person to determine whether, based on the information on the application, the applicant was eligible and the information provided was consistent and reasonable. 20 C.F.R. § 676.75-3(b) (2) (i). On a quarterly basis, the recipient was required to take a random sample of participants to verify their eligibility and to assure that the intake process was screening out ineligible applicants. 20 C.F.R. § 676.75-3(b) (3).

When EOMC took its random sample of applications for quarterly verification, it only reviewed one or two out of some twenty elements of eligibility set forth in the regulations. 20 C.F.R. § 676.75-3(b) (1) (i). (Some of the elements have several subparts, e.g. labor force status.) In effect, EOMC was taking a sample of a sample, and EOMC has placed nothing in the record to show how it chose the eligibility elements to review in each case. The regulations permit sampling of up to 10 per cent of the applications so that the recipient can concentrate its resources on those and conduct a thorough, complete review of all relevant eligibility elements in each sampled application. I agree with the Grant Officer, therefore, that **EOMC's** "system was insufficient to determine the credibility of the eligibility [determination]." Final Determination of Barry B. Brown, Grant Officer, November 23, 1983, at 14.

The prime sponsor argues, nevertheless, that the Grant Officer's denial of its request for a waiver of the disallowance of costs under 20 C.F.R. § 676.88(c) was an abuse of his

discretion. The prime sponsor asserts, and the ALJ agreed, that **EOMC's** eligibility determination system not only met but exceeded the requirements of the regulation. EOMC conducted a review of 100 per cent of the applications, although not required to do so, and discovered some 15 ineligible or questionable participants.

I cannot agree with the ALJ that **EOMC's** verification system was "even better than was required by **CETA.**" EOMC only decided to expand its verification beyond the quarterly sample because its subcontractor, the Eastern Oregon Community Development Council (which actually operated the CETA programs in **EOMC's** area), had undergone a change in directors and other staff in early 1979. Donald Calder, **the Executive** Director of EOMC, was concerned that the new director and staff had little background in manpower programs. He directed the EOMC Independent Monitoring Unit (**IMU**), consisting of one person, Barbara Ambrosek, to "do as thorough a job of monitoring as we could to try and find not ineligibles ... but where we might be able to assist the [new staff] in providing training that would help them bring these people up." Hearing Transcript at 93-94.

But, as discussed above, the EOMC quarterly verification system was inadequate. The state **IMU** report itself found that

- a. None of the verifications reviewed in the sample were complete or adequate. Only one or two elements of eligibility were generally verified which is not sufficient to determine the credibility of the eligibility determination system.

- b. There is no adequate procedure in existence for collecting the amount of verification material necessary to do complete verifications on the quarterly sample.

Solicitor's Exhibit 1, paragraph C (emphasis supplied).

The state **IMU** recommended that:

- a. The EOMC develop an adequate procedure for collecting verification documentation.
- b. Do verification on all eligibility items so the data can be sued [sic] to determine the credibility of the eligibility system.

There is no evidence in the record that these recommendations were carried out or that the review of all applications by the EOMC **IMU** was more than a one time exercise to assist and train its subcontractor.^{2/} I find that the Grant Officer was well within his discretion in disallowing these costs and denying the request for allowance of the costs under 20 C.F.R. § 676.88(c). Costs associated with ineligible participants incidentally discovered by EOMC is a reasonable measure of the amount to be a disallowed in this case without regard to whether, absent this violation, costs should have been allowed for particular participants under 20 C.F.R. § 676.88(c) for technical, de minimus violations of the regulations.

2/ While it is true that the Grant Officer's representative at the hearing could not provide any basis for the Grant Officer's determination that the system was "flawed", there was ample documentary support for that conclusion in the record.

Overpayment by East Central Oregon
Association of Counties for classroom
study time

Under Title II-B of CETA, 29 U.S.C. §§ 846-851, the East Central Oregon Association of Counties (ECOAC) made allowance payments to CETA participants in classroom training programs for classroom hours and study hours at the Federal minimum wage. The grant agreement with the Department of Labor provided that the grantee could make such payments for two hours of study time for each hour of classroom time, the combination of which was not to exceed 40 hours per week. ECOAC, however, automatically increased the total to 40 hours if the combination of actual classroom and study time was less than 40.

The Grant Officer calculated the permissible allowance payment based on the 2 for'1 policy and disallowed the remainder. The ALJ apparently believed that a retroactive change in the rules of Oregon Balance of State to limit allowance payments to one hour of study time for each hour of classroom time accounted for the amount disallowed. But the Grant Officer stated in his final determination that he was allowing \$7,032 "based upon the **2:1** study time policy" and disallowed \$2,997. The amount disallowed, therefore, was not based on limiting payments to a **1:1** ratio, but was because ECOAC improperly increased hours to 40 per week even if the participants had not put in such hours.

The Grant Officer also suggested in his initial determination "that the prime sponsor might seek further relief of the \$2,997

[disallowed] per 29 C.F.R. § 95.34(k) (1984)." That regulation provided:

(k) Repayments. Prime sponsors shall require participants to repay the amount of any overpayment of allowances under this part, except if the overpayment was made in the absence of fault on the part of the participant, in which case repayment shall be waived where such recovery would be against equity and good conscience or would otherwise defeat the purposes of the program.

The prime sponsor assumed that, by making this suggestion, the Grant Officer would be receptive to a request for an allowance of the \$2,997. In view of the language of the regulation, which speaks to the relationship between the prime sponsor and its participants, I find nothing in the Grant Officer's suggestion to imply a promise to waive the costs if a request were made. Since the disallowed costs were for payments clearly exceeding those authorized in the grant agreement, I find the Grant Officer's refusal to waive them was within his discretion.

Participant Fraud

The Grant Officer disallowed \$533 because of participant fraud and refused to waive the disallowance under 20 C.F.R. § 676.88(c). The ALJ ordered that these costs be allowed because the prime sponsor discovered the fraud and the frauds were reported to the Department of Labor, which took no action at that time. In addition the ALJ noted that the prime sponsor attempted to recover the funds and was not negligent in supervising these participants.

However, the Grant Officer has no discretion to allow costs under 20 C.F.R. § 676.88(c) if the activity was fraudulent. 20 C.F.R. § 676.88(c) (1). The factors considered by the ALJ are simply not relevant to a finding under that section if there has been fraud. Furthermore, I find this result reasonable. By definition, where there has been fraud, someone has been misled into believing something is a fact which is not. It is reasonable to place the risk of loss from that misconduct on the party in the best position to prevent it or uncover it before it causes further damage. Here, that is the prime sponsor.

Interest

The ALJ ordered the Department of Labor to pay interest on the amounts he found should have been allowed, from the date his order became final. The prime sponsor objected to this part of the **ALJ's** decision on the grounds that interest should be awarded from the the date the prime sponsor paid the disputed amount to the Department of Labor, December 29, 1983. The Grant Officer excepted on the grounds that there was no authority to award interest at all in these circumstances. With the exception of the first item (the audit cost of ECOAC CETA funds) which is being -remanded, this issue is moot since I have upheld the Grant Officer's disallowance of other costs. I would note, however, that in the absence of a specific provision in a statute or by agreement, interest may not be assessed against the United States. See United States v. Thayer-West Point Hotel co., 329 U.S. 585 (1946).

Accordingly, for the reasons discussed above, the **ALJ's** decision in this case is vacated and reversed in part and remanded in part.

SO ORDERED.


Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

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Document : Decision and Remand Order

A copy of the above-referenced document was sent to the following
persons on FEB 19 1987.



CERTIFIED MAIL

Jim G. Russell, Esq.
Dept. of Justice
Business/Labor/Consumer
Affairs Division
Workers' Compensation Unit
201 Labor & Industries Bldg.
Salem, OR 97310

Renee Bryant Mason
Assistant Attorney General
Dept. of Justice
550 Justice Building
Salem, OR 97310

Faye Von Wrangel, Esq.
Office of the Solicitor
U.S. Dept. of Labor
8003 Federal Building
909 First Avenue
Seattle, WA 98174

Associate Solicitor for Employment
& Training Legal Services
U.S. Dept. of Labor
Office of the Solicitor
N-2101, Francis Perkins Bldg.
200 Constitution Ave., N.W.
Washington, D.C. 20210
Attn: Harry Sheinfeld, Esq.
William S. Rhyne, Esq.

Hon. Nahum Litt
Office of Administrative Law Judges
1111 20th Street, N. W.
Suite 700
Washington, D.C. 20036

David O. Williams
Administrator
Office of Program & Fiscal
Integrity
Room N-4671
200 Constitution Ave., N.W.
Washington, D.C. 20210

Linda Kontnier
Chief, Debt Collection
Room N-4671
200 Constitution Ave., N.W.
Washington, D.C. 20210

Charles Wood
Chief, Division of Audit
Closeout and Appeals Resolution
Room N-4671
200 Constitution Ave., N.W.
Washington, D.C. 20210