

U.S. DEPARTMENT OF LABOR

DEPUTY SECRETARY OF LABOR
WASHINGTON, D.C.
20210

DATE: November 16, 1987
CASE NOS. 86-CTA-43; 87-JTP-3

IN THE MATTER OF

U.S. DEPARTMENT OF LABOR,

PLAINTIFF,

v.

HOME EDUCATION LIVELIHOOD PROGRAM,

RESPONDENT.

BEFORE: THE DEPUTY SECRETARY OF LABOR^{1/}

FINAL DECISION AND ORDER

These cases arise under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§ 801-999 (Supp. V 1981),^{2/} and the Job Training Partnership Act (JTPA), 29 U.S.C. §§ 1501-1781 (1982). The dispute concerns disallowance by the Grant Officer of certain costs claimed by Home Employment Livelihood Program, Inc. (HELP), pursuant to three CETA grants (99-1-282-48-23, 99-1-282-38-3 and 99-2-282-31-35) and one JTPA grant (99-4-0282-56-158-02).

^{1/} There is presently a vacancy in the office of Secretary of Labor. The Deputy Secretary is authorized to "perform the duties of the Secretary until a successor is appointed . . ." 29 U.S.C. § 552 (1982); Department of Labor Executive Level Conforming Amendments of 1986, Pub. L. No. 99-619 (November 6, 1986).

^{2/} CETA has been replaced by the Job Training Partnership Act, 29 U.S.C. §§ 1501-1781 (1982), but pending cases continue to be adjudicated under CETA. 29 U.S.C. § 1591(e) (1982).

BACKGROUND

On May 2, 1986, the Grant Officer issued a Final Determination that disallowed \$19,101 of grant expenditures claimed by HELP. This sum consisted of \$5,107, which was determined to be in excess of the indirect cost rates allowed for grants 99-1-282-48-23 and 99-1-282-38-3, and of \$13,994, which was in excess of allowable lease costs and which was charged in varying amounts to all four of the above grants. HELP requested a hearing before the Office of Administrative Law Judges, and on May 1, 1987, Administrative Law Judge (ALJ) Alfred Lindeman issued his Decision and Order.²¹ THE ALJ determined that the Grant Officer properly disallowed the costs associated with both the excess indirect cost rate and the excess lease costs./ However, the ALJ found that special circumstances existed regarding the disallowed excess indirect cost rate which warranted waiving recoupment of the \$5,107. The ALJ did not find such mitigating conditions regarding the excess lease **costs**, and he affirmed the Grant Officer's disallowance of the \$13,994.

Both parties excepted to the ALJ's Decision and Order, and on May 28, 1987, the Secretary asserted jurisdiction in this case.

3/ In the Matter of U.S. Department of Labor v. Home Employment Livelihood Program, 86-CTA-43; 87-JTP-3, Decision and Order (D. and O.) issued May 1, 1987.

4/ Id. at 3.

ISSUES AND DISCUSSION

I. Did The Administrative Law Judge Err In Finding Special Circumstances Concerning The Charging Of Excess Indirect Costs By HELP To Justify Waiving Recoupment Of Misspent CETA Funds?

The ALJ concluded that the Grant Officer properly disallowed both the \$5,107 in excess indirect costs and the \$13,994 in excess rental charges. D. and O. at 3. He further determined that the authority of the Secretary to waive the repayment of misspent funds pursuant to Section 106(d)(2) of CETA, 29 U.S.C. § 816(d) (2), would be applicable in this case^{5/}. However, a close reading of Section 106(d)(2) reveals that it applies specifically to CETA "public service employment" programs (Title VI-Countercyclical Public Service Employment Program - 29 U.S.C. §§ 961-970) which have been found to be in violation of section 121(e)(2), (e)(3), (g)(1), section 122(C) , (e), or section 123(g) .^{6/} The grants awarded

^{5/} There is discussion in the D. and O. at 3 concerning the **Secretary's** discretion to waive repayment of misspent funds under JTPA Section 164. 29 U.S.C. § 1574. However, since the sources of the misspent funds in the Grant Officer's disallowance concerning excess indirect costs are from CETA grants, the discussion regarding JTPA is inapplicable.

^{6/} CETA Section 121 is entitled "Conditions Applicable to All Programs" and provides in pertinent part:

(e)(2) No currently employed worker shall be displaced by any participant (including partial displacement such as a reduction in the hours of nonovertime work, wages, or employment benefits). (e)(3) No program shall impair existing contracts for services.

* * * *

(footnote continued on next page)'

to ^{HELP} were to **operate** the Department of Labor's Migrant and Seasonal Farmworker Employment and Training Programs,

6/ (footnote continued)

- (g) (1) (A) No program shall substitute funds under this Act for other funds in connection with work that would otherwise be performed.
(B) Jobs shall be created that are in addition to those that would be funded in the absence of assistance under this Act.
(C) Funds shall be used to supplement, and not to supplant, the level of funds that would otherwise be made available from non-Federal sources for the planning and administration of programs.

29 U.S.C. § 823. CETA Section 122 is entitled "**Special Conditions** Applicable to Public Service Employment" and provides:

(c) (1) No person shall be employed or job opening filled (A) when any other person not supported under this Act is on layoff from the same or any substantially equivalent job, or (B) **when** the employer has terminated the employment of any regular employee not supported under this Act or otherwise reduced its workforce with the intention of filling the vacancy so created by hiring a public service employee. (2) No funds for public service employment programs under this Act may be used to provide public services, through a private organization or institution, which are customarily provided by a State, a political subdivision, or a local educational agency in the area served by the program.

* * * *

(e) No public service jobs shall be substituted for existing federally assisted jobs.

29 U.S.C. § 824. CETA Section 123 is entitled "Special Provisions" and provides:

(g) The Secretary, by regulation, shall establish such standards and procedures for recipients of funds under this Act as are necessary to assure against program abuses including, but not limited to, nepotism; conflicts-of-interest; the charging of fees in connection with participation in the program; excessive or unreasonable legal fees; the
(footnote continued on next page)

29 U.S.C. § 873,^{7/} and the possible consideration of "special circumstances" in relation to public service employment programs contemplated by Section 106(d) (2) is not proper. The ALJ erred in determining otherwise.

Under CETA Section 106(d) **(1)**, 29 U.S.C. § 816(d)(1), the Secretary is authorized to order such sanctions or corrective actions as are appropriate with regard to any recipient of CETA funds which the Secretary concludes is failing to comply with any of the provisions of the Act or any regulations promulgated

6/ (footnote continued)

improper commingling of funds under the Act with funds received from other sources; the failure to keep and maintain sufficient, auditable, or otherwise adequate records; kickbacks; political patronage; violations of applicable child labor laws; the use of funds for political, religious, antireligious, unionization, or antiunionization activities; the use of funds for lobbying local, State, or Federal legislators; and the use of funds for activities which are not directly related to the proper operation of the program.

29 U.S.C. § 825.

7/ Administrative Record. CETA/JTPA Grant Final Determination to Mr. Ernest E. (Gene) Ortega from Charles A. Wood, Jr., Grant Officer, dated May 2, 1986.

under the Act.^{8/} Determining an appropriate response does not lend itself to a rote measurement of factors but requires a careful consideration of the relevant facts in each case. In the case before me there **is** no dispute that **HELP's** Executive Director was aware of the final, negotiated indirect cost rate. **The** record contains a copy of the NON-PROFIT ORGANIZATIONS **INDIRECT** COST NEGOTIATION AGREEMENT. The agreement begins:

8/ CETA Section 106 (d)(1) provides:

If the Secretary concludes that any recipient of funds under this Act is failing to comply with any provision of this Act or the regulations under this Act or that the recipient has not taken appropriate action against its subcontractors, subgrantees, and other recipients, the Secretary shall have authority to terminate or suspend financial assistance in whole or in part and order such sanctions or corrective actions as are appropriate, including the repayment of misspent funds from sources other than funds under this Act and the withholding of future funding, if prior notice and an opportunity for a hearing have been given to the recipient. Whenever the Secretary orders termination or suspension of financial assistance to a subgrantee or subcontractor (including operators under a nonfinancial agreement), the Secretary shall have authority to take whatever action is necessary to enforce such order, including action directly against the subgrantee or subcontractor, and an order to the primary recipient that it take such legal action, to reclaim misspent funds or to otherwise protect the integrity of the funds or ensure the proper operation of the program.

29 U.S.C. § 816(d)(1), (emphasis supplied).

The indirect cost **rate(s) contained herein are** for use on grants and contracts with the Federal Government **to** which **OMB** Circular A-122 applies subject to the limitations contained in the Circular and Section **11-A**, below. The **rate(s)** were negotiated by the Home Education Livelihood Program, Inc. of Albuquerque, New Mexico, and the U.S. Department of Labor in accordance with the authority contained in Attachment A, Section **B**, of the **Circular**.

The agreement then lists the negotiated indirect cost rates for the periods of time and grants in question. Section I: Rates. The document was signed and accepted on behalf of the grantee, Home Education Livelihood Program, Inc. by Ernest E. Ortega, Executive Director. Such an agreement is rendered meaningless if a grantee may sign it and then simply ignore its terms. In view of this negotiation agreement and its specificity, there is no justification for the **ALJ's** finding that the grantee was unclear as to which cost rate applied.

The ALJ's decision would require the Department **to assume** responsibility for assuring that a grantee applied the known rates to its budget submissions. This would shift the burden of record keeping for CETA grants from the grantees to the Department's staff. In addition to the fact that such a shift would pose an impossible new task for the Department's staff, it would wrongfully relieve those parties who are best aware of a program's expenditure pattern, and for whose services the grant pays, of their proper administrative responsibilities as established in the Act and the regulations. While it is uncontested that the total administrative outlays by HELP are

within the grants' total allowable limits, the consequences of **HELP's** misapplication of costs cannot be shifted to the government. It is not the responsibility of the Department's auditors or of the Grant Officer to later advise a grantee how to find budgetary niches within which otherwise misapplied costs can be placed.

The decision of the ALJ, with regard to the allowability of the excess indirect costs in CETA grants 99-1-282-48-23 and 99-1-282-38-3 is REVERSED. The grantee is to repay \$5,107 to the Department of Labor.

II. Were HELP'S Rental Costs Covered By The OMB Circular A-122, Attachment B, Provision Concerning Rental Costs Under A **Less-Than-Arms-**Length Lease And Thus Properly Disallowed?

HELP excepted to the ALJ's determination that the rental costs it charged to its CETA grants and its JTPA grant were in excess of the amount allowable by OMB Circular A-122, Attachment B, **42.c.8/** Here again, the facts are undisputed. **HELP** rented certain premises from Rural Housing, Incorporated

8/ OMB Circular A-122, Attachment B, **42.c.** (1980) provides:

Rental costs under less-than-arms-length leases are allowable only up to the amount that would be allowed had title to the property vested in the organization. For this purpose, a less-than-arms-length lease is one under which one party to the lease agreement is able to control or substantially influence the actions of the other. Such leases include, but are not limited to those between (i) divisions of an organization; (ii) organizations under common control through common officers, directors, or members; and (iii) an organization and a director, trustee, officer, or key employee of the organization or his immediate family either directly or through corporations, trusts or similar arrangements in which they hold a controlling interest

(RHI), a New Mexico corporation, duly registered with the state. For two years, the Board of Directors of RHI was composed ^Lsolely of members of the Board of Directors of HELP. ✓
For the last six months of the grant period, three members of RHI's seven-member board were HELP board members, three were non-HELP board members and one position was vacant. However, all six members of the RHI board were selected by the HELP board.

The provisions of OMB Circular A-122 are specific as to what constitutes a less-than-arms-length lease. It is where one party to the lease agreement is able to control or substantially influence the actions of the other. Such leases include organizations under common control through common officers, directors or members. It is not necessary to prove that such influence actually took place, or that the rental costs were in excess of the market rate then available. The situation in this case is four-square with the conditions set out in the controlling rules. Rental costs are therefore allowable only to the amount HELP would be entitled to claim had they owned the property. The Circular, Paragraph 42.d, limits rental costs to depreciation or use allowances, maintenance, taxes, and insurance but specifically excludes interest expense and other unallowable costs. North Dakota Rural Development Corporation v. United States Department of Labor and Minnesota Migrant Council, Case No. 85-JTP-4, Secretary's Final Decision and Order issued March 25, 1986, slip op. at 18, dismissed and remanded North Dakota Rural

Development Corporation v. United States Department of Labor and Minnesota Migrant Council, No. 86-1492 (8th Cir. 1987).

The ALJ correctly determined that the conditions necessary to find a less-than-arms-length lease existed between HELP and **RHI** in spite of HELP's explanations of the separateness of the organizations. Further, he correctly rejected **HELP's** contention that the bases used in determining rental costs in the Medicare program be used in this case. It would be inappropriate to apply standards devised under a totally different statute and program to determine allowable costs in grants under CETA and JTPA. The ALJ's decision concerning \$13,994 in excess rental costs is AFFIRMED.

ORDER

In accordance with the foregoing, the Final Determination of the Grant Officer is reinstated. Within 30 days of the date of this Order, the Home Education Livelihood Program, Inc., shall submit to the Grant Officer a certified check for \$19,101 payable to the United States Department of Labor.

SO ORDERED.



Deputy Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: In the Matter of U.S. Department of Labor,
Plaintiff v. Home Education Livelihood Program,
Respondent.

Case Nos.: 86-CTA-43; 87-JTP-3

Document : Deputy Secretary's Final Decision and Order

A **copy** of the above-referenced document was sent to the
following persons on NOV 16 1987.

Berece Kearney

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