

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR

WASHINGTON, D.C.

DATE: February 4, 1988
CASE NO. 80-BCA/CETA-97

IN THE MATTER OF

QUECHAN INDIAN TRIBE
(QUECHAN TRIBAL COUNCIL)

v.

UNITED STATES DEPARTMENT
OF LABOR

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Comprehensive Employment and Training Act (CETA). **29 U.S.C. §§ 801-999 (Supp. V 1981).**^{1/} The Grant Officer of the Employment and Training Administration, United States Department of Labor (Department), disallowed \$197,000 in expenditures made by the Quechan Tribal Council (Quechan) pursuant to three grants they received under CETA in 1974, 1975 and 1976. On appeal, the Administrative Law Judge upheld the Grant Officer's disallowance and the Secretary declined to review the case. Decision and Order (D. and O.) at **11-12**. Quechan appealed the final decision to the United States Court of Appeal for the Ninth Circuit. That court remanded the case to the Secretary "to consider all the equities in making an explicit

^{1/} CETA was substantially revised in 1978 and repealed effective **October 12, 1982**. The replacement statute, Job Training Partner Act, **29 U.S.C. §§ 1501-1781(1982)**, provided that CETA administrative or judicial proceedings commenced prior to September 30, 1984, would not be affected. **29 U.S.C. § 1591(e)**.

determination whether the sanction of repayment of almost four-fifths of the grants' total is warranted."^{2/} The court directed the Secretary to consider Six factors in determining whether to use the Secretary's authority under 29 U.S.C. § 816(d)(1) to waive the Department's right to recoupment.^{3/}

The court of appeals found that Quechan had the burden of proving that CETA funds were expended in accordance with CETA regulation and determined that "[i]t appears from the record before us that Quechan failed to meet its burden of showing that it complied with the requirements of 29 C.F.R. §§ 96.25, 97.132, 97.167(a), 99.42(c)(1) and 97.161."^{5/} The court went on to find, however, that the Administrative Law Judge did not consider "the equities in this case in arriving at his decision and order of repayment", and remanded the case to the Secretary.

BACKGROUND

The Quechan Indian Tribe is a small tribe in southern Arizona, whose reservation is an isolated community near the Mexican border.

^{2/} Quechan Indian Tribe v. U.S. Dept. of Labor, 723 F.2d 733, 736 (1984) (footnote omitted).

^{3/} Id. at 737.

^{4/} Id. at 735.

^{5/} Id. at 736. The regulations cited (and published at 29 C.F.R. in 1984 and prior years) concern: 29 C.F.R. § 96.25, Responsibility for selecting participants; § 97.132, Eligibility for participation in a Title III, Section 302, program (Indian and Native American Programs); § 97.167(a) Maintenance and retention of records; § 99.42(c)(1), Eligibility for participation in Title VI programs; and § 97.161, Allowable Federal costs.

^{6/} Id. at 736.

In 1974 and 1975, the Quechan Tribal Council was awarded a series of CETA Title II, III and VI grants (for the years 1974, 1975 and 1976) to provide training and employment for a number of unemployed or underemployed reservation residents. Quechan received CETA funds for Title II - Services for the Economically Disadvantaged, 29 U.S.C. § 848; Title III, - (Section 302) Native American employment and-training programs, 29 U.S.C. S 872; and Title VI - Countercyclical Public Service Employment Programs, 29 U.S.C. S 961.

The Tribe's project administrative staff failed to comply with Federal reporting and record maintenance requirements from the onset of the project. The absence of these records made it impossible to determine in an audit of program expenditures which of the participants was eligible to be in the program. The gross inadequacy of the project's records regarding the eligibility of program participants was the basis for the audit recommendations and the final determination of disallowance of costs by the Grant **Officer.1/**

Most of the project's records were missing and were never produced by Quechan in response to the auditor's requests. Some records were reconstructed after the fact by the project's director and bookkeeper, but the necessary information that could credibly establish the eligibility of the participants for the program was

1/ See 29 C.F.R. §§ 96.27 for eligibility requirements for Title II; 97.132 for eligibility requirements for Title III, Section 302 program; 99.42 for eligibility requirements for Title VI (1984).

never forthcoming. There had been approximately 100 **participants in the various titles'** programs during the entire operation. Although Quechan significantly overexpended grant funds on administrative Costs, and improperly attempted to **use grant funds to pay tax penalties,** / it appears that most of the grant funds were used to support jobs for the Indians residing on **or near the** reservation. What is not clear, because of the lack of adequate records, is the percentage **of those** funds that supported jobs for eligible participants.

DISCUSSION

The Ninth Circuit remanded this case to the Secretary when it determined that the **ALJ** did not consider the equities in deciding whether the Secretary should waive the right to recoupment as the Secretary may do under Section 106 of **CETA**, 29 U.S.C.

§ 816.Y

Before considering the six factors which the court of appeals directed the Secretary to evaluate, I would note that there has been a significant change in the legal framework applicable to cases of this kind since the case was remanded. In Bennett v. New Jersey, 470 U.S. 632 (1985), the United States Department of Education sought repayment of over \$1 million from the State of New Jersey for improperly spent funds in the Newark School District under Title I of the Elementary and Secondary Education

8/ Quechan has not appealed the recoupment of \$22,884 in excess administrative expenditures and \$2,388 in unallowable late tax filing penalties.

9/ Quechan Indian Tribe, 723 F.2d at 736.

Act of 1965, as amended, 20 U.S.C. § 241a et seq. (1976 ed.).

Although the Newark School District had received the proper total amount of funds, and the **money had been spent on authorized educational programs**, the funds had not been allocated properly to individual schools within the school district under **statutorily** mandated criteria. The Supreme Court reversed a court of appeals decision **which the state urged should be upheld as having reached** an equitable result. The Court said:

[W]e find no inequity in requiring repayment of funds that were spent contrary to the assurances provided by the State in obtaining the grants. . . . The role of a court in reviewing a determination by the Secretary that funds have been misused is to judge whether the findings are supported by substantial evidence and reflect application of the proper legal standards. Bell v. New Jersey, 461 U.S. at 792. Where the Secretary has properly concluded that funds were misused under the legal standards in effect when the grants were made, a reviewing court has no independent authority to excuse payment based on its view of what would be the most equitable outcome.

470 U.S. at 645-646 (citation omitted).

The Ninth Circuit itself recently has recognized the limitations the Supreme Court has placed on reviewing courts in cases where the government seeks repayment of misspent grant funds. In State of California Department of Education v. Bennett, 829 F.2d 795 (9th Cir. 1987), the California Department of Education argued that it should not be required to repay any **Migrant** Education Program funds because 90 percent of the children in state migrant education programs were eligible to participate. The court of appeals rejected this argument, recognizing that the Court had made it clear in Bennett v. New Jersey a "substantial compliance" by a recipient does not

affect the government's right to recover the funds which were **misspent** on ineligible participants. The court acknowledged it was "constrained by the Supreme Court's admonition" in Bennett v. New Jersey, quoted above. State of California Department of Education v. Bennett, 829 **F.2d** at 799.

Here, Quechan had the burden of proving that participants in its CETA programs were eligible. The court of appeals accepted the **ALJ's** finding that Quechan failed to meet its burden of showing that participants in its CETA programs were eligible to participate. 723 **F.2d** at 736. **Quechan's** argument that many of the participants probably were eligible because of the high rate of unemployment and underemployment and economically disadvantaged on the reservation amounts to an argument that it achieved "substantial compliance." Even if that were true, under Bennett v. New Jersey it would not affect the Secretary's right to recover the misspent funds. 470 U.S. at 646. See also, Bennett v. Kentucky Department of Education, 470 U.S. 656, 663 (1985).^{10/}

Although I do not believe that the Secretary is required under these recent decisions to consider all the equities in each case where requested to waive the right to recoupment, pursuant to the court of appeals' directive **I** have nevertheless considered each of the factors listed in the court's remand. 723 **F.2d** at 737. For the reasons discussed below, I do not

^{10/} The Court in Bennett v. Kentucky said: "[t]he State gave **certain** assurances as a condition for receiving federal funds, and if those assurances were not complied with, the Federal Government is entitled to recover amounts spent contrary to the terms of the grant." 470 U.S. at 663.

find **that any of** the factors justifies the exercise of **my discretion to waive** recoupment in this case.

The six factors the court specifically listed to guide the Secretary's decision when considering the equities in this case **are** as follows:

1. Quechan failed to fulfill important statutory and regulatory duties.

Quechan failed, almost totally, to maintain the records required of every grantee under CETA. Quechan was aware of the **reporting** obligations and included in its three successful grant applications assurances that all pertinent report requirements under the statute, regulations, and OMB circulars would be **met.**^{11/} Virtually none of these reporting requirements was satisfied. The responsible officials of the Tribal Council did not retain or **protect the** documentary evidence to support the expenditure of CETA funds. There is evidence that CETA programs were operated, but little in the way of documentary evidence that the participants were eligible to participate in these programs. The maintenance of these records was necessary to ensure that the appropriated funds were spent in support of the programs.

2. Quechan was not advised until September 1975 that it was in violation of CETA regulations, some ten months after Quechan began participating in the CETA grants.

Each of the grants entered into by Quechan set forth the reporting requirements of the **program.**^{12/} In addition, Quechan

^{11/} See Administrative File, Grant Applications; Exhibit D-1 at 7; Exhibit D-5 at 10; Exhibit D-6 at 9.

^{12/} Id.

program staff attended training programs concerning record keeping and reporting offered by the Labor Department.²¹ Quechan staff were aware that required reports were to be filed on a regular basis from the start of its involvement in the CETA program. **The reporting** requirements were set forth in the grants, in the regulations and in the statute. There is no evidence that Quechan program staff were unaware **of** the reporting requirements from the initiation of the programs until the time the Department threatened to remove the programs from its administration.

3. The additional funding amendment in September 1975.

Additional funds were allocated by the Department to Quechan in September, 1975, to increment its Title III (Indian employment and training) **program**, as well as for its Title II, and Title III summer program. (The Title VI program was unchanged by this additional funding.) These funds were specifically to employ 26 persons in the Title III program, 1 person in the Title II program, and 22 in the Title III summer program. Although the project was deficient in filing the required reports with the Department, there was no suggestion of fraud which would have triggered a cessation of funding. Barring the need to intervene immediately to protect Federal funds, the Federal program staff continued the project in the belief that it was ameliorating the economic distress on the reservation. When it became obvious

¹³/**Testimony** of Albert O'Brien, Jr., CETA Director, Hearing Transcript (Tr.) at 26-29.

that the Quechan Tribal Council was unable to produce the necessary reports, the administration of the project was transferred to **the** Inter Tribal Council of **California.**^{14/} The failure of Quechan to produce the required administrative reports is not the reason for the disallowance of program costs. It **is Quechan's** inability to demonstrate that the people participating in the program were in fact eligible **to** do so.

4. The extremely high unemployment rate on the reservation.

Testimony at the hearing before the ALJ provided wide ranging estimates of unemployment on the reservation. These estimates varied from 10 percent to 67 percent. Even assuming that actual unemployment was closer to the high range of the estimates, there is no proof that the individuals selected to participate in the program were unemployed or underemployed.

Quechan presented no evidence on which the Government can **rely** to support a contention that any or all of the participants in the Tribe's CETA programs were eligible to do so. There is no justification to allow any additional funds which had been spent by the project on the assumption that some of the participants were eligible. See discussion of Bennett v. New Jersey above at 4-6. Some records were produced and the costs attributable to these eligible participants were allowed.

The court of appeals believed that it could logically infer that participants in the Title III program were in fact eligible,

^{14/}Testimony of O'Brien, Tr. at 16.

even if they had other employment because **they** were economically disadvantaged **or** underemployed. 723 **F.2d** at 736. I think that assumption is speculative, incapable of being proven, and would permit the expenditure of funds in contravention of the express legislative mandate of the Congress. The ALJ explicitly found that "no affirmative finding on participant eligibility can be made in this proceeding," D. and O. at 11, because participants were not required to fill out applications or provide information on their financial condition or employment history on which an eligibility determination could be made. Participants were simply hired and put on the payroll whenever vacancies existed. Id. There is no evidence in the record that any of the participants was economically disadvantaged or underemployed. These findings, which became the decision of the Secretary, are binding unless explicitly set aside by the court of appeals as unsupported by substantial evidence. 29 U.S.C. § 817(b). A different weighing of equities by a court cannot avail. Bennett v. New Jersey, 470 U.S. at 646.

5. The grant officer's disclaimer of any charges of fraud.

The Grant Officer **testified**^{15/} that the auditors did not find that the funds were not expended **in** accordance w'ith the objectives of the program (except for the payment of tax penalties and the excess administrative costs). However, the lack of documentation made it impossible for either the auditors or

15/ Testimony of Linda Kontnier, Grant Officer, Tr. at 76.

the Grant Officer to determine whether the statutory and regulatory requirements regarding participant eligibility had been met. The testimony of the program's administrative staff indicated that the administrative practices were loose and personally **idiosyncratic**^{16/}, even if there were no indications of deception or malfeasance. The crucial point here is that costs were disallowed not for fraud but for inability to determine **whether** CETA funds were expended for the purposes intended by Congress. Good faith on the part of the Quechan program administrators is not relevant to that determination. Bennett v. Kentucky, 470 U.S. at 665.

6. The ALJ's conclusion that Quechan had spent the grant funds on the programs for which they were intended.

The testimony of **Quechan's** administrative staff and the testimony and documentary evidence presented by the Department supports a contention that CETA programs were operated by Quechan during the fifteen months of the grants' terms. Existing records, despite their technical and administrative unacceptability, indicate that about 100 participants were enrolled and participated in programs on the reservation during the grant periods. But here again, the key point is that the supporting details of these records, which concern the eligibility of the participants, are generally unavailable. While the programs may have been in place, it is impossible to determine the eligibility of those who participated in them.

^{16/} Testimony of O'Brien, Tr. at 25.

The court of appeals recognized the Secretary's authority to recover misspent funds in this **case.17/** In City of Oakland v. Donovan, **703 F.2d** 1104, (9th Cir. 1983) the court affirmed the Department's broad authority to determine appropriate sanctions for violations of CETA.

Congress has given DOL broad authority to determine sanctions **for** violations of CETA. 29 U.S.C. § 816(d). In such instances, courts give great deference to agency determinations of sanctions; absent an abuse of discretion, the agency determination will be affirmed. ... The sanction imposed must, however, have some relationship to the violation found by the agency. ...

703 F.2d 1107 (citations omitted). **Quechan's** failure to keep records made it impossible to determine if program enrollees were eligible to participate. The sanction thus imposed bears directly on the violation of the CETA program.

The gravity of not keeping adequate records by Federal grantees was addressed by the United States Court of Appeals for the Fourth Circuit in Montgomery County, Md. v. Department of Labor, **757 F.2d** 1510 (1985). That court, in affirming the Secretary's decision to recoup almost **75** percent of a grant where there was a failure to keep auditable records stated:

We hold that by failing to comply with the record keeping requirements of CETA and its regulations, the County "misspent" federal funds within the meaning of the statute. City of Oakland v. Donovan, **707 F.2d** 1013 (9th Cir. 1983).

Record keeping is at the heart of the federal oversight and evaluation provisions of CETA and its implementing

17/ Quechan, **723 F.2d** at 735, n.3.

regulations. Only by requiring documentation to support expenditures is the DOL able to verify that billions of federal grant dollars are spent for the purposes intended by Congress. Unless the burden of producing the required documentation is placed on recipients, federal grantees would be free to spend funds in whatever way they wished and obtain virtual immunity from wrongdoing by failing to keep required records. Neither CETA nor the regulations permit such anomalous results.

757 **F.2d** at 1513. .

CONCLUSIONS

As noted above, I do not believe present case law requires consideration of the "equities" when a grantee has misspent funds under CETA. Nevertheless, I have responded to the six specific considerations outlined by the court and fully considered all of the equities in this case, including the interest of the Federal government to insure that funds appropriated by Congress are spent only for statutory purposes. I hereby affirm the decision of the Administrative Law Judge and reinstate the amounts due and owing to the Department of Labor. Accordingly, the Quechan Tribal Council is ordered to repay to the Department \$197,452 from non-CETA funds. 29 U.S.C. § 816(d)(2).

SO ORDERED.



Secretary of Labor

Washington, D.C.

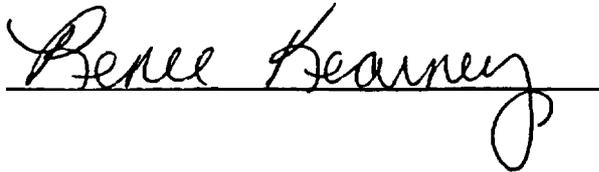
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A copy of the above-referenced document was sent to the following
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