

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: March 14, 1988
CASE NO. 84-CPA-3

IN THE MATTER OF
CHICANO EDUCATION AND MANPOWER SERVICES

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) of 1973. ^{1/} The Chicano Education and Manpower Services (CEMS), a grant recipient under CETA, provided educational and job placement opportunities for the greater Seattle-King County, Washington, community in general, and to the Hispanic and Chicano community in particular. In November of 1976, CEMS hired Ms. Joanne Elizondo, first as a substitute teacher, and then as a permanent instructor, and employed her until June, 1983.

In the course of a 1982 audit by the Office of Inspector General, it was concluded that the hiring of Ms. Elizondo, who was the daughter of CEMS Board Chairman Victor Elizondo, violated CETA regulations regarding nepotism. 29 C.F.R. § 98.22 (1976). The audit recommended that all costs associated with Ms. Elizondo's employment, totaling

^{1/} CETA was substantially revised in 1978 and repealed effective October 12, 1982. The replacement statute, the Job Training Partnership 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).

\$104,954.74, be disallowed. The audit also proposed disallowance of \$61.20 because CEMS had been paid for class participants who allegedly were absent during a random check made on December 22, 1982. The Grant Officer's final determination on October 18, 1983, sustained the disallowance of these costs.

CEMS appealed the Grant Officer's determination and following a hearing, the Administrative Law Judge (**ALJ**) issued his Decision and Order (D. and O.) on February 18, 1985. The **ALJ** decided that the **Grant** Officer had improperly disallowed the \$61.20 in costs for the alleged violation of 20 C.F.R. § 676.26-2(a)(1) (1982). The **ALJ** **agreed** that the nepotism provision of the regulations had been violated, but he reversed the Grant Officer's disallowance of **\$104,954.74** in costs, based on consideration of the equities, pursuant to the decision in Quechan Indian Tribe v. United States Department of Labor, 723 **F.2d** 733 (9th Cir. 1984), remanding that case to the Secretary. Additionally the ALJ found, pursuant to the decision in City of Edmonds v. United States Department of Labor, 749 **F.2d** 1419 (9th Cir. 1984), that the Secretary lacked jurisdiction as a consequence of the Grant Officer's failure to issue a "final determination" within the 120-day period stated in § 106(b) of the Act, 29 U.S.C. 816(b).

The Grant Officer filed exceptions ^{2/} and jurisdiction was asserted by Order of the Under Secretary on April 1, 1985, pursuant to

^{2/} It appears that the Grant Officer excepts only to the **ALJ's** determination to waive recoupment of **\$104,954.74** for the nepotism violation. **See** Brief of the Grant Officer at 3, 4, 6-11.

20 C.F.R. § 676.91(f) (1985). Thereafter, by orders dated June 28, 1985, and October 21, 1985, all proceedings were stayed pending resolution by the Supreme Court of the issue raised in the Edmonds case. In a unanimous opinion the Court held that the Secretary does not lose the power to recover misused CETA funds after the expiration of the 120-day period specified in § 106(b). Brock v. Pierce County, 476 U.S. 253 (1986), reversing Pierce County v. United States, 759 F.2d 1398 (9th Cir. 1985). The stay in this case was lifted, and the parties were given an opportunity to file briefs, which they did.

Upon consideration of the full record including all filings by the parties, I adopt the ALJ's determination that CEMS violated the nepotism provision of the regulations at 29 C.F.R. § 98.22 (1976). The basis of this decision was fully and properly stated as follows:

At the time of the hiring of Joanna Elizondo, the appropriate CETA nepotism regulations found at 29 C.F.R. § 98.22 read as follows:

"No grantee, subgrantee, contractor or employing agency may hire a person in an administrative capacity, staff position, or public service employment position funded under the Act if a member of his or her immediate family is employed in an administrative capacity for the same grantee or its subgrantees, contractors, or employing agencies..."

The Employer argues that the nepotism prohibition of the regulation was not violated because Victor Elizondo was not employed in an administrative capacity notwithstanding his being Chairman of the Board of Directors. CEMS argues that Mr. Elizondo never received any compensation, whether in the form of money, goods, services, or other things of value during his tenure as a Board member and Chairman. It is urged that since Mr. Elizondo acted in a voluntary capacity as a member of the Board of Directors he was not "employed" as used by the regulation. It is further argued that the

construction of the regulation to denote an employer-employee relationship is supported by a later amendment to the regulation when on October 18, 1977, 29 C.F.R. § 98.22 was amended to read as follows:

"No grantee, subgrantee, grantor, or employing agency may hire a person in an administrative capacity, staff position, or public service employment position funded under the Act if a member of his or her immediate family is engaged in an administrative capacity for the same grantee or its subgrantees, contractors, or employing agency..." [emphasis added].

At the time of the hiring of Ms. Elizondo the nepotism regulation referred to one who is "employed in an administrative capacity" and thereafter the regulation was changed to one who is "engaged in an administrative capacity."

I find the aforesaid argument of CEMS without merit as the word "employed" does not require the payment of compensation and one may be "employed" even though acting on a volunteer basis. The dictionary defines the word "employed" as "to put to use or service; to devote or apply (time, for example) to some activity." The American Heritage Dictionary, (2nd Coll. Ed., copyright 1976 & 1982). The services of volunteer directors on the boards of nonprofit community organizations such as CEMS are commonly compensated in the form of personal gratification which one achieves out of performing such services, and such employment is not predicated on receiving monetary compensation as suggested by counsel for CEMS. Consequently, I conclude that merely because Victor Elizondo did not receive monetary compensation for his services he nonetheless was employed in an administrative capacity on the Board of Directors of CEMS at the time of the hiring of his daughter.

Counsel for CEMS further argues that Victor Elizondo was not a person in an administrative capacity at the time of his daughters hiring. The term "person in an administrative capacity" is defined at 29 C.F.R. § 98.22(b)(3). It includes:

"Those persons who have overall administrative responsibility for a program, including: all elected and appointed officials who have any responsibility for the obtaining of and/or approval of any grant funded under the Act as well as other officials who have any influence or control over the administration of the program, such as the project director, deputy director, and unit chiefs; and persons who have selection, hiring, placement or supervisory responsibilities for public service employment participants."

CEMS argues that during the relevant time period all decisions with respect to hiring and firing were made by the Executive Director, Jose A. Correa and that the Board of Directors, in general, or Mr. Elizondo, in particular, was not involved in any hiring, firing, or other personnel decision making. I find this argument equally without merit as clearly the Board of Directors had the ultimate administrative responsibility for the CEMS programs and they had delegated ministerial functions to the Executive Director. The Executive Director was answerable to the Board of Directors and Mr. Elizondo its Chairman. The delegation of authority to an Executive Director did not relieve the ultimate responsibility for the administration of the program in the Board of Directors.

In view of the foregoing it is clear that CEMS violated that nepotism provisions of the regulations....

D. and O. at 3-5. ^{3/}

The ALJ then proceeded to determine whether the "equities of the case are such as to preclude the government from recovering the disallowed costs," D. and O. at 5, apparently believing, *id.* at 5,

^{3/} See also In the Matter of The City of Camden, New Jersey and Mark Del Grande, Case No. 79-CETA-102, Secretary's decision issued October 16, 1986, slip op. at 18-19 (finding violation of nepotism hiring proscription), affirmed, City of Camden v. United States Department of Labor, 831 F. 2d 449, 753 (3rd Cir. 1987).

that such an analysis was required by the Ninth Circuit's opinion in Quechan Indian Tribe v. United States Department of Labor, 723 F.2d 733. However, as explained in my recent final decision and order in Quechan:

[T]here 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 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 assurance 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 that "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.

Slip op. at 4-6.

Accordingly, I decline to apply a balancing of equities to **CEMS's** failure to follow the applicable nepotism provisions. I find that the costs incurred in violation of the nepotism regulations were properly disallowed under the applicable criteria. Chicano Education and Manpower Services is ordered to reimburse the Employment and Training Administration of the United States Department of Labor from non-CETA funds the sum of **\$104,954.74**.

SO ORDERED.


Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: In the Matter of Chicano Education and Manpower
Services v. U.S. Department of Labor

Case No. : **84-CPA-3**

Document : Final Decision and Order

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