

U.S. DEPARTMENT OF LABOR

SECRETARY OF **LABOR**
WASHINGTON, D.C.

DATE: October 25, 1988
CASE NO. **85-CTA-124**

IN THE MATTER OF
U.S. DEPARTMENT OF LABOR,

v.

CALIFORNIA INDIAN MANPOWER
CONSORTIUM, INC.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

Administrative Law Judge (**ALJ**) Alfred Lindeman issued a Decision and Order (D. and O.) in this case, arising under the Comprehensive Employment and Training Act (CETA or Act), 29 U.S.C. §§ 801-999 (Supp. V **1981**), ^{1/} on February 24, 1987. Exceptions to the **ALJ's** decision were timely filed by the Grant Officer, the case was accepted for review by the Secretary of Labor, and the parties were invited to submit further briefs, which they did.

The record in this case has been thoroughly reviewed. **It** shows that, in furtherance of its obligations under the CETA grant in question, the California Indian Manpower Consortium, Inc. (CIMC), had contracted with Mr. Wayne Williams, d/b/a WHJ Welding School, to provide vocational training to three CETA

^{1/} CETA was repealed effective October 13, 1982.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) (1982).

participants, and prepaid the tuition. Before the training was completed, the school closed and Mr. Williams could not be located. The Grant Officer seeks recovery of **\$3,735.00**, the portion of the prepaid tuition applicable to the training which was contracted for but not supplied.

The **ALJ** found these tuition costs "necessary, reasonable, and, therefore, **allowable**" pursuant to the CETA regulation. D. and O. at 3. The **ALJ** went on to say that, even if these costs were disallowable, he believed recoupment should be waived, citing puechan Indian Tribe v. U.S. Department of Labor, 773 F.2d 733, 737 (9th Circuit 1984). D. and O. at 3. Accordingly, the **ALJ** reversed the Grant Officer's Final Determination disallowing and ordering repayment of the \$3,735.

The Grant Officer, in his "**Exceptions** to the Decision of the Administrative Law Judge," contends that the **ALJ** erred in concluding that the costs in question were allowable. The Grant officer asserts that, since the expenditures were for training that was not provided, such expenditures are intrinsically unnecessary and unreasonable, and that they are, therefore, not allowable. The Grant Officer further excepts to the **ALJ's** conclusion that, even if the questioned costs were not allowable, special circumstances exist warranting waiver of the right to recoupment. The Grant Officer argues that the **ALJ's** reliance on Quechan was premature, since, at the time of the **ALJ's** decision, the Secretary had not issued the Department's puechag decision in response to the court's remand order.

In his subsequently filed brief, the Grant Officer points out that the regulation cited by the ALJ as the basis for granting a waiver of recoupment, establishes the criteria for waiving recoupment of costs under CETA and that the regulation is limited to public service employment programs and ineligible participants, and that the waiver provisions do **not** extend to classroom training, as was the case here.

In its reply brief, the CIMC argues that the cases cited by the Grant Officer are inapposite; cites evidence in support of the **ALJ's** conclusion that special circumstances exist warranting waiver; contends that the Secretary's authority to waive recoupment is not limited by the provision of 20 C.F.R. **§ 676.88(c)**; and further contends that the Secretary is estopped from requiring recoupment of the costs *in question* because the **CIMC** relied upon this Department's approval of prepayment of tuition, both in general (as evidenced by the tuition-prepayment provision in a model training *contract* contained in a Department-issued CETA guidebook) and in this particular case.

DISCUSSION

I. Tuition Costs for **Training** Not Provided Are Disallowable.

The ALJ erred in finding that the expenditures by the CIMC for WHJ Welding School training services that were not provided were allowable. The pertinent CETA regulations provide, at 20 C.F.R. **§ 688.40**, that, although "**[c]ontracts** may be entered into between the Native American grantee and any party, public or **private[,]** for purposes set forth in the CETP [the grantee's

comprehensive employment and training plan], " **20 C.F.R.** § 688.40(a), "[t]he Native American grantee is responsible for the development, approval, and operation of all contracts and subgrants. ..." 20 C.F.R. § **688.40(c)** (emphasis supplied). Similar language is used in 20 C.F.R. Part 676 ("General Provisions Governing Programs Under the Comprehensive Employment and Training Act"): "Recipient Responsibility. (1) The recipient is responsible for development, approval, and operation of all contracts and subgrants" 20 C.F.R. § 676.37(a)(1). A grantee may arrange for another entity to perform the grantee's obligations under the latter's CETA agreement with this Department, but doing so does not divest the grantee of liability for nonperformance of those obligations. In CETA decisions signed by the Secretary in which the contractor was selected by the grantee, the grantee has consistently been held liable for improper performance or nonperformance by the contractor or subrecipient where the grantee was clearly not at fault. See, e.g., Janet Syner v. West Virginia Governor's Office of Community Development and City of Ansted, 82-CETA-42, Final Decision and Order, issued September 11, 1986, slip op. at 2; Bruce Lee Caukin v. City of Chula Vista, 80-CETA-74, Final Decision of the Secretary of Labor, issued February 25, 1982, slip op. at 16-17.

The statutory basis for this long-standing construction of grantee responsibility is Section 106(k) of the Comprehensive

Employment and Training Amendments of 1978, 29 U.S.C. § 816(k). ^{2/}
 As stated in the report on those amendments by the United States
 Senate Committee on Human Resources:

Subsection (h) [subsequently redesignated as
 Subsection (k)] provides that prime sponsors and other
 recipients receiving funds directly from the Secretary
 [of Labor] remain responsible and liable despite the
 right of direct action by the Secretary against
 subcontractors and subgrantees.

s. Rep. No. 891, 95th Cong., 2d Sess. 81, reprinted in 1978 U.S.
 Code Cong. & Admin. News 4480, 4561.

Accordingly, it is appropriate that CIMC, the party closest
 to the defaulting subcontractor, bear the loss occasioned by the
 failure of WHJ Welding School to provide the training. See t v
of Gary, Indiana v. United States Department of Labor, 793 **F.2d**
 873, 875 (7th Cir. 1986); North Carolina Commission of Indian
Affairs v. United States Department of Labor, 725 **F.2d** 238, 242
 (4th Cir. 1984), cert. denied, 469 U.S. 828 (1984); Milwaukee
County v. Peters, 682 **F.2d** 609, 612-13 (1982) (7th Cir. 1982).
 By so doing, CIMC simply fulfills its assurances under its
 contract. Bennett v. New Jersey, 470 U.S. 632, 645-646 (1985);
State of California Department of Education v. Bennett, 829 **F.2d**
 775, 799 (9th Cir. 1987).

^{2/} Section 106(k) provides:

Nothing in this section shall be deemed to reduce
 the responsibility and full liability of the prime
 sponsors and other recipients which receive funds
 directly from the Secretary.

II. The Secretary Is Not Estopped from Recouping the Disallowed Cost.

The evidence in this case indicates that grantee prepayment of tuition to private contractors was a standard method of payment, but not the only standard method. Although the Department permitted prepayment, it did not require that practice. There is no basis for any finding of estoppel based on these facts.

III. Waiver of Disallowed Costs Is Not Required.

The **ALJ** stated that even if the disputed costs were disallowed, he believed that recoupment should be waived, "pursuant to 29 U.S.C. § 816(d)(2), " "considering the equities, as directed by Quechan Indian Tribe v. U.S. Department of Labor, 723 **F.2d** 733, 737 (9th Cir. 1984)" D. and O. at 3. The **ALJ** erred in applying Section 816(d)(2) in this situation. That provision relates only to "public service employment" programs in which the Secretary may find that, due to "special circumstances as demonstrated by the recipient, ... requiring repayment would not serve the purpose of attaining compliance" 29 U.S.C. § 816(d)(2) (Supp. V 1981). Since the disallowed costs here related to training welders, not to public service employment (PSE), neither 29 U.S.C. § 816(d)(2) nor the regulatory provision at 20 C.F.R. § 676.88(c) which implements the statutory provision concerning waiver of disallowed PSE costs, provides any basis for waiver.

Moreover, it should be noted that the **ALJ's** proposed application of the court of appeals' remand instruction in Quechag would not be apt in light of my Final Decision and Order in **that** case. Quechan Indian Tribe (Quechan Tribal Council) v. United States Department of Labor, 80-BCA/CETA-97, issued February 4, 1988, appeal docketed, No. 88-71-40 (9th Cir. Apr. 1, 1988). The legal framework has changed since the Ninth Circuit issued its remand in Quechan, and the Secretary is not obliged to consider the equities in every case where a party may request waiver of the Department's right to recoupment. See Quechan, 80-BCA/CETA-97, Final Decision and Order, issued February 4, 1988, slip op. at 4-6, and cases cited therein, especially Bennett v. New Jersey, 470 U.S. at 645-646; Bennett v. Kentucky Department of Education, 470 U.S. 656, 663 (1985). See also Chicano Education and Manpower Services v. United States Department of Labor, 84-CPA-3, Final Decision and Order of the Secretary, issued March 14, 1988, slip op. at 5-7.

Accordingly, **I** decline to apply a balancing-of-equities analysis to **CIMC's** expenditure of funds for welder training that was paid for but was not provided. I find that those costs **were** properly disallowed by the Grant Officer and I order California Indian Manpower Consortium, Incorporated, to reimburse the

Employment and Training Administration of the United States
Department of Labor from non-CETA funds the sum of \$3,735.

SO ORDERED.


Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: United States Department of Labor v. California
Indian Manpower Consortium, Inc.

Case No. : **85-CTA-124**

Document : Final Decision and Order

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