

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR  
WASHINGTON, D.C.

DATE: August 9, 1989  
CASE NO. 85-CTA-89

IN THE MATTER OF  
OAKLAND COUNTY BOARD OF COMMISSIONERS,  
COMPLAINANT,

v.

UNITED STATES DEPARTMENT OF LABOR,  
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the provisions of the Comprehensive Employment and Training Act (CETA or the Act), 29 U.S.C. §§ 801-999 (Supp. V 1981). <sup>1/</sup> Administrative Law Judge (AL?) Reno E. Bonfanti issued a decision on November 26, 1986, holding that the Oakland County Board of Commissioners (Oakland), as a CETA grantee, was entitled to reimbursement for any properly expended and documented costs necessary in the resolution of three CETA

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<sup>1/</sup> CETA was repealed by the Job Training Partnership Act (JTPA), 29 U.S.C. §§ 1501-1781 (1982), on October 13, 1982. CETA administrative and judicial proceedings pending on that date or begun before September 30, 1984, were not affected. 29 U.S.C. § 1591(e). CETA and JTPA are administered through implementing regulations found at 20 C.F.R. Parts 675-689 and 20 C.F.R. Parts 626-636 (1988), respectively.

audit cases pending on July 31, 1984. <sup>2/</sup> The Grant Officer excepted to the **ALJ's** decision on December 19, 1986, Oakland replied to the Grant Officer's exceptions on December 31, 1986, and the Secretary asserted jurisdiction in this case on January 8, 1987. <sup>3/</sup>

#### BACKGROUND

The CETA program utilized a number of political entities as prime sponsors to obtain grant funds to operate programs under the Act. Oakland County, Michigan, was a CETA prime sponsor, and as such received CETA grant funds. On October 13, 1982, the Job Training Partnership Act (JTPA), Pub. L. No. 97-300, 29 U.S.C. §§ 1501-1781, was enacted as the successor to CETA. JTPA provided that CETA program activities were to cease as of September 30, 1983, 29 U.S.C. § 1591(a), and that funds received by prime sponsors under JTPA or CETA could be expended for an

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<sup>2/</sup> In the Matter of Oakland County Board of Commissioners v. United States Department of Labor, Case No. 85-CTA-89, Decision and Order (D. and O.), issued November 26, 1986, at 9.

<sup>3/</sup> Oakland County Board of Commissioners v. United States Department of Labor, Case No. 85-CTA-89, Secretary's Order Asserting Jurisdiction and Notice of Briefing Schedule.

orderly transition of programs from CETA to JTPA. 29 U.S.C.

**§ 1591(c)(4).**<sup>4/</sup>

Beginning in December, 1982, the Department of Labor issued the administrative procedures to be used in the closeout of the CETA program.<sup>5/</sup> This information concerning the CETA closeout was received by the Department's Regional Administrators and was forwarded by the Regional Office to the region's prime sponsors through a series of letters. Oakland County is in Region V which encompasses Michigan, Ohio, Indiana, Illinois, Wisconsin and Minnesota. Region V CETA Letter No. 83-8, Change 2, dated April 15, 1983, notified all CETA prime sponsors of the program's closeout calendar, and at Attachment I at 3, provided the following information:

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<sup>4/</sup> The pertinent language entitled "**TRANSITION**" at Section 181(c)(4) of JTPA provides:

(c) Notwithstanding the provisions of subsection (a), Governors, prime sponsors, and other **recipients** of financial assistance under this Act; may expend funds received under this Act, or under the Comprehensive Employment and Training Act, prior to October 1, 1983, in order to--

\* \* \* \*

(4) conduct any other activity deemed necessary by the recipient to provide for an orderly transition to the operation, as of October 1, 1983, of programs under this Act.

<sup>5/</sup> Department of Labor - Employment and Training Administration (DOL-ETA) Field Memorandum (FM) No. 30-83, dated December 16, 1982; Change 1, dated December 21, 1982; Change 2, dated March 25, 1983; Change 3, dated April 27, 1983; Change 4, dated May 4, 1983; designated in the case record as Respondent Exhibit #1.

<u>"DEADLINE</u>	<u>REQUIRED OR RECOMMENDED</u>	<u>ACTIVITY</u>	<u>RESPONSIBILITY</u>
	*	*	*
3/31/84	required	<u>ACP TERMINATES</u> Incur no more ACP costs	PS[+]
3/31/84	required	Terminate or transfer Staff funded by ACP	PS
3/31/84	required	Final disposition of property	PS/RO[++]
3/31/84	required	Complete all audit resolutions and complaints, grievances/etc.	PS/RO

[+ PS = Prime Sponsor: ++ RO = Regional **Office**]"

The "**ACP**" referred to in the instructions stood for the Administrative Cost Pool which was established to fund the activities associated with the audit and closeout of the various CETA program activities, and the FM permitted the transfer to the ACP of excess program subpart funds on hand as of September 30, 1983. <sup>6/</sup> The warning that "[c]osts incurred for closeout activities after the expiration date of the Administrative Cost Pool must be borne from local resources," was known to the prime sponsors from the very initiation of the closeout process. <sup>7/</sup> The deadline date for the termination of the ACP was extended during the course of the closeout period from September 30, 1983,

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<sup>6/</sup> FM No. 30-83 at 3.

<sup>7/</sup> FM No. 30-83 at 2.

initially, to March 31, 1984, and finally, to July 31, 1984. <sup>8/</sup>  
The Region V CETA Letters consistently warned prime sponsors that  
a cutoff date had been established with regard to closeout costs  
that would be allowable as charges against the ACP and that no  
costs incurred after that date would be allowable. <sup>9/</sup>

Oakland requested that it be granted an extension for the  
use of ACP funds until July 31, 1984, and that request was  
granted. <sup>10/</sup> On July 23, 1984, Oakland, through its manager,  
Harold R. McKay, requested a further extension of the CETA  
Closeout Time Deadline until September 30, 1984. <sup>11/</sup> On  
August 21, 1984, that request was denied by the Grant Officer. <sup>12/</sup>  
On August 28, 1984, Mr. McKay requested an extension until  
October 15, 1984, for the submission of Oakland's CETA (ACP)  
closeout plan report, but stated "[n]o additional costs will  
be incurred past the July 31, 1984, deadline, per your  
instructions. II <sup>13/</sup>

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<sup>8/</sup> Memorandum for: All ETA Regional Administrators from Bert  
Lewis, Administrator for Regional Management, Subject: CETA  
Closeout Packages and Final Audit Reports, dated March 26, 1984,  
at 1, designated in the case record as Respondent Exhibit # 3.

<sup>9/</sup> Administrative File (A.F.) at tabs P, Q, S, T, V, and X.

<sup>10/</sup> A.F. at tabs J and I.

<sup>11/</sup> A.F. at tab H.

<sup>12/</sup> A.F. at tab F.

<sup>13/</sup> A.F. at tab E.

On August 30, 1984, a letter was sent to the Grant Officer from Oakland's counsel in this case, <sup>14/</sup> stating, ~~inter alia~~, that at that time Oakland had three cases before the Office of Administrative Law Judges (**OALJ**) regarding audits conducted by the Department, <sup>15/</sup> and that the Department had failed to act in a timely manner in conducting the audits. The letter also contended that:

Accordingly, the Department is without authority, has failed to properly exercise its authority under the law, has acted arbitrarily and capriciously in the cutting off of funds to the County [Oakland), and is estopped by its actions in delaying the resolution of the subject matters from cutting off the expenditure of funds that remain available.

Therefore, the County hereby requests that you revise your decision of August 21, 1984 to permit the County to expense [sic] funds after August 31, 1984 for the purposes authorized by statute ....

On November 13, 1984, the Regional Administrator notified Oakland that its delinquency in submitting its closeout documents for the CETA Master Plan/Administrative Cost Pool which had been

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<sup>14/</sup> A.F. at tab D.

<sup>15/</sup> Although the stipulated record does not indicate the nature of the issues in the three CETA audit cases then pending, Oakland's Opening Brief before the **ALJ** provides the case numbers. Respondent's Opening Brief at 3. I take administrative notice that one of these cases, 84-CTA-177, was appealed to the United States Court of Appeals for the Sixth Circuit. That case, involving the allowability in CETA cases of attorney's fees incurred in contesting a Grant Officer's final determination, affirmed the Grant Officer's disallowance of such fees. Oakland County Board of Commissioners v. United States Department of Labor, 853 F.2d 439 (1988).

due by August 31, 1984, might result in the disallowance of all costs incurred after September 30, 1983. <sup>16/</sup> On March 7, 1985, the Grant Officer notified Oakland that the Master Plan/Administrative Cost Pool closeout was "processed as submitted ... . [and] the Master Plan/Administrative Cost Pool is closed and matters pertaining to this closeout are resolved." <sup>17/</sup> The Grant Officer's March 7 letter does not address the August 30 request by Oakland's counsel that the Grant Officer's August 21 decision denying further expenditures be revised. The record does not contain the Master Plan/ACP closeout package submitted by Oakland, but it can be surmised that the costs concerning the three audits, which were not resolved as of July 31, 1984, were not reflected as costs charged against the ACP because on March 21, 1985, Oakland appealed the Grant Officer's Final Closeout and Deobligation of Funds to the **OALJ** stating Oakland's "**position** that the costs incurred in the resolution of its remaining CETA audits are also allowable costs and that they are payable from Oakland County's unexpended CETA funds." <sup>18/</sup>

The parties requested that the hearing before the **ALJ** be waived and that the matter be decided on the record. Briefs by the parties were submitted to the **ALJ** and a supplemental response to the Department's brief also was submitted by Oakland. D. and

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<sup>16/</sup> A.F. at tab C.

<sup>17/</sup> A.F. at tab B.

<sup>18/</sup> A.F. at tab A (emphasis supplied).

0. at 1. In his decision construing JTPA, the **ALJ** determined that although the Secretary was given discretion pursuant to Section 181, 29 U.S.C. § 1591, in implementing the new program and in administering the closeout of CETA, D. and 0. at 6, CETA prime sponsors were authorized to spend funds as they deemed necessary **for** the orderly transition from CETA to JTPA pursuant to 29 U.S.C. § 1591(c)(4). D. and 0. at 6. In addition, the **ALJ** interpreted the language of Section 181(e) <sup>19/</sup> to mean that "**no** provision of JTPA can affect pending administrative or judicial proceedings. There is no doubt that this section applies to audit resolution proceedings pending as of September 30, 1984." D. and 0. at 7 (emphasis in original).

The **ALJ** also found that the action establishing the cutoff of the use of ACP funds was a substantive rule and as such, subject to notice and comment procedures in accordance with the Administrative Procedure Act (**APA**), 5 U.S.C. § 553 (1982). The **ALJ** concluded:

Accordingly, I find that the cutoff of ACP funds after July 31, 1984, although neither arbitrary, capricious, nor an abuse of discretion, was not in accordance with the statutory provisions of CETA and JTPA, in

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<sup>19/</sup> Section 181(e) provides:

The provisions of this chapter shall not affect administrative or judicial proceedings pending on October 13, 1982, or begun between October 13, 1982, and September 30, 1984, under the Comprehensive Employment and Training Act.

excess of statutory authority, without observance of procedure required by law, and is therefore unenforceable pursuant to the provisions of 5 U.S.C. 706(2)(A), (C), & (D).

D. and 0. at 9.

#### DISCUSSION

In his brief before the Secretary <sup>20/</sup> the Grant Officer challenges for the first time the authority of the Office of Administrative Law Judges to hear this case. The belated raising of this issue is not a bar to its consideration. Joyce v. United States, 474 F.2d 215, 219 (3d Cir. 1973). The OALJ's jurisdiction to hear cases under CETA derives from 20 C.F.R. § 676.88(f) (1988) which authorizes an affected recipient to request a hearing before the OALJ within 10 days of receipt of the Grant Officer's dismissal of a complaint or the Grant Officer's issuance of a final determination. <sup>21/</sup>

The Grant Officer contends that he did not issue a final determination or an initial determination concerning a complaint

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<sup>20/</sup> Brief of the Grant Officer (G.O. Brief) at 5.

<sup>21/</sup> Section 676.88 is entitled "[i]nitial and final determination; request for hearing at the Federal level," and provides in pertinent part:

(f) Request for hearing. Within 10 days of receipt of the Grant Officer's dismissal of the complaint or of the Grant Officer's final determination, any affected recipient ... may request a hearing by filing a request for hearing with the Chief Administrative Law Judge .... The request for hearing shall be accompanied by a copy of the Grant Officer's final determination or dismissal of the complaint and shall specifically state those provisions of the determination upon which a hearing is requested.

or an audit report, and that he did not prescribe any sanction or corrective action against Oakland. <sup>22/</sup> Rather, the Grant Officer argues that his letter of March 7, 1985, "**merely** informed the County that upon review of the closeout documents submitted by the County ... the final cash balance was at zero and the Master Plan/Administrative Cost Pool [ACP] was therefore **closed.**" (emphasis in original). <sup>23/</sup> It was this March 7, 1985, letter from which Oakland appealed to the **OALJ** on March 21, 1985. <sup>24/</sup>

The case before me presents a rare fact situation since it concerns allowable costs pursuant to the CETA program closeout rather than the more usual case which questions the allowability of CETA grant costs following an audit. Where an audit of post program operations has challenged the claimed costs of operational or administrative practices by a CETA grantee, the Grant Officer would issue a final determination disallowing the claimed costs if he found the audit recommendations appropriate. In this case, the grantee was attempting to gain approval for administrative costs that would be incurred after the announced closeout date of the ACP. At that time the allowability of the costs was not in question, but Oakland disputed the establishment by the Department of a timeframe within which the reimbursed costs could be incurred.

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<sup>22/</sup> G.O. Brief at 6, 7.

<sup>23/</sup> Id. at 7.

<sup>24/</sup> **A.F.** at tab A; supra at 7.

On August 30, 1984, Oakland's counsel wrote to the Grant Officer asserting that the Grant Officer had incorrectly stated the law (Section 181(e) of JTPA) concerning the allocability of CETA costs incurred after the ACP closeout date: that there were pending before the **OALJ** three cases concerning audits of Oakland's CETA grants; and that the Department had acted arbitrarily and capriciously in establishing the cutoff date. Having challenged the Department's interpretation of the pertinent statute concerning the closeout of CETA, Oakland then requested a **"final determination on this matter."** <sup>25/</sup> On March 7, 1985, the Grant Officer notified Oakland that its Master Plan/ Administrative Cost Pool closeout **"was processed as submitted,"** and that he had determined the "matters pertaining to the closeout resolved," <sup>26/</sup> even though the record <sup>27/</sup> reveals no response by the Grant Officer to Oakland's dispute as to the basis for establishing a closeout date.

Apparently pursuant to the Grant Officer's instructions, <sup>28/</sup> Oakland did not include in its closeout package any costs it may

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<sup>25/</sup> A.F. tab D at 3.

<sup>26/</sup> A.F. at tab B.

<sup>27/</sup> I take note that the Grant Officer compiles and **"shall** submit to the Administrative Law Judge an administrative file consisting of all pertinent documents. ..." 20 C.F.R. § 676.88(g) (emphasis supplied). The Grant Officer's Response to Request for Production of Documents states that **"[a]ll documents pertaining to this matter have been included in the Administrative File."**

<sup>28/</sup> See supra at 5.

have incurred after July 31, 1984, nor any anticipated costs related to the three pending audit cases. The effect of the Grant Officer's failure to respond to Oakland's August 30 letter and his acceptance on March 7, 1985, of Oakland's closeout package was to deny Oakland reimbursement for such costs which were incurred after July 31, 1984. The fact that the denial occurred prior to Oakland's incurring the costs and then charging its CETA grants rather than following an audit challenging charges by Oakland to its CETA grants, was a condition of the CETA program's termination. Certainly nothing in the record reflects Oakland's assent to the Grant Officer's claimed authority to establish a date to terminate allowable CETA charges. On the facts here, I find that the Grant Officer's March 7, 1985, letter to Oakland, constituted a constructive final determination, because the effect was to deny specific costs which Oakland alleged were necessary and allowable in the administration of its CETA program. Accordingly, it was

appropriate for the OALJ to accept <sup>29/</sup> and proceed with Oakland's request for a hearing in accordance with 20 C.F.R. § 676.88(f).

I turn now to the issue whether the procedure for establishing the cutoff date for the termination of the use of ACP funds was in accordance with CETA, JTPA and the APA. On March 9, 1988, a Final Decision and Order was issued in In the Matter of Seattle-King County Private Industry Council v. U.S. Department of Labor, Case Nos. 85-CPA-47, 85-CPA-57, which dealt with the same question of statutory interpretation at issue here, that is, the allowability of CETA closeout administrative costs incurred after July 31, 1984. In Seattle, the Prime Sponsor had claimed costs incurred in resolving outstanding CETA audit cases

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<sup>29/</sup> The Grant Officer also argues that the OALJ lacked jurisdiction, citing Tennessee Department of Employment Security v. Secretary of Labor, 801 F.2d 170 (6th Cir. 1986), for the proposition that "the decision to cut-off CETA ACP funds on July 31, 1984 was a 'final order' of the agency, judicial review of which was 'committed to the court of appeals.'" G.O. Brief at 9. I believe the Grant Officer misapprehends the holding of that case. In Tennessee, the issue was whether the district court had properly concluded that it did not have subject matter jurisdiction to review a final order of the Department. In determining that review in that case arose under JTPA, rather than CETA, and lay only in the court of appeals, the court said "for the purpose of resolving the question of what court properly has jurisdiction over the subject matter of appellant's [Tennessee Department of Employment Security] claims, we assume the Secretary's action to be a 'final order'. ..." 801 F.2d at 174, n.5 (emphasis supplied). Nor do I read the court's decision to foreclose review by an ALJ of claims concerning the cutoff date. Id.

for services rendered subsequent to July 31, 1984. <sup>30/</sup> Because that decision addressed the contentions and arguments raised here and because it is controlling, I **quote** from it at length:

The dispositive issue is whether the procedure used by the Department in establishing a termination date for CETA closeout charges against the administrative cost pool (ACP) is binding on Seattle-King PIC. [The procedure used was essentially the same as with Oakland County.] There is no dispute that the Department notified the organizations concerned with the phasedown and closeout of the CETA program, including PIC, of its establishment of a **termination** date for allowable **administrative** costs. The Department also warned these organizations that any closeout costs incurred after the termination date would have to be borne by local funds, and not CETA funds. The issue has two aspects. First, was the Department bound, as PIC contends, to follow the notice, comment and publication requirements for rulemaking under the Administrative Procedure Act (**APA**), 5 U.S.C. § 553(b) (**1982**)? Second, if it was not, did the Department act within the scope of its authority pursuant to the transition provisions of Section 181 of JTPA, 29 U.S.C. § **1591**?

When section **181(c)(4)** is read together with the legislative history of the transition provisions of JTPA, it seems reasonably clear that Congress intended all closeout activities to be completed and expenditures for such purposes to have been made by September 30, 1983.

Section 181(c) provides in pertinent part that:

[R]ecipients of financial assistance under [JTPA], or under [CETA], may expend funds received under [JTPA], or under [CETA], prior to October 1, 1983, in order to --

\* \* \* \*

(4) conduct any other activity deemed necessary by the recipient for an orderly

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<sup>30/</sup> Although Oakland had not submitted specific reimbursement claims for costs incurred after July 31, 1984, it has asserted that all costs incurred in the resolution of its remaining CETA audits are allowable and payable from Oakland's unexpended ACP funds.

transition to the operation, as of October 1, 1983, of programs under [JTPA].

**29 U.S.C. § 1591.**

The **ALJ** and the PIC apparently interpret this language to mean that any funds received by a recipient prior to October 1, 1983, may be expended for any transition activity. That reading, however, would make the transition period entirely open ended: as long as the funds were received prior to October 1, 1983, they could be expended on transition activities at any time without limitation.

A more reasonable interpretation of section **181(c)(4)** is that the date October 1, 1983, applies to the phrase "**may expend funds**", and establishes that as the cutoff date for all transition activities and expenditures. This conclusion is reinforced by the legislative history. The section on "Transition Provisions" in Senate Report No. 97-469, 97th Cong., 2nd Sess. 29 **(1982)**, renrinted in 1982 U.S. Code Cong. & Ad. News 2664, says

While all of these program buildup activities are occurring durins the transition period [October 13, 1982, the date of enactment of JTPA, to September 30, **1983**], CETA will be phasing down and undergoing program closeouts . . . . Audits, closeouts and debt collection of former program operations must be completed. The transition provisions of the bill will allow for all of these activities to be concluded in an orderly fashion while preparing for the full implementation of [JTPA].

(Emphasis added.)

PIC asserts that the cutoff date established by the Department of Labor was a rule required by section 181(f)(5) and section 169(a) of JTPA to be published for notice and comment in accordance with the Administrative Procedure Act (**APA**), 5 U.S.C. § 553 (1982). I agree that the various communications establishing and extending the cutoff date in this case constituted a "**rule**" under 5 U.S.C. § 551(4) because it was "**an agency statement of general . . . applicability and future effect . . . describing the . . . procedure, or practice requirements of an agency . . .**" However, neither sections 169(a) and **181(f)(5)** of JTPA, 29 U.S.C. §§ 1579, 1591, nor the rule making provisions

of the **APA**, 5 U.S.C. § 553(b), requires this rule to be published for notice and comment. Section 169(a) simply grants power to the Secretary to promulgate rules and regulations to carry out JTPA "in accordance with [the **APA**]". Section 181(f) requires publication for notice and comment for three types of rules under JTPA, but the cutoff date does not fall into any of those categories.

The requirement in the **APA** that a rule be published for notice and comment does not apply to "rules of agency, organization, procedure, or practice ...." 5 U.S.C. § 553(b) (A). The courts have recognized that there is no bright line separating substantive rules from rules of agency practice and procedure, but rather, most rules fall along a continuum from primarily substantive to procedural. "An internal agency 'practice or procedure' is primarily directed toward a determination of the rights of [sic] interests of affected parties." Batterton v. Marshall, 648 F.2d 694, 702, n.34 (D.C. Cir. 1980). As the court said in Lamoille Valley R. co. v. I.C.C., 711 F.2d 295 (D.C. Cir. 1983), "[t]he issue is one of degree -- whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the **APA**." 711 F.2d at 328.

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[I]n Kessler v. F.C.C., 326 F.2d 673 (D.C. Cir. 1963) the court held the F.C.C. was not required to publish for notice and comment a "freeze order" on accepting new applications for radio and television station licenses. See also Ranaer v. F.C.C., 294 F.2d 240 (D.C. Cir. 1961) (a rule establishing a cutoff date for broadcast license applications was procedural and did not have to be published for notice and comment.)

I find that the cutoff date established by the Department of Labor here was a procedural rule which did not have to be published for notice and comment. It is similar to the "freeze order" and cutoff date in Kessler v. F.C.C. and Ranger v. F.C.C., which had the effect of foreclosing pursuit of private rights. Particularly in light of the apparent Congressional intent that CETA closeout activities be concluded by September 30, 1983, the cutoff date was primarily directed toward the efficient and effective operations of the Department of Labor in winding up the CETA program. Without setting a cutoff date, the Department of Labor could never finally close out CETA.

Although the cutoff date was not published in the Federal Register, there seems to be no dispute that PIC had actual notice of each established date and each extension. The requirement to publish all rules does not apply where "persons subject thereto ... have actual notice thereof ...." 5 U.S.C. § 553(b); Kessler v. F.C.C., 326 **F.2d** at 690.

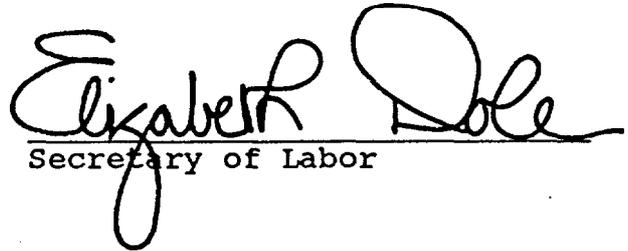
Slip op. at 7-12 (footnotes omitted).

Accordingly, I find that as raised by this case, the establishment of the cutoff date for the termination of the use of the ACP funds was in accordance with CETA, JTPA and the **APA**.

ORDER

Therefore, the decision of the **ALJ** is REVERSED and the Grant Officer's acceptance of Oakland's Master Plan/ACP closeout document as submitted and his determination that the CETA Master Plan/Administrative Cost Pool is closed are AFFIRMED.

SO ORDERED.

  
Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: In the Matter of Oakland County Board of Commissioners v. United States Department of Labor

Case No. : 85-CTA-89

Document : Final Decision and Order

A copy of this document was sent to the following persons

o n **AUG 9 1989** .

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