

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: February 12, 1990
CASE NO. 85-CTA-137 ^{1/}

IN THE MATTER OF
IDAHO DEPARTMENT OF EMPLOYMENT,
COMPLAINANT,
v.
U.S. DEPARTMENT OF LABOR,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Social Security Act, as amended, 42 U.S.C. § 1100-1105 (1982); the Federal Unemployment Tax Act, as amended, 26 U.S.C. § 3301-3311 (1982); the Federal-State Extended Unemployment Compensation Act of 1970, Pub. L. No. **91-373**, Title II, 84 **Stat.** 708 (codified as amended in a note at 26 U.S.C. § 3304); regulations at 20 C.F.R. Part 615 (1989); 41 **C.F.R.** Part 29-70 (1984); and Employment and Training Order No. 5-85 (August 16, **1985**), 50 Fed. Reg. 40,072 (October 1, 1985).

^{1/} The case number is misdesignated "**CTA**", which usually would signify a case arising under the Comprehensive Employment and Training Act. This case arises in a dispute concerning disallowed funds claimed under the State's unemployment compensation programs.

BACKGROUND

The unemployment compensation programs of Complainant, State of Idaho Department of Employment (State or DOE), were audited by the State of Idaho, Office of the Legislative Auditor, for the Federal Fiscal Years 1981-83. ^{2/} The audit report questioned certain federally reimbursed costs claimed by the State due to missing and/or incomplete claimant files uncovered during the audit. Although there was no specific indication in the record that DOE received a copy of the audit report filed with the U.S. Department of Labor (USDOL), its receipt is presumed since DOE introduced a letter at the hearing before the presiding Administrative Law Judge (ALJ), John M. Vittone, which provided the State Auditor with **DOE's** responses to the audit report. ^{3/} The subject letter was dated before USDOL received the audit report.

The Grant Officer issued an Initial Determination on May 24, 1985, based on the audit report wherein he disallowed \$6,491 (Findings 7 & 8), because of missing **or** incomplete claimant files. ^{4/} The Grant Officer stated that the disallowances were

^{2/} DOL Exhibit #1. "State Employment Security Agency Operations for Federal Fiscal Years Ended September 30, 1981, 1982 and 1983," Office of the Legislative Auditor, State of Idaho, 1984. Undated copy received by U.S. Dept. of Labor, Seattle Reg. Audit Office, Jan. 17, 1985.

^{3/} DOE Exhibit #10. Letter to Bruce Balderston, Legislative Auditor, from Scott B. McDonald, Director, DOE, dated September 27, 1984.

^{4/} DOE Exhibit #9. Letter to Scott B. McDonald, Director, DOE, from Harry B. Brown, Grant Officer, dated May 24, 1985.

due to the State's violation of various sections of the Federal Emergency Unemployment Compensation Act of 1974, (FEUCA).

Initial Determination at 19, 21. The violation of this law had been cited by the State audit office as its basis for questioning DOE'S costs.

On August 21, 1985, the Grant Officer issued his Final Determination, reducing the disallowed costs from \$6,491 to \$6,013, after the State produced some of the missing claimant records. The Grant Officer noted that the FEUCA, cited by the auditors and relied upon in the Initial Determination, was not applicable, since it had expired before the audited period of operations. The Grant Officer found, however, that the State was subject to other regulations pertaining to required recordkeeping by recipients of Labor Department grants or agreements. ^{5/} Those regulations are at 20 C.F.R. § 615.15(b) (1989) and 41 C.F.R. §§ 29-70.203-2 and .203-3 (1984). ^{6/}

^{5/} Administrative File (A.F.), Grant Officer's Final Determination, dated August 21, 1985, at 21, 23-24.

^{6/} Section 615.15 is entitled "[r]ecords and reports," and provides in pertinent part:

(b) Recordkeeping. Each State agency will make and maintain records pertaining to the administration of the Extended Benefit Programs as the Department requires, and will make all such records available for inspection, examination and audit by such Federal officials or employees as the Secretary or the Department may designate or as may be required by law.

The regulations in 41 C.F.R. Part **29-70** were last published in the Code of Federal Regulations in 1984. They have been superseded but remain applicable to all contracts (such as those at issue here) that preceded the April 1, 1984, effective date of

DOE requested a hearing before the Office of Administrative Law Judges on September 10, 1985, ^{1/} and a hearing was held in Boise, Idaho, on August 31, 1987. The **ALJ** issued his Decision and Order (D. and O.) on July 12, 1989, wherein he affirmed the Grant Officer's determination in part. The **ALJ** found, inter alia, that DOE had provided a claim file to the auditors during their review, which was never returned to DOE. Although the **ALJ's** finding that the probable responsibility for the missing file was

the successor provisions. 41 C.F.R., Subtitle A-Federal Procurement Regulations System (1989).

The regulation for the retention of and custodial requirements for records set out in 41 C.F.R. § 29-70.203 (1984) provides in relevant part:

§ 29-70.203-2 Record retention policy.

The recipient shall retain all records pertinent to a grant or agreement, including financial and statistical records and supporting documents, for a period of 3 years, subject to the qualifications set forth in § 29-70.203-3.

§ 29-70.203-3 Retention periods.

(a) The retention period will begin on the date of submission by the recipient of the annual or final expenditure report, whichever applies to the particular grant or agreement, except that the recipient shall retain records for nonexpendable property acquired with financial assistance awarded by a DOL Agency for a period of 3 years after final disposition of the property.

(b) If, prior to the expiration of the 3-year retention period, any litigation or audit is begun or a claim is instituted involving the grant or agreement covered by the records, the recipient shall retain the records beyond the 3-year period until the litigation, audit findings, or claim has been finally resolved.

^{1/} A.F., Request for Hearing, dated September 10, 1985.

that of the auditors, rather than DOE, did not establish the allowability of the questioned payment, he found that DOE did not violate the recordkeeping requirement in this instance, and allowed the costs associated with this claimant. D. and O. at 5. The **ALJ** also found that DOE provided USDOL with additional documentation subsequent to the issuance of the Grant Officer's Final Determination, and allowed the additional \$233 in costs which pertained to those files. D. and O. at 6. The **ALJ** affirmed the balance of the Grant Officer's disallowances in the sum of \$5,325. D. and O. at 7.

DOE timely excepted to the **ALJ's** decision, and counsel for the Grant Officer opposed the **State's** request that the Secretary review the **ALJ's** decision.^{9/} The Secretary asserted jurisdiction in the case on September 7, 1989, limiting the issue to be briefed by the parties to that of the State's contribution to those disallowed payments which were made pursuant to the Federal-State Extended Unemployment Compensation Act, 26 U.S.C. § 3304 (1982).^{9/} Both parties submitted briefs wherein it was contended by the State,^{10/} and conceded by the Department of

^{9/} Letter to Honorable Elizabeth H. Dole from Charles D. Raymond, Associate Solicitor for Employment and Training Legal Services, dated August 30, 1989.

^{9/} In the Matter of Idaho Department of Employment v. U.S. Department of Labor, Case No. 85-CTA-137, Secretary's Order Asserting Jurisdiction and Briefing Schedule, dated September 7, 1989.

^{10/} Brief of the Idaho Department of Employment before the Secretary of Labor, dated October 5, 1989, at 3.

Labor ^{11/} that \$697 of the disallowed payments had been the State's contribution and therefore should not be paid to the Government. The amount in dispute thus is reduced to \$4,628.

DISCUSSION

Parties entering into agreements with the Federal government to expend Federal funds for statutory purposes must keep adequate records to assure the awarding Federal agency that the funds were spent in accordance with the underlying authorizing statute. See Montgomery County, Maryland v. Department of Labor, 757 F.2d 1510 (4th Cir. 1985). (CETA prime sponsor was held responsible for "misspent" federal funds when it failed to comply with the recordkeeping requirements of the statute). In commenting upon the necessity of maintaining the **requisite** records, the court wrote:

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

757 F.2d at 1513.

The regulatory requirements cited by the Grant Officer in the Final Determination, n.6 supra, apply to all state and local governmental units, and provide an administrative framework for

^{11/} Grant Officer's Brief, dated November 3, 1989, at 2.

grantees to support their claims for costs of administering programs, including the payment of unemployment compensation (UC) claims. The recovery of federally contributed funds because of a state's clerical failure to maintain the requisite supporting documentation is not a sanction or a penalty levied on a state. It is the determination that the state has failed to provide an adequate documentary basis to support a claim for specific costs. It is not necessary for the Department of Labor to claim, let alone prove, any culpability on the part of the state agency in expending the funds. It is sufficient to show that the state did not provide the documentary support for its claimed costs. In this case, when the state evidenced such documentation at the hearing, the **ALJ** fully credited its claims and allowed the specific, previously disallowed costs. D. and O. at 5-6.

The State does not dispute the fact that certain claimants' records were either missing or incomplete, despite the State's good faith efforts to locate them. ^{12/} The **ALJ's** decision to affirm the Grant Officer's disallowance of inadequately substantiated claims was correct.

The State raises a number of other contentions in its submissions before the Secretary that do not bear on the merits of this case. The State contends that the UC administrative appeal procedures followed in this case were inoperative because

^{12/} **See** Transcript (TR.) at 52-67, testimony of Myrna Osterhout, Administrator for Administrative Services Division, DOE. TR. at 122-24, testimony of William Stiles, Internal Audit Supervisor, DOE.

the Department failed to publish the procedures for notice and comment as required by the Administrative Procedure Act (**APA**), 5 U.S.C. § 553 (1982). ^{13/} The UC appellate procedures had been published in the Federal Register on October 1, 1985, 50 Fed. Reg. **40,072-73**, having first been issued as Employment and Training Order No. 5-85. ^{14/} Prior to the issuance of these procedures, states had no administrative appeal recourse to dispute adverse determinations of a Grant Officer pertaining to unemployment compensation claims.

The requirement of the **APA** that a rule be published for notice and comment prior to promulgation does not apply to "rules of agency organization, procedure or practice . . ." 5 U.S.C. § 553(b) (1) (A). The State contends that the UC appellate procedural rules have a substantial impact on its right to appeal a Grant Officer's determination, and therefore the exemption is not applicable. ^{15/} The State claims that the infringement of this right pertains to the timeframes within which a state must appeal a Grant Officer's final determination to the Office of Administrative Law Judges, 21 days from its receipt of the

^{13/} Notice of Exceptions in the Matter of Idaho Department of Employment v. U.S. Department of Labor, dated August 4, 1989, at 2-10.

^{14/} DOL Exhibit #2, Employment and Training Order No. 5-85, Department of Labor Administrative Appeals Procedures for Audits of the Federal-State Unemployment Compensation Program and Related Federal Unemployment Benefit and Allowance Programs, dated August 16, 1985.

^{15/} Notice of Exceptions, dated August 4, 1989, at 4.

document, ^{16/} or to except to the **ALJ's** decision, 20 days from its receipt of the decision. ^{17/} This argument is not persuasive for the rules are clearly procedural and do not rise to the level of substantive rules as defined by the U.S. Court of Appeals for the Ninth Circuit in Southern California Edison Co. v. Federal Energy Regulatory Commission, 770 **F.2d** 779 (1985). **"For** purposes of the **APA**, substantive rules are rules that create law. These rules usually implement existing law, imposing general, extrastatutory obligations pursuant to authority properly delegated by Congress. Alcaraz v. Block, 746 **F.2d** 593, 613 (9th Cir. 1984)."^{18/} 770 **F.2d** at 783. ^{18/}

The State's reliance on Pickus v. U.S. Board of Parole, 507 **F.2d** 1107 (D.C. Cir. 1974), is misplaced. In that case the regulations were not rules relating to agency procedure but rather established a series of factors in categories to be calculated by parole boards in determining a prisoner's chance for parole. The factors defined a tight framework within which selection by the Board was circumscribed. 507 **F.2d** at 1113. Those regulations are clearly distinguishable from the timeframes

^{16/} Id. at 7.

^{17/} Id. at 8.

^{18/} See Rivera v. Becerra, 714 **F.2d** 887, 889-91 (9th Cir. 1983). See also In the Matter of Seattle-King County Private Industry Council v. U.S. Department of Labor, Case Nos. 85-CPA-47, **85-CPA-57**, Secretary's Final Decision and Order, issued March 9, 1988, **slip op.** at **9-10**. (Secretary held that the establishment of the cutoff date for administrative costs was procedural rather than substantive and thus not subject to the notice and comment requirements of the rulemaking provision of the **APA**.)

for the submission of documents to which all of the parties in the UC appellate process must adhere, and about which the State complains.

The State, in its brief before the Secretary, n.10 supra, questions the adequacy of the **USDOL's** prima facie case with regard to the Grant Officer's disallowance of the State's UC **claims**. The Grant Officer produced his Final Determination as part of the Administrative File, and placed the State Auditor's report on which the Grant Officer relied in making his determination of disallowance into evidence at the hearing. The evidence then before the **ALJ** was sufficient to permit the **ALJ** to draw the inference that federal monies had been claimed by the State and remitted to the State by the USDOL when there was inadequate documentation to support such claims. The State had actual knowledge of **USDOL's** evidence in the form of both the audit report and the Grant Officer's Initial and Final Determinations since 1985. The record does not reveal that the State questioned the truth or reliability of the audit report with regard to the missing documentation. There would be no reason for the **ALJ** to question if the audit report was factually in error. The **ALJ** could therefore reasonably infer that federal UC funds had been claimed and received by the State, and that the underlying documentation to support such payments was missing. The Department's burden of establishing a prima facie case was met and the State had the burden of persuasion to rebut the Department's case. See State of Maine v. U.S. Department of

Labor, 669 F.2d 827, 830 (1st Cir. 1982). The State failed to present persuasive evidence that the Grant Officer erred in disallowing the claimed costs.

None of the State's other contentions affect its liability. while the delay in the proceedings is regrettable, the Department is not seeking interest on the repayment of these funds, and the State is not harmed monetarily because of the length of the pendency of this case. Indeed, it has had the use of the disallowed monies throughout this time at no cost. Moreover, the State does not contend that the records might have been available at an earlier date but were somehow misplaced during the delay. The State's witnesses at the hearing, n.12 supra, testified that the missing records had been sought at the time of the audit and subsequently, and could not be located. The State's complaint concerning what it deems to be unrealistic timeframes for its responses may have been discomfoting for its counsel, but DOE's counsel did not miss any deadlines nor does it appear that the completeness of their documents suffered.

ORDER

The ALJ's decision and order IS AFFIRMED, although the amount of disallowed funds is modified to reflect the State's contribution to the Extended Benefit Program. The State of Idaho

Department of Employment IS ORDERED to pay to the U.S. Department of Labor the sum of \$4,628 in non-federal funds.

SO ORDERED.


Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: In the Matter of Idaho Department of Employment v.
U.S. Department of Labor

Case No. : 85-CTA-137

Document : Secretary's Final Decision and Order

A copy of the above-referenced document was sent to the following
persons on FEB 12 1990.



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