

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, DC.

DATE: August 23, 1990
CASE NO, 82-CPA-32

IN THE MATTER OF
LOUISIANA DEPARTMENT OF LABOR,

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Comprehensive Employment and Training Act (CETA or the Act), 29 U.S.C. §§ 801-999 (Supp. V 1981), ^{1/} and regulations promulgated thereunder at 20 C.F.R. Parts 675-680 (1989). The grantee, Louisiana Department of Labor, filed exceptions to the Decision and Order (D. and O.) of Administrative Law Judge (ALJ) Martin J. Dolan, Jr., upholding the Grant Officer's disallowance of certain expended CETA funds. The case was accepted for review in accordance with the provisions of 20 C.F.R § 676.91(f).

The Grant Officer disallowed \$6,398.13 in costs expended by the subgrantee, West Carroll Parish Police Jury, for employing an ineligible participant, Complainant's Exhibit (CX) 1, tab F, and denied the request of the grantee to waive repayment of CETA funds. CX 1, tab B. In denying the waiver request, the Grant Officer concluded that ^{1/} item 2 of the criteria for waiver [20

^{1/} CETA was repealed effective October 12, 1982. The replacement statute, the Job Training Partnership Act, 29 U.S.C. §§ 1501-1791 (1988), provides that pending proceedings under CETA are not affected. 29 U.S.C. § 1591(e).

C.F.R. § 676.88(c)] **requires** immediate termination of ineligible participants when identified by the subgrantee or prime sponsor. This requirement was not met." ^{2/} CX 1, tab B.

The ALJ did not address the Grant Officer's finding that the grantee did not meet the requirement in item 2 of the waiver criteria. Instead, he reasoned that the Grant Officer has the discretion to waive or not waive costs, whether or not all the specified criteria are met. D. and O. at 2. The ALJ found that the Grant Officer did not abuse his discretion and concluded that the disallowance of questioned costs was warranted and must be upheld. D. and O. at 2-3.

^{2/} Section 676.88(c) provides:

(c) Allowability of certain questioned costs. In any case in which the Grant Officer determines that there is sufficient evidence that funds have been misspent, the Grant Officer shall disallow the costs, except that costs associated with ineligible participants and public service employment programs may be allowed when the Grant Officer finds:

(1) The activity was not fraudulent and the violation did not take place with the knowledge of the recipient or subrecipient; and

(2) Immediate action was taken to remove the ineligible participant; and

(3) Eligibility determination procedures **or** other such management systems and mechanisms required in these regulations, were properly followed and monitored; and

(4) Immediate action was taken to remedy the problem causing the questioned activity or ineligibility; and

(5) The magnitude of questioned costs or activities is not substantial.

DISCUSSIONA. Termination of the Ineligible Participant.

The grantee discovered that one of its CETA employees, Doris J. Vining, was an ineligible participant through an audit conducted after her term of employment had concluded. Transcript (T.) 8, 27, 30. The grantee alleged, T. 10, and the Grant Officer did not contest, that it complied with the regulations, 20 C.F.R. § 676.75-3, for determining eligibility for CETA applicants. Under Section 676.75-3, each grantee and subgrantee must establish an eligibility determination system which is to be based on attestations by the applicant, a thirty day review of the applications, and quarterly sample verifications with the sample not to exceed ten percent of the applicants. Although the grantee followed the applicable regulations, the Grant Officer decided that *item 2* of the waiver criteria was not met because the ineligible participant was terminated when the public service employment program ended and not for reasons of ineligibility. CX 1, tab B.

The grantee contends that the Grant Officer erred in finding that *item 2* was not met because it could not satisfy *item 2* since it was unable to terminate an already terminated participant of a defunct program. Appellant's Proposed Findings at 2, 5. The ALJ did not reach this issue, presumably because, in his view, the Grant Officer had the discretion to waive repayment of questioned costs whether or not all the specified waiver criteria were met. I disagree. The five criteria set forth in Section 676.88(c) are

joined by the word "and," signifying that all criteria must be satisfied before the Grant Officer has the discretion to allow questioned costs.

The grantee essentially asks to be absolved from the responsibility for satisfying item 2 based on impossibility. The doctrine of impossibility is well recognized in the field of contract law as a defense to nonperformance. The doctrine is essentially equitable in character, based on the unfairness or unreasonableness of giving a contract the absolute force which its words clearly state. Opera Co. of Boston v. Wolf Trap Foundation, 817 F.2d 1094, 1100 (4th Cir. 1987). I conclude that the impossibility concept **also** applies to Section 676.88(c). With the exception of criterion 5, Section 676.88(c) essentially looks to the good faith of the grantee as a basis for discretion to allow questioned costs. If the grantee has exhibited good faith by complying with applicable regulations, it would be unfair and unreasonable to conclude that a Grant Officer has no discretion to allow questioned costs under Section 676.88(c) solely because it is impossible for the grantee to comply literally with all of the waiver criteria. I therefore agree with the grantee, Appellant's Proposed Findings at 5, that the intent of item 2, provided the grantee has followed the eligibility determination regulations, is that no CETA funds be expended for a participant after discovery of ineligibility. Under this interpretation, the grantee has met item 2 of the waiver criteria. Inasmuch as the Grant Officer has not alleged

that the grantee has failed to satisfy the other waiver criteria, I conclude that it has met all **the criteria** of Section 676.88(c).

B. ~~Refusal to Waive Questioned Costs Where All Section 676.88(c) Criteria are Satisfied.~~

Subsequent to the **ALJ's** decision in this case, it was **determined** that "[e]ven if all five criteria have been met, the Grant Officer retains discretion under 29 C.F.R. § 676.88(c) to refuse to allow costs for misspent funds, but he must **provide** reasons for doing so." In the Matter of City of Torrance, Case No. 79-CETA-254, Sec. Decision, March 22, 1988, slip op. at 6. See also Action, Inc. v. Donovan, 789 F.2d 1453, 1459 (10th Cir. 1986) (there may be considerations which explain a decision not to **exercise** discretion to allow costs). Under Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706 (1988), federal agencies are required to explain the basis for their actions clearly enough to permit effective judicial review. International Longshoremen's Association v. National Mediation Board, 870 F.2d 733, 735 (D.C. Cir. 1989).

In the instant case, the **ALJ's** decision to disallow the questioned CETA costs was predicated entirely upon his determination that the Grant Officer did not abuse his discretion ^{3/}. The **ALJ**, however, cites no reasons why the Grant

^{3/} The abuse of discretion standard of review was effectively disapproved in City of Torrance, supra. While the Grant Officer has discretion in the first instance to waive or not waive costs, provided the five criteria have been met, when a case is before the ALJ, the ALJ is to make an independent determination, giving "due deference" to the decision of the Grant Officer. Slip op. at 5.

Officer's exercise of discretion was proper. A review of the **record** indicates that the only evidence which could provide reasons for not waiving the questioned costs is the testimony of Lindsey Crenshaw, an employee of the Employment and Training Administration.

Mr. Crenshaw stated that the grantee could have done more by checking the wage record information ninety days after the ineligible participant enrolled. T. 22. When informed that the grantee did check that information for the ten percent sample of participants as required by the regulations, Mr. Crenshaw replied that following the regulations is "**not** sufficient if there are individual participants moving through the system and being subsidized with federal **dollars.**" T. 23.

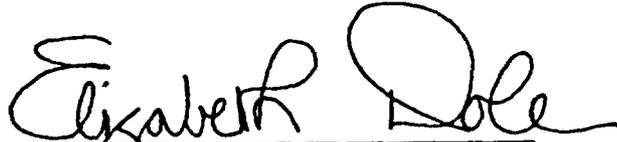
This evidence does not constitute legitimate reasons for not **waiving costs** under Section 676.88(c) because, as the grantee argues, Appellant's Proposed Findings at 7, it would amount to penalizing the grantee for failing to take action even though it met the duty of verifying eligibility and had no knowledge that corrective action should be taken. Accordingly, I reverse the **ALJ's** finding that the CETA costs questioned by the Grant Officer must be disallowed.

CONCLUSIONS AND ORDER

The Grant Officer's determination that the grantee did not satisfy item 2 of the waiver criteria in 20 C.F.R § 676.88(c) is reversed. The **ALJ's** conclusion **that** the CETA costs of **\$6,398.13** questioned **by** the Grant Officer must be disallowed also is

reversed, and the sum of \$6,398.13, spent by the grantee for the employment of participant Doris J. Vining, is allowed.

SO ORDERED.


Secretary of Labor

Washington, D.C.

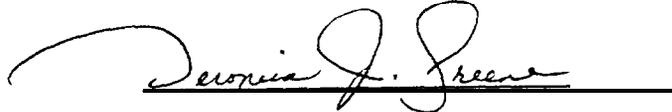
CERTIFICATE OF SERVICE

Case Name: In the Matter of Louisiana Department of Labor

Case No. : 82-CPA-32

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following persons on AUG 23 1990



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