

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: December 2, 1991
CASE NO. **85-CPA-45**

IN THE MATTER OF
BLACKFEET TRIBE,
COMPLAINANT,

v.

UNITED STATES DEPARTMENT OF LABOR,
RESPONDENT.

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 its regulations, 20 C.F.R. Parts 675-680 (1990). The Grant Officer (G.O.) filed exceptions to the Decision and Order (D. and O.) of Administrative Law Judge (ALJ) Charles P. **Rippey**, reversing and vacating the Grant Officer's order that certain misspent CETA funds be repaid. The case was accepted for review in accordance with 20 C.F.R. § 676.91(f).

BACKGROUND

In his final determination concerning allowable expenses under Grant No. 99-1-006-30-87, the G.O. disallowed **\$5,371.11** which the grantee, Blackfeet Tribe, expended from grant funds to

^{1/} CETA was repealed effective October 12, 1982.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).

pay back taxes incurred under a prior grant. The G.O. also disallowed **\$15,250.00**, representing funds the grantee received in excess of grant costs. Finally, the G.O. disallowed another **\$16,704.00** because it was an overexpenditure of the Grantee's Title III allocation funded by an assertedly unauthorized transfer of funds from its Title VI program to its Title III program. The G.O. ordered that all three disallowed expenditures be repaid. Administrative File, Section A.

Back Taxes

The **ALJ** noted the grantee's acknowledgement that the back taxes expenditure was not a proper cost chargeable to the grant. However, he concluded that, under Quechan Indian Tribe v. United States Department of Labor, 723 **F.2d** 733 (9th Cir. 1984), repayment of a disallowed cost is not automatic, and that the "**equities**" in the case must be considered before ordering repayment. D. and O. at 1. Applying Quechan, the **ALJ** found no evidence of fraud, and that the funds were essentially from the year the taxes were incurred because there had been a substantial carryover of funds from the prior grant to the grant in this case. Accordingly, he found that requiring repayment of this **\$5,371.11** was not equitable and, thus, not an appropriate sanction. D. and O. at 2.

Other Expenditures

The **ALJ** found that the other expenditures related to funds transfers from Title VI to Title III without the **G.O.'s** approval as required by 41 C.F.R. § 29-70.211 (1984). The **ALJ** noted that

the parties filed a stipulation that the Department of Labor's representative in the Division of Indian and Native American Programs (DINAP) had orally advised the grantee that it was proper to transfer funds from Title VI to Title III. D. and O. at 2; February 19, 1986, Stipulation of **Facts**. The stipulation further provided that the grantee, relying on that advice, made such a transfer under the grant herein. The ALJ concluded that the grantee justifiably relied on the DINAP representation and, under Quechan, the G.O. was equitably estopped from enforcing the requirement **that all transfers of funds be authorized in writing**. D. and O. at 3.

DISCUSSION

Both parties agree, **G.O.'s** Brief at 5; Grantee's Brief at 9, and the record supports the conclusion, that CETA Section 106(d)(1) is the appropriate statutory section applicable herein. It provides:

If the Secretary concludes that any recipient of funds under this chapter is failing to comply with any provision of this chapter ... the Secretary shall have authority to terminate or suspend financial assistance in whole or in part and order such sanctions or corrective actions as are appropriate, including the repayment of misspent funds . . .

29 U.S.C. § 816(d)(1) (emphasis added). ^{2/}

^{2/} By contrast Section 106(d)(2), pertains solely to public service employment programs and includes a "special circumstances** exception. The statute provides:

If the Secretary concludes that a public service employment program is being conducted in violation of [enumerated sections of the Act], or regulations promulgated pursuant to such sections, the Secretary

(continued...)

Section 106(d)(1) thus grants discretion either to waive repayment of disallowed costs or to order repayment as a sanction. See Creek Nation v. United States, 318 U.S. 629, 639 (1943) (use of word "**authorized**" necessarily reserved to the Secretary the right to determine his own course of action). To implement ^{3/} both Section 106(d)(1) and (2), the Department of Labor promulgated 20 C.F.R. § 676.88(c). ^{4/}

^{2/} (...continued)

shall, pursuant to paragraph (1) of this subsection, terminate or suspend financial assistance in whole or in part, order the repayment of misspent funds ... (unless, in view of special circumstances as demonstrated by the recipient, the Secretary determines that requiring repayment would not serve the purpose of attaining compliance with such sections), ... [Emphasis added].

29 U.S.C. § 816(d)(2).

^{3/} See Chicano Education and Manpower Services v. United States Department of Labor, 909 F.2d 1320, 1326 (9th Cir. 1990) (Secretary promulgated 20 C.F.R. § 676.88(c) to implement the "**special** circumstances" language of Section 106(d)(2)). A review of Section 676.88(c) discloses that it also implements Section 106(d)(1) of CETA because it applies to "**any** case in which the Grant Officer determines that there is sufficient evidence that funds have been misspent, ..." (emphasis supplied.)

^{4/} Providing as follows:

(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 inellaible participants and public service emnloymnt 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

(continued...)

Notwithstanding the Grantee's position that Section 106(d)(1) is applicable to this case, the Grantee argues that Quechan, a Section 106(d)(2) decision, controls this case and that the ALJ correctly considered the equities when deciding the repayment issue. Grantee's Brief at 3, 6. After the **ALJ's** decision in this case, the U.S. Court of Appeals for the Ninth Circuit had an opportunity to reconsider Quechan. In Chicano Education, supra note 3, which like Quechan construed CETA Section 106(d)(2), the court noted first that the Quechan court did not consider the effect of Section 676.88(c), id. at 1327 n.4, and then concluded that "[t]he Department [of Labor] is, of course, required to follow its own regulations." Id. at 1327. Chicano essentially held that consideration of the equities in general under Section 106(d)(2) is now discretionary, as the Department of Labor is only required to take into account those specific equitable factors listed in Section 676.88(c). Id. The court recognized that the Department may also consider "**factors** not covered by the regulation.*" Id.

4/ (. . .continued)

- (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.

(Emphasis added).

Although Chicano addressed consideration of the equities only in relation to CETA Section 106(d)(2), its holding that the Department of Labor must follow its own regulations applies equally to cases arising under CETA Section 106(d)(1), such as this one. ^{5/} I am mindful of the law in Ninth Circuit and will apply that law in this case by following the Department's regulations.

Regulatory Section 676.88(c), as the Grant Officer notes, **G.O.'s** Reply Brief at 7, makes the recovery of improperly spent funds mandatory in this case because the initial clause, which pertains to Section 106(d)(1), states that the Grant Officer **"shall disallow the costs."** ^{6/} To consider the equities in a case concerning Section 106(d)(1), therefore, would be contrary to the regulatory mandate which, as noted by the Ninth Circuit, the Department of Labor is bound to follow. Finding repayment mandatory in this case is appropriate, because CETA Section **106(d)(1) "expressly** provides for a right of repayment of misspent **funds."** City of St. Louis v. U.S. Department of Labor, 787 F.2d 342, 344 n.2 (8th Cir. 1986). It is also consistent with the legislative history of the 1978 CETA Amendments, which **"demonstrates** that Congress 'intended to give the Secretary

^{5/} As noted, supra at page 3, the grantee concedes that this case should be decided under CETA Section 106(d)(1).

^{6/} Chicano held that the language stating the exception to the general rule and the five specified criteria for determining if the exception applies were promulgated to **"implement** the 'special circumstances' language of [Section 106(d)(2) of] the statute. **"..."**

greater power to prevent and correct the fraud and abuse that had developed in **CETA programs.**" **Id.** at 348.

The grantee, while conceding that the **ALJ's** "equitable **estoppel**" rationale is broader than necessary for this case, maintains that it was justified in relying on the DINAP representative's advice and argues that it would be inequitable to require repayment of the disallowed expenditures relating to funds transfers from Title VI to Title III programs. Grantee's Brief at 12. The U.S. Court of Appeals for the Fourth Circuit, however, has held that "[t]he Secretary is not precluded from recovering amounts **concededly** improperly paid ... and improperly shifted from (one grant year to another] simply because a representative of the Secretary erroneously told [the grantee] that the expenditures were **proper.**" Onslow County, North Carolina v. U.S. Department of Labor, 774 **F.2d** 607, 613 (4th Cir. 1985). In Onslow County, the court found that the grantee did not show that it could not have discovered that the expenditures were improper and noted that the Act places primary responsibility for ensuring compliance with the recipient. **Id.** Notwithstanding the parties' stipulation about the **DINAP** representative's advice, the grantee failed to show that there was any legal authority for its actions and thus did not meet its responsibility for complying with the Act. Moreover, under Section 676.88(c) of the regulations, arguments based on equitable considerations apply only to the special circumstances exception applicable in cases arising under Section 106(d)(2) of

CETA. See Chicano, 909 **F.2d** at 1326-27. I therefore reject the Grantee's argument.

CONCLUSION AND ORDER

The Grant Officer's determination that **\$37,325.11** in misspent CETA funds must be repaid is affirmed. The **ALJ's** order reversing and vacating the Grant Officer's determination is reversed. The grantee, Blackfeet Tribe, is ordered to pay the above amount to the Department of Labor. This payment shall be from non-Federal funds. Milwaukee County. Wisconsin v. Donovan, 771 **F.2d** 983, 993 (7th Cir. 1985).

SO ORDERED.



Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: In the Matter of Blackfeet Tribe v. United States
Department of Labor

Case No. : 85-CPA-45

Document : Final Decision and Order

A copy of the ~~above-referenced~~ document was sent to the following persons on April 2, 1991.

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