

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: January 28, 1992
CASE NO. 81-CTA-199

IN THE MATTER OF
AMERICAN INDIAN COMMUNITY HOUSE.

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 involves an audit of CETA grant expenditures by American Indian Community House (AICH) during the period from October 1, 1976, to September 30, 1977. The Administrative Law Judge (ALJ) issued a Decision and Order (D. and O.) on April 2, 1984, ordering AICH to repay \$13,967 to the United States Department of Labor (DOL) from non-CETA funds. Upon consideration of **AICH's** request, the Secretary asserted jurisdiction pursuant to 20 C.F.R. § 676.91(f) (1984). ^{2/}

^{1/} CETA was repealed effective October 13, 1982, and replaced by the Job Training Partnership Act, 29 U.S.C. §§ 1501-1781 (1988). CETA continues to govern administrative or judicial proceedings pending on October 13, 1982, or begun between October 13, 1982, and September 30, 1984. 29 U.S.C. § 1591(e).

^{2/} Review was stayed pending appellate and Supreme Court review of the applicability of the "120-day" provision in section 106(b) of the Act, 29 U.S.C. § 816(b), an issue raised by AICH in its appeal to the Secretary.

BACKGROUND

AICH was awarded a grant under CETA Titles II, III and VI to combat unemployment problems among the Native American community in the New York City metropolitan area. Based on the Final Auditors' Report of a 1978 audit covering **AICH's** grant operations for the year ending September 30, 1977, the Grant Officer issued an Initial Determination, dated December 23, 1980, and a Final Determination, dated July 9, 1981. The Grant Officer's Final Determination disallowed costs totaling \$116,096. See AX-2a; AX-2b. AICH timely appealed this determination to the Office of Administrative Law Judges; a hearing was held on March 15, 1982, see AX-1; the parties filed further evidentiary material; the record was closed on June 22, 1982; and **post-**hearing briefs were filed by the parties in July 1982. Through this process the amount of disallowed costs was reduced, and based on **AICH's** post-hearing evidence, the Grant Officer further revised the Final Determination in a letter dated March 7, 1983. The ALJ addressed only the **\$23,337.12** still in dispute after the Grant Officer's March 7 determinations.

After reviewing the remaining disallowed costs seriatim, the ALJ upheld disallowances totaling **\$13,967.07** and ordered AICH to repay this sum from non-CETA funds. ^{3/} The **ALJ** considered and

^{3/} With respect to \$3,953 in disallowed costs associated with improperly withheld Federal Insurance Contributions Act (FICA) contributions, the ALJ ordered AICH to furnish DOL with the names, addresses and amounts due to each participant involved. The **ALJ** instructed that DOL should pay the amount owed to each of these participants from the disallowed costs repaid by AICH.

rejected the legal arguments raised by AICH: (1) that the Grant Officer failed to present a prima facie case because the administrative file was not entered into the record; (2) that the Act does not provide the Secretary with authority to order repayment of misspent CETA funds; (3) that the Grant Officer's final determination was invalid because it was not issued within **120** days of receipt of the final audit report, as provided for in Section 106(b) of the Act: (4) that the final determination is flawed because the Grant Officer incorrectly cited the applicable regulations: and (5) that the **ALJ's** order allow repayment through services.

Before me, the parties have agreed to disposition based on the record as reconstituted. ^{4/}

DISCUSSION

AICH's appeal letter of April 26, 1984, asserted several reasons for seeking review of the D. and O. First, AICH reiterated arguments rejected by the ALJ: (1) that Section 602(b) of the Act provides **DOL's** sole remedy and provides no authority for collecting misspent funds, and that the United States Court

^{4/} On March 17, 1988, the Secretary issued an order directing the parties to reconstitute the case record and providing a briefing schedule. On November 19, 1990, the Secretary issued a Supplemental Order to Reconstitute the Record, and a further briefing schedule. At the request of **AICH's** counsel, the parties were allowed additional time to pursue settlement. In response to my Order to Show Cause of April 16, 1991, the parties agreed that review should proceed based on the existing record. AICH further requested until June 1, 1991, to file a brief in support of its exceptions. This request was granted by Order issued on May 7, 1991, but the briefing period allowed has expired, and AICH has not filed a brief.

of Appeals for the Second Circuit has not ruled on this issue; (2) that the Grant Officer's failure to issue a final determination within 120 days divested the Secretary of jurisdiction; and (3) that the Grant Officer failed to cite particular applicable regulations for each specific finding in his final determination. Next, AICH argued that in light of the decision in Quechan Indian Tribe v. DOL, 723 F.2d 733 (9th Cir. 1984), the Secretary must consider the equitable arguments for waiver of repayment. Additionally, AICH stated that, "**finally**, with regard to the specific cost disallowances, the Secretary needs presented in brief the specific equitable, factual or legal argument to determine if the repayment sanction is proper. This can only be done by accepting this appeal and scheduling briefs." See April 26 letter at p. 2. Lastly, AICH noted that the final determination failed to impose a specific sanction as required by statute and regulation, and consequently, argued there is not an enforceable order.

As the party requesting the hearing before the ALJ, AICH had the burden of establishing the facts and entitlement to the relief requested. 20 C.F.R. § 676.90(b) (1990). ^{5/} Thus, AICH has the burden herein, of establishing that, contrary to the Grant Officer's determinations and the **ALJ's** findings, the disallowed expenditures of CETA funds were made in compliance with the Act and the regulations in effect at the time. AICH

^{5/} The same regulatory provision governing the burden of proof in a CETA hearing was in effect at the time of **AICH's** hearing in 1982.

was directed to indicate specifically each item of exception remaining in this appeal and was afforded numerous opportunities to submit a brief in support of these exceptions. AICH has not responded. Based on review of the reconstituted record, the statute and regulations and the applicable case law, I affirm the **ALJ's** findings upholding the grant officer's disallowances of **\$13,967.07** in misspent CETA funds. See D. and O. at 3-8; 15-17.

The assertion that the Secretary lacks the authority to recover misspent CETA funds is without merit. See generally Chicano Education and Manpower Services v. Department of Labor, 909 **F.2d** 1320, 1327 (9th Cir. 1990); Colorado Department of Labor & Employment v. U.S. Department of Labor, 875 **F.2d** 791, 799 (10th Cir. 1989); City of St. Louis, Missouri v. Department of Labor, 787 **F.2d** 342, 349 (8th Cir. 1986); Onslow County v. U.S. Department of Labor, 774 **F.2d** 607, 614 (4th Cir. 1985). Commonwealth of Kentucky Department of Human Resources v. Donovan, 704 **F.2d** 288, 294-97 (6th Cir. 1983); Blackfeet Tribe v. U.S. Department of Labor, Case No. 85-CPA-45, Sec. Final Dec. and Order, Dec. 2, 1991, slip op. at 6-7.

Any claim that the failure to issue a final determination within 120 days was dispositive of the case was settled in Brock v. Pierce County, 476 U.S. 253 (1986). The Court held that the Secretary does not lose the authority to recover misspent funds after the expiration of the **120-day** period specified in CETA Section 106(b), 29 U.S.C. § 816(b) (Supp. V 1981). 476 U.S. at 258-266. Moreover, I agree with the ALJ, D. and O. at 14, that

contrary to **AICH's** assertions, the Grant Officer's Final Determination findings conform to the applicable regulations.

The ALJ did not consider the equitable waiver of recoupment issue because it was not raised before him. AICH, citing the decision in Quechan Indian Tribe v. DOL, 723 **F.2d** 733 (9th Cir. **1984**), has raised the issue before me and I will consider it.

Subsequent to the **ALJ's** decision in this case, the U.S. **Court** of Appeals for the Ninth Circuit had an opportunity to reconsider Quechan^{6/} See Chicano Education and Manpower Services v. United States Department of Labor, 909 **F.2d** 1320 (9th Cir. 1990). In Chicano Education, which like Quechan construed CETA Section 106(d)(2), the court said that the Department had promulgated 20 C.F.R. § 676.88(c) to implement the "**special** circumstances** exception of Section 106(d)(2), and concluded that the Department is "**of** course, required to follow its own regulations." Id. at 1327. Section 676.88(c), specifies that misspent funds "**shall**" be disallowed "**except** that costs associated with ineligible participants and public service employment **programs**" may be allowed when the Grant Officer finds five specific factors present. See U.S. Department of Labor v. Rockingham/Strafford Employment and Training Consortium, Case No. 81-CTA-363, Sec. Dec. and Order of Remand, March 11, 1991, slip op. at 4-5; Central Tribes of the Shawnee Area, Inc. v. U.S.

^{6/} I note again that although AICH urged the Secretary to provide an opportunity for briefing its several arguments, it failed to submit a brief in support of its position and addressing intervening case law and decisions of the Secretary on the issue of waiver of repayment post Quechan.

Department of Labor, Case No. 85-CPA-17, Sec. Final Dec. and Order, Dec. 14, 1989, slip op. at 3-5; California Indian Manpower Consortium, Case No. 85-CTA-124, Sec. Final Dec. and Order, October 25, 1988, slip op. at 6. As Blackfeet Tribe made clear, slip op. at 4, the Secretary's discretionary authority to waive **DOL's** right to recoupment pursuant to Section 106(d) has been exercised through the promulgation of Section 676.88(c).

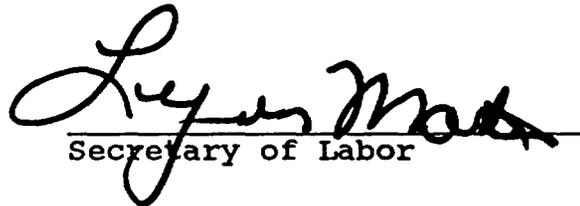
A review of the record establishes that none of the \$13,967 of disallowed costs at issue in this case involved "public service employment programs" as specified in the Act, 29 U.S.C. § 816(d) (2), and the regulation, 29 C.F.R. § 676:88(c). **See** Blackfeet Tribe, Case No. 85-CPA-45, slip op. at 3-7; Rockingham/Strafford, slip op. at 4-5; Central Tribes, slip op. at 4-5. Since Section 676.88(c) limits waiver to disallowed costs involved in public service employment programs, I find that waiver of repayment is not appropriate in this case.

ORDER

Accordingly, American Indian Community House is ordered to repay to the United States Department of Labor, from non-CETA funds, \$13,967. If it has not done so, AICH is ordered to submit

the information specified by the ALJ regarding the participants entitled to reimbursement pursuant to Findings 8 and 9. D. and 0. at 16.

SO ORDERED.


Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: In the Matter of American Indian Community House

Case No. : 81-CTA-199

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following persons on JAN 28 1992.

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