

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: June 24, 1992
CASE NO. 82-CETA-A-166

IN THE MATTER OF
WORCESTER CETA CONSORTIUM.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§ 801-999 (Supp. V 1981), ^{1/} and the regulations promulgated under 20 C.F.R. Parts 675-678 (1990) and 29 C.F.R. Part 96 (1984). The Worcester CETA Consortium (Worcester), a CETA prime sponsor and grantee, appealed to the Office of Administrative Law Judges the Grant Officer's Revised Final Determination disallowing \$263,444 in costs claimed under its CETA grants for the period between October 1, 1976, and September 30, 1979. ^{2/} Following a hearing, the Administrative Law Judge (ALJ) issued a Decision and Order (D. and O.) affirming the Grant Officer's disallowance in the amount of **\$262,894.39**. D. and O. at 9. Both Worcester and the Grant Officer requested

^{1/} CETA has been repealed and replaced by the Job Training Partnership Act, 29 U.S.C. §§ 1501-1781 (1982). Pending CETA administrative and judicial proceedings continue to be adjudicated under CETA. 29 U.S.C. § 1591(e).

^{2/} Case Record, Exhibit 2.

that the Secretary assert jurisdiction and the Grant Officer further requested that any decision be held in abeyance until the Secretary issued a decision pursuant to the remand order from the court of appeals in Quechan Indian Tribe v. United States Department of Labor, 723 F.2d 733 (9th Cir. 1984). Accordingly, the Secretary asserted jurisdiction.

On September 7, 1988, the parties were asked to provide a status report, taking into account the Quechan decision.^{3/} The parties provided status reports, and later submitted briefs pursuant to a briefing schedule issued January 19, 1989.

BACKGROUND

The Grant Officer disallowed costs improperly charged to Worcester's CETA grants pursuant to an audit by the Department's Office of the Inspector General. Of the disallowed costs, \$213,811.78 were for excess indirect costs, i.e. costs over and above the approved indirect cost rate (ICR) for Worcester's CETA programs. The record shows that Worcester had used an unapproved ICR despite contrary advice from Labor Department representatives as far back as 1976. Transcript (Tr.) 52. In April 1982, a substantially lower ICR for the audit period was negotiated and finalized between the Department's Office of Cost Determination (OCD) and the Worcester City Manager. The excess costs above the negotiated ICR and other expenditures, either not documented or

^{3/} The Secretary's decision in Quechan was issued February 4, 1988. Quechan Indian Tribe (Quechan Tribal Council) v. United States Department of Labor, Case No. 80-BCA/CETA-97, Sec. Final Dec. and Order.

incurred in contravention of the regulations, resulted in the disallowed costs.

DISCUSSION

Worcester's appeal does not challenge the ALJ's finding that its ICR expenditures exceeded the negotiated rate or that it either failed to document or otherwise misspent the other disallowed costs. Thus the debt of \$262,894.39 is established. Instead Worcester asks me to exercise my "plenary and discretionary powers" to accept certain expenditures made under a different CETA program (Title I) as substitute payment for the disallowed costs. ^{4/} Although the Secretary has discretionary authority to waive the Department's right to recoupment, such discretion must be exercised in accordance with Section 106(d) of CETA, 29 U.S.C. § 816(d), ^{5/} and the implementing regulations.

^{4/} Worcester's sole submission concerning these CETA Title I expenditures is Attachment Y to its Initial Brief to the Secretary. The document is an auditor's conditional abstract reflecting Worcester's Title I expenditures from July 1, 1974, through June 30, 1980. It has no evidentiary value in supporting Worcester's contention that any part of these expenditures would be allowable or allocable to the CETA grants at issue, 20 C.F.R. § 676.40-1(a), and it was not offered in evidence at the hearing nor subsequently made part of the record. 20 C.F.R. §§ 676.(90)(c) (f), 676.91(f), 676.92(a); 5 U.S.C. § 556(e) (1988).

^{5/} The applicable portion of Section 106(d) provides:

(1) 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 ... order such sanctions or corrective actions as are appropriate, including the repayment of misspent funds. ...

(continued...)

See Action, Inc. v. Donovan, 789 F.2d 1453, 1459-60 (10th Cir. 1986); Puechan Indian Tribe v. U.S. Dep't of Labor, 723 F.2d 733, 736 (9th Cir. 1984); U.S. Dep't of Labor v. Rockingham/Strafford Employment and Training Consortium, Case No. 81-CTA-363, Sec. Dec. and Order of Remand, Mar. 11, 1991, slip op. at 3-4.

The Department promulgated 20 C.F.R. § 676.88(c) to implement Section 106(d).^{6/} Section 676.88(c) requires that the Grant Officer "shall disallow [misspent] costs, except that costs associated with ineligible participants and public service employment" may be allowed when the Grant Officer finds five

^{5/} (. . .continued)

(2) If the Secretary concludes that a public service employment program is being conducted in violation of . . . [various sections of the Act], or regulations promulgated pursuant to such sections, the Secretary shall, . . . order the repayment of misspent funds from sources other than funds under this Act or other funds used in connection with programs funded under this Act (unless, in view of special circumstances as demonstrated by the recipient, the Secretary determines that requiring repayment would not serve the purposes of attaining compliance with such sections), and order such other sanctions or corrective actions as are appropriate.

29 U.S.C. § 816(d) (emphasis added).

^{6/} See Education and Manpower Services v. U.S. Dep't 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)). Section 676.88(c) also implements Section 106(d)(1) because it applies to "any case in which the Grant Officer determines that there is sufficient evidence that funds have been misspent. . . ." (emphasis supplied). See note 7 infra and Blackfeet Tribe v. U.S. Dep't of Labor, Case No. 85-CPA-45, Sec. Final Dec. and Order, Dec. 2, 1991, slip op. at 3-4.

specific conditions present. ^U See Rockingham/Strafford, slip op. at 4-5; Central Tribes of the Shawnee Area, Inc. v. U.S. Dep't of Labor, Case No. 85-CPA-17, Sec. Final Dec. and Order, Dec. 14, 1989, slip op. at 3-5; California, Case No. **85-CTA-124**, **Sec.** Final Dec. and Order, Oct. 25, 1988, slip op. at 6.

I. A.

Approximately 70% of the excess indirect costs were associated with (1) participant wages and fringe benefits payments and (2) administrative wages and fringe benefits payments incurred pursuant to Worcester's Title VI (public

^U 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 the questioned costs or activities is not substantial.

service employment) program. Administrative File (A.F.), Tab C, pp. 9-9c. While these costs might be considered within the purview of the waiver provision of the regulation, I find that they fail to meet three of the required criteria.

Regulatory section 676.88(c)(1) requires that the grant recipient not have knowledge of the questionable activity. Worcester was on notice by regional Labor Department staff prior to its use during the audit period that the unapproved ICR might not be approved. Worcester's CETA Director testified that the Department had challenged Worcester's use of the same unapproved ICR in the immediately preceding audit period and that a lowered ICR rate had been negotiated for the prior period. Tr. 53-54. Worcester submitted its first indirect cost plan to the Department in late December 1978, and a modified plan in January 1979, but continued to use the unapproved ICR throughout the audit period here, and indeed used the higher ICR for its CETA grants until a negotiated rate was agreed to in 1981. Tr. 56-58; Exhibit 6. Worcester's persistence in using an ICR that had been challenged and negotiated to a lower rate not only runs afoul of the requirement that the grantee not have "knowledge" of the violation, section 676.88(c)(1), it also fails to meet the requirement that the grantee take "[i]mmediate action," section 676.88(c)(4), to remedy the problem giving rise to the questionable activity. Moreover, and significantly, the disallowed ICR costs of almost \$150,000 attributable to the Title VI program cannot be considered "not substantial," and thus these

expenditures also fail to meet the requirement of section **676.88(c)(5)**.

The balance of the excess indirect costs are attributable to Worcester's Title II program, A.F. Tab C, pp. **9-9c**, which is not a public service employment program, and therefore the regulatory recoupment waiver does not pertain. In addition, it is appropriate to require Worcester to repay the disallowed [excess ICR] costs since Section 106(d)(1) "expressly provides for a right of repayment of misspent funds." City of St. Louis v. U.S. Dep't of Labor, 787 **F.2d** 342, 344 n.2 (8th Cir. 1986). See Blackfeet Tribe v. U. S. Dep't of Labor, slip op. at 6; American Indian Community House, Case No. **81-CTA-199**, Sec. Final Dec. and Order, Jan. 28, 1992, slip op. at 6-7.

B.

With regard to the other disallowed costs, Worcester requested that the \$17,141 the Grant Officer disallowed resulting from questionable participant wage payments be waived. There was brief testimony at the hearing about three questioned participants, two ineligible participants had been enrolled in the public service employment program. The testimony indicates that Worcester's standard procedures were not carefully followed during the intake process, Tr. 39-47, thereby not satisfying the requirement of section **676.88(c)(3)** that "[e]ligibility determination procedures ... were properly followed and monitored." Worcester offered no evidence that it took immediate action to remedy the problem that resulted in these ineligible

participants being brought on board. 20 C.F.R. § 676.88(c)(4). Thus I affirm the disallowance of \$17,141.

The balance of the disallowed costs, \$31,753, resulted from the payment of CETA participant wages in contravention of applicable CETA regulations, disallowed audited subgrantee costs and the charging of unallowable interest costs. The regulatory recoupment waiver does not pertain and therefore, I affirm the disallowance.

II.

Worcester challenges the Secretary's authority to recoup misspent CETA funds from grants awarded prior to the 1978 CETA Amendments. The law affirming this authority is well established, ^{8/} see also Bell v. New Jersey, 461 U.S. 773, 780-90 (1983), (Secretary of Education authorized to recoup funds misspent under Elementary and Secondary Education Act absent explicit statutory authority), and this defense is denied.

Further, Worcester contends that it was induced to accept the low negotiated indirect cost rate by the assurances of Regional Office staff that the Department would permit it to

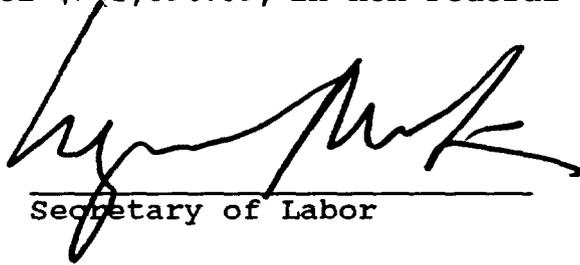
^{8/} St. Reais Mohawk Tribe, New York v. Brock, 769 F.2d 37, 49 (2d. Cir. 1985); Atlantic County, New Jersey v. U.S. Department of Labor, 715 F.2d 834, 835-836 (3d Cir. 1983); Onslow County, North Carolina v. U.S. Department of Labor, 774 F.2d 607, 610 (4th Cir. 1985); City of Gary, Indiana v. U.S. Department of Labor, 793 F.2d 873, a74 (7th Cir. 1986); City of St. Louis, Missouri v. U.S. Department of Labor, 787 F.2d 342, 349 (8th Cir. 1986); Alameda County Training and Employment Board/Associated Community Action Program v. Donovan, 743 F.2d 1267, 1269(9th Cir. 1984); Mobile Consortium of CETA, Alabama v. U.S. Department of Labor, 745 F.2d 1416, 1418 (11th Cir. 1984).

satisfy the disallowed cost determinations by accepting other costs as replacement. See Tr. 62-64. The testimony of the assistant to the Regional Grant Officer reveals that negotiations on the ICR were protracted and continued until the final renegotiation of the agreement was reached in April 1982. Tr. 104-09. The negotiated ICR provided for lower indirect cost percentages and agreement as to which costs were covered, and this testimony does not substantiate Worcester's allegation that there was an underlying agreement. The further testimony was that the Department had not permitted the use of excess costs under one title to offset disallowed costs under another and that in submitting such a request to the National Office, they were "breaking [new] ground." Tr. 125. The substitution was denied by the National Office as contrary to congressional intent and funding obligational levels. Tr. 109. I am persuaded that, as part of their discussions with Worcester, the Regional Office staff agreed to put forth a good faith effort to see if Worcester's Title I costs could be substituted for the disallowed ICR costs associated with its Titles II and VI programs, and that this was done, but the National Office denied the substitution. On the record that denial appears proper and in keeping with the regulations and Department practice. In any case, the willingness of the Regional Office to forward Worcester's request to the National Office affords no basis for excusing Worcester's obligation to repay the disallowed amounts.

ORDER

Accordingly the ALJ's decision IS AFFIRMED, and the Worcester CETA Consortium is ordered to pay to the United States Department of Labor the sum of \$262,894.39, in non-Federal funds.

SO ORDERED.



Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: In the Matter of Worcester CETA Consortium

Case No. : 82-CETA-A-166

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following persons on JUN 24 1992.



CERTIFIED MAIL

Gary S. **Brackett, Esq.**
City Solicitor
Donald V. Rider, Esq.
Assistant City Solicitor
City Hall
455 Main Street
Worcester, MA 01608

William J. Mulford, City Manager
Office of the City Manager
City Hall
455 Main Street
Worcester, MA 01608

Steven **Willand**, Director
Office of Employment and
Training Administrator
City Hall
455 Main Street
Worcester, MA 01608

HAND DELIVERED

Associate Solicitor for Employment
& Training Legal Services
Attn: Gary Bernstecker, Esq.
U.S. Department of Labor
Room N-2101
200 Constitution Avenue, N.W.
Washington, DC 20210

REGULAR MAIL

Robert J. Semler
Regional Administrator
U.S. Department of Labor/ETA
One Congress Street
Boston, MA 02203

Albert H. Ross, Esq.
Office of the Regional Solicitor
U.S. Department of Labor
One Congress Street
Boston, **MA** 02203

David O. Williams
Office of Financial & Administrative
management
Charles Wood
Chief, Division of Audit Resolution
Linda Kontnier
Office of Debt Management
U.S. Department of Labor
Room N-4671
200 Constitution Avenue, N.W.
Washington, DC 20210

Hon. Chester Shatz
District Chief Judge
Office of Administrative Law Judges
John W. **McCormack** Post Office
and Courthouse, Rm. 409
Boston, MA 02109

Hon. Nahum Litt
Chief Administrative Law Judge
Office of Administrative Law Judges
Suite 400
800 **K** Street, N.W.
Washington, DC 20001-8002

Hon. John M. Vittone
Deputy Chief Administrative Law Judge
Office of Administrative Law Judges
Suite 400
800 **K** Street, N.W.
Washington, DC 20001-8002