

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: August 31, 1992
CASE NO. 83-CPA-14

SPOKANE CITY-COUNTY EMPLOYMENT
AND TRAINING CONSORTIUM AND
CAREER PATH SERVICES,

v.

U.S. DEPARTMENT OF LABOR.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER ON REMAND

This case arises under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§ 801-999 (Supp. V 1981),^{1/} and its implementing regulations, 20 C.F.R. Parts 675-680 (1990). The grantee, Spokane City-County Employment and Training Consortium, and one of the subrecipients, Career Path Services (collectively referred to as the Petitioners), filed exceptions to the Decision and Order (D. and O.) of the Administrative Law Judge (ALJ) disallowing certain expended CETA funds and ordering that they be repaid to the Department of Labor. The Secretary declined to accept the case for review and the ALJ's decision became the final decision of the Secretary. 20 C.F.R. § 676.91(f). Petitioners appealed to the United States Court of Appeals for the Ninth Circuit. While the case was pending on appeal, the parties requested that the petition for review be

^{1/} CETA was repealed effective October 12, 1982.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

dismissed and the matter remanded to the Secretary. Pursuant to the parties' agreement, the court remanded the case for the Secretary to consider petitioners' request to "waive the penalty imposed by the Department." Spokane City-County Employment & Training Consortium v. U.S. Department of Labor, No. 88-7312 (9th Cir. July 17, 1991).

BACKGROUND

The grantee entered into subrecipient agreements with Career Path Services (CPS) and Spokane School District No. 81 (District) to operate on-the-job (OJT) training programs on its behalf. D. and O. at 2. Each subrecipient, during 1982, contracted with Knickel Investments to provide the OJT services. Because of dissatisfaction with the services, the District terminated its contract on December 6, 1982. Id. In September 1982, one of the participants under the CPS contract complained that training was not being accomplished. Id. at 3. Thereafter, there were other indications of problems with the CPS contract, culminating in the referral of the matter, on January 6, 1983, to the Office of the Inspector General, Department of Labor, because of allegations of fraud on the part of Knickel Investment's proprietor, Mr. Jerry Koller. Id. at 4. An investigation revealed that Mr. Koller was operating a fictitious business entity which provided participants with little or no training and that he falsely billed the CETA program for training not provided and salaries not paid. Id.

The Grant Officer found that \$9,779.97 in CETA funds was obtained fraudulently by Mr. Koller and disallowed that amount. Id. at 5. The ALJ affirmed the disallowance of \$9,779.97 and ordered that the grantee pay it to the Department of Labor, subject to the Secretary's consideration of whether the right to repayment should be waived. Id. at 8, 9. Following the court's remand, the parties were given the opportunity to submit briefs on the waiver issue, taking into account In the Matter of Blackfeet Tribe v. United States Department of Labor, Case No. 85-CPA-45, Sec. Dec., Dec. 2. 1991.

DISCUSSION

Waiver of the right to repayment of misspent CETA funds is authorized, under certain circumstances, by CETA Section 106(d). ^{2/} 29 U.S.C. § 816(d). To implement Section 106(d) the

^{2/} Section 106(d)(1) provides in relevant part:

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).

Section 106(d)(2), which pertains solely to public service employment programs, provides in part as follows:

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 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

Department of Labor promulgated 20 C.F.R. § 676.88(c). ^{3/} See Blackfeet, slip op. at 4 & n.3. Section 676.88(c) states the general rule that where funds have been misspent "the Grant Officer shall disallow the costs" It provides an exception under which costs associated with ineligible

demonstrated by the recipient, the Secretary determines that requiring repayment would not serve the purpose of attaining compliance with such sections)

29 U.S.C. 816(d)(2).

^{3/} 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.

participants and public service employment programs may be allowed ^{4/} if the five specified criteria are met.

Petitioners make no contention that this case falls within the exception stated in Section 676.88(c). See Petitioner's Brief (Pet. Br.) at 3-6. Instead, while acknowledging the general rule stated in Section 676.88(c) that the Grant Officer shall disallow the costs, the petitioners allege that there is a distinction between disallowing costs and requiring that the costs be repaid. Petitioners add that nowhere in the regulations is there a requirement that disallowed costs must be repaid. ^{5/} Pet. Br. at 5, 6. Moreover, petitioners argue that Blackfeet does not stand for the proposition that waiver of repayment may not be considered in Section 106(d)(1) cases (those cases not involving public service employment programs); rather, that section does not mandate repayment, it merely provides for a right of repayment. Pet. Br. at 3, 5.

It is unnecessary to consider what Section 106(d)(1) allows the Secretary to do regarding repayment because the Department has promulgated regulatory Section 676.88(c) addressing that issue, and the circuit within which this case arises has

^{4/} The regulatory concept of allowing costs has been equated with waiving repayment as the Ninth Circuit has looked to the five factors in Section 676.88(c) as the basis for waiver. See Chicano Education and Manpower Services v. United States Department of Labor, 909 F.2d 1320, 1327 (9th Cir. 1990).

^{5/} Petitioners are not arguing that the Secretary lacks authority to order repayment of the disallowed amounts, only that the Secretary is not required to do so. Pet. Br. at 6.

concluded that the Department of Labor is required to follow its own regulations. Chicano Education and Manpower Services v. United States DeDartment of Labor, 909 **F.2d** 1320, 1327 (9th Cir. 1990). In Blackfeet, repayment of misspent funds was found to be mandatory because the applicable language of Section 676.88(c) stated that the Grant Officer shall disallow the costs. Blackfeet, slip op. at 6. The issue raised in this remand is whether the directive to disallow costs is, as found in Blackfeet, tantamount to requiring their repayment.

When, as here, regulatory terms are not *given* a specific regulatory definition, they are to be interpreted according to commonly understood definitions, considering the context in which they appear. Colorado DeDartment of Labor and Employment v. United States DeDartment of Labor, 875 **F.2d** 791, 797 (10th Cir. 1989). In Chicano, the court noted that the Secretary promulgated Section 676.88(c) to implement the "special **circumstances**" language of CETA Section 106(d)(2) which concerns waiver of repayment. 909 **F.2d** at 1326. The regulation, however, does not mention waiving repayment. Instead, it refers to allowing costs. Because Section 676.88(c) implements the statutory section involving waiver of repayment, the concept of allowing costs must be viewed as its functional equivalent. See supra note 4. Conversely, under the general rule stated in Section 676.88(c), where the Grant Officer is instructed to disallow the costs, the implication is that there can be no waiver of repayment.

This interpretation is consistent with a long line of cases where costs have been disallowed and repayment ordered. See Florida Department of Labor v. United States Department of Labor, 893 **F.2d** 1319, 1320 (11th Cir), cert. denied, 111 S. Ct. 49 (1990); Colorado Department of Labor, 875 **F.2d** at 793; State of South Carolina v. United States Department of Labor, 795 **F.2d** 375, 376 (4th Cir. 1986); Arizona Department of Economic Security v. United States Department of Labor, 790 **F.2d** 782, 783 (9th Cir. 1986); City of St. Louis v. United States Department of Labor, 787 **F.2d** 342, 344 (8th Cir. 1986); Eastern Band of Cherokee Indians v. Donovan, 739 **F.2d** 153, 155 (4th Cir. 1984).

Petitioners have not cited, nor am I aware of, any cases in which costs have been disallowed, within the meaning of Section 676.88(c), without repayment being ordered. To disallow costs without ordering repayment would unreasonably eliminate the distinction between cases where costs are disallowed and those where they are allowed, and would undercut my Secretarial duty under CETA to protect the public **fisc**. See City of Camden, New Jersey v. U.S. Department of Labor, 831 **F.2d** 449, 451 (3d Cir. 1987).

CONCLUSION AND ORDER

For the foregoing reasons, I decline to waive repayment of misspent funds when Section 676.88(c) directs that they be disallowed. The grantee, Spokane City-County Employment and Training Consortium is therefore ordered to pay **\$9,779.97** to the Department of Labor. This payment shall be from non-Federal

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funds. Milwaukee County, Wisconsin v. Donovan, 771 F.2d 983, 993
(7th Cir. 1985), cert. denied, 476 U.S. 1140 (1986).

SO ORDERED.



Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: Spokane City-County Employment and Training Consortium and Career Path Services v. U.S. Department of Labor

Case No. : 83-CPA-14

Document : Final Decision and Order on Remand

A copy of the above-referenced document was sent to the following persons on AUG 31 1992.

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