

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: September 8, 1992
CASE NO. 80-BCA-CETA-93

IN THE MATTER OF

AFFILIATION OF ARIZONA
INDIAN CENTERS, INC.

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), and the applicable regulations. ^{1/} The Grant Officer (G.O.) excepted to the decision (D. and O.) of the Administrative Law Judge (ALJ) remanding the case to the G.O. to determine whether the Affiliation of Arizona Indian Centers (AAIC or the Grantee) was entitled under 20 C.F.R. § 676.88(c) to a waiver of \$12,051 in disallowed CETA grant costs. D. and O. at 3-4. Both parties filed initial and reply briefs before the Secretary. ^{2/}

^{1/} CETA was repealed on October 13, 1982, by the Job Training Partnership Act (JTPA), 29 U.S.C. §§ 1501-1781 (1988). CETA administrative proceedings pending on that date were not affected. 29 U.S.C. § 1591(e). Current CETA implementing regulations are at 20 C.F.R. Parts 675-689 (1990). Earlier CETA regulations, applicable during the grant periods at issue, were published on June 25, 1976, effective July 26, 1976, 41 Fed. Reg. 26,371, and codified at 29 C.F.R. Parts 94-99 (1977).

^{2/} AAIC moved to dismiss this appeal claiming **that the** Secretary's May 9, 1985, order asserting jurisdiction over the **ALJ's** March 28, 1985, decision was untimely because "[t]he decision of the Administrative Law Judge SHALL BECOME THE FINAL DECISION of the Secretary unless the Secretary modifies or **vacants** (sic) the decision WITHIN THIRTY (30) DAYS after it is (continued...)

The Department of Labor (DOL) awarded AAIC a \$103,378 CETA grant (No. 99-7-268-30-30) on October 1, 1976, for a Title III manpower program to provide employment and training services to enable unemployed and underemployed Indians from certain **non-reservation** areas to obtain and retain appropriate employment. Grant Agreement (Grant) at 1, Administrative File (A.F.), Tab D. DOL provided additional funds for Grant No. 99-7-268-30-30 pursuant to Modification No. 1 on October 3, 1977. A.F., Tab E. The G.O. disallowed costs comprised of grant funds provided through Modification No. 1 and spent by AAIC in furtherance of Grant No. 99-7-268-30-30. The G.O. determined that the Grant and CETA regulations at 29 C.F.R. § 98.12(a) and (b)(4) limited the use of 1977 grant funds to grant operations in that fiscal year. Affiliation of Arizona Indian Centers v. U.S. Department of Labor 709 F.2d 602, 603 (9th Cir. 1983). See also the "General Assurances" provisions of the Grant binding the Grantee to the procurement principles of OMB Circular A-95 and Federal Management Circular (FMC) 74-4. Upon review of the initial DOL

2/ (. . .continued)

served." **AAIC's** Motion to Dismiss and Post Hearing Brief (emphasis in original). AAIC has quoted the prior version of this regulation. The applicable regulation, as amended at 49 Fed. Reg. 19,640 (May 9, 1984), modified the period for asserting jurisdiction by allowing a party dissatisfied with the ALJ's decision to file exceptions within thirty days. "Thereafter the decision of the administrative law judge shall become the final decision of the Secretary unless the Secretary, within 20 days of such filina, has notified the parties that the case has been accented for review." 20 C.F.R. § 676.91(f) (emphasis supplied). Both the Grant Officer's April 19 exceptions and the Secretary's May 9 Order Asserting Jurisdiction were timely. The motion to dismiss is DENIED.

decision, the court of appeals remanded the case to take additional evidence on three issues: the specific type of employment program run by AAIC; the applicability of § 676.88(c) to the disallowed funds; and, a determination of "**shared costs**" chargeable to the Grantee under 29 C.F.R. § 97.161(a)(2). The parties subsequently stipulated that \$500 of the cost allocation was disallowable. D. and O. at 1; G.O. Initial Brief at 2; Recipient's Reply at 1.

On remand, the ALJ found that the parties intended for AAIC to conduct a public service employment program to which 20 C.F.R. § 676.88(c) was applicable and remanded the case to the G.O. to apply the Section 676.88(c) criteria. D. and O. at 3. The G.O. objects to this disposition.

DISCUSSION

AAIC received its initial funds under Title III of CETA. The 1976 initial grant was extended for one year and supplemented with over \$130,000 in additional Title III funds in October of 1977. See Modification No. 1, A.F. at Tab E. While the Grantee disputes the alleged illegality of its actions, it admits that it shifted 1977 funds to cover deficiencies in its 1976 grant. Throughout these proceedings, the G.O. has contended that the Grantee violated the terms of its grant and CETA regulations, specifically 29 C.F.R. § 98.12(b)(4), because such fund shifting was expressly prohibited. The regulation relied upon reads:

[F]unds provided under one title of the Act may not be used to support costs of another title, or another

grant under the same title.^{3/}

The Grantee also agreed to be bound **by** the cost allowance principles of OMB Circular A-95 and FMC 74-4, both made applicable to the grant through 29 C.F.R. § 98.12(a) **"as** they relate to the utilization of funds, [and] operation of programs. **.."**, pursuant to the "General Assurances" provisions. A.F., at Tab D. Concerning allocable costs FMC 74-4 provides:

(b) Any cost allocable to a particular grant or cost objective under the principles provided for in this part may not be shifted to other Federal grant programs to overcome fund deficiencies, avoid restrictions imposed by law or grant agreements, or for other reasons.

39 Fed. Reg. 27,133, July 25, 1974. Upon close review of the record, it appears that neither of these provisions support the \$12,051 disallowance in question. The funds at issue involved administrative costs paid from the 1977 modification funds to cover obligations from the initial 1976 grant period. But the 1977 money was for an extension of Grant No. 99-7-268-30-30, expressly for "Title III," A.F., Tab E, item D. "Grant Allotment". Thus, the money was not "used to support costs of another title, or another grant under the same title," 29 C.F.R. § 98.12(b)(4),^{4/} or "shifted to other Federal grant **program[s]**."

^{3/} 41 Fed. Reg. 26,371, June 25, 1976, citation amended from 98.12(b)(3) to 98.12(b)(4) at 42 Fed. Reg. 2,429, Jan. 11, 1977.

^{4/} The prohibition set forth in this provision is, by its terms, a "Restriction on use of funds in Public Service Employment Programs." 29 C.F.R. § 98.12(b) (1977). The G.O.'s reliance on this provision to support the disallowance appears to be at odds with its insistence that the Grantee did not conduct a public service employment program.

FMC 74-4. Therefore, while funds from one grant year covered deficiencies in the previous year, the funds were not shifted to support another title, grant or federal grant program. Shifting funds between awards under the same title of CETA was not prohibited until OMB Circular A-122 was amended in July 1980. ^{5/} Upon review, I decline to insist on the disallowance against AAIC based on the asserted rationale. Because the asserted basis for the disallowance cannot be maintained on the facts of this case, I need not review the **ALJ's** findings about the nature of **AAIC's** program or the applicability of the waiver provision.

Accordingly, I VACATE the **ALJ's** D. and O.

If AAIC has not paid the \$500 stipulated in settlement of the shared cost issue, it is ORDERED to make such payment from non-Federal funds within thirty days of receipt of this order. Milwaukee County, Wisconsin v. Donovan, 771 F.2d 983, 993 (7th Cir. 1985).

SO ORDERED.


Secretary of Labor

Washington, D.C.

^{5/} See revised OMB Circular A-122 providing that:

b. Any cost allocable to a particular award or other cost object under these principles may not be shifted to other Federal awards to overcome funding deficiencies, or to avoid restrictions imposed by law or by the terms of the award.

45 Fed. Reg. 46,024, July 8, 1980 (emphasis added), codified at 41 C.F.R. § 1-15 (1984), applicable to CETA grants pursuant to 29 C.F.R. § 98.12(a).

CERTIFICATE OF SERVICE

Case Name: Affiliation of Arizona Indian Centers, Inc.
Case No. : 80-BCA-CETA-93
Document : Final Decision and Order

A copy of the above-referenced document was sent to the following persons on SEP 8 1992



CERTIFIED MAIL

Charles D. Raymond
Associate Solicitor
U.S. Department of Labor
Office of the Solicitor
Division of Employment
Training and Legal Services
200 Constitution Avenue, N.W.
Room N-2101
Washington, D.C. 20210

4.

Mr. Jerome Blake and
Ms. Mary Jo O'Neil
Urban Indian Law Project
Community Legal Services
3302 N. 7th Street
Phoenix, Arizona 85104

Ms. Joy L. Hanley
Executive Director
Affiliation of Arizona
Indian Center, Inc.
2721 N. Central Avenue
Phoenix, Arizona 85004

REGULAR MAIL

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

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

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

Hon. Glenn Robert Lawrence
Office of Administrative Law Judges
800 K Street, NW
Suite 400
Washington, DC 20001-8002