

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: October 26, 1992
CASE NOS. 88-CPA-1,
87-CTA-16

IN THE MATTER OF
BIRMINGHAM AREA MANPOWER CONSORTIUM,
COMPLAINANT,

v.

U.S. DEPARTMENT OF LABOR,
RESPONDENT.

and

CARPENTERS DISTRICT COUNCIL, JATC,
COMPLAINANT,

v.

U.S. DEPARTMENT OF LABOR,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

These cases arise under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§ 801-999 (Supp. V 1981), and the regulations at 20 C.F.R. Parts 675-689 (1990) and 41 C.F.R. Part 29 (1984). ^{1/} The cases result from the Grant Officer's Final

^{1/} CETA was repealed by the Job Training Partnership Act, 29 U.S.C. §§ 1501-1781 (1988), on October 13, 1982, but CETA
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Determinations which found the Birmingham Area Manpower Consortium (BAMC), a CETA grantee, and one of its subgrantees, the Carpenters District Council, JATC [Joint Apprenticeship Training Committee] (Carpenters), liable for disallowed costs claimed pursuant to CETA grants.

BAMC and the Carpenters appealed the Final Determinations to the Office of Administrative Law Judges. The cases were consolidated, and at the hearing, the parties agreed to submit the cases without further testimony. The Administrative Law Judge (ALJ) issued a Decision and Order (D. and O.) finding that the Department retained authority to recoup misspent CETA grant funds even though the Grant Officer's Final Determination was issued subsequent to the statutory close-out date for CETA activities. D. and O. at 2-3. He found the Carpenters indebted to BAMC for **\$14,821.63** in disallowed costs, id. at 10, but citing the regulation at 20 C.F.R. § 676.88(c), he relieved BAMC from liability to the Department for **\$39,708.28** in disallowed costs. D. and O. at 6 and 10. The Grant Officer excepted to that part

^{1/}(. . .continued)

administrative and judicial proceedings pending on that date were not affected. 29 U.S.C. § 1591(e).

On September 19, 1983, the Federal Procurement Regulations System (F.P.R.) which governed the award of this grant was replaced by the Federal Acquisition Regulation. The last year that the F.P.R. regulations were printed was 1984. See note, 41 C.F.R. (1985) at 3.

The last year that the CETA regulations were printed in the Code of Federal Regulations was 1990.

of the **ALJ's** decision relieving BAMC of liability, ^{2/} and the Secretary accepted the case for review.

BACKGROUND

BAMC entered into subgrants with three local labor unions to provide on-the-job apprenticeship training to CETA-eligible participants in Fiscal years 1981 and 1982. ^{3/} Investigations by BAMC, the Federal Bureau of Investigation and the Department's Office of the Inspector General (OIG) uncovered evidence of fraudulent enrollment of ineligible participants in all three **subgrant** programs. ^{4/} The Grant Officer issued a Final Determination holding BAMC liable for the costs associated with its **subgrantees'** fraudulent activities, ^{5/} and, separately,

^{2/} The Carpenters did not appeal the **ALJ's** decision with regard to their indebtedness to BAMC, and the Grant Officer's exceptions expressly took no position on the **ALJ's** order directing the Carpenters to make repayment to BAMC. Exceptions at 4, n. 1. Accordingly, that part of the **ALJ's** decision becomes the final action of the Secretary. 20 C.F.R. § 676.91(f).

^{3/} The subgrantees were: the Carpenters District Council, JATC; the Painters Local Union No. 57; and the Roofers Local Union No. 110.

^{4/} Copies of the Investigative Memoranda prepared by a Regional OIG Special Agent which implicate officials of the three union locals in the enrollment of ineligible participants in their CETA programs are in the Administrative File (A.F.). A.F. at 56-74 (Roofers); A.F. at 75-83 (Carpenters); A.F. at 84-90 (Painters). The investigations resulted in criminal prosecution of two union officials in the Roofers Local and the return to the Department of disallowed costs directly associated with the individual prosecutions. Neither the criminal prosecutions nor the repaid funds are at issue here. Criminal proceedings were not instituted against the individuals identified in the OIG memoranda concerning the Carpenters Local or the Painters Local.

^{5/} The Grant Officer initially disallowed **\$59,120.75** in his March 20, 1987, Final Determination. Various sums have since
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determined that the Carpenters were liable to BAMC for disallowed costs including those specifically associated with the fraudulent enrollment of participants in their program.

Although the ALJ determined that BAMC was innocent of wrongdoing in the fraudulent activities of its subgrantees, he recognized that the failure of an investigatory agency to recommend criminal proceedings does not preclude the presence of civil fraud or knowledge. D. and O. at 5. The ALJ found that BAMC appropriately responded to allegations about its subgrantees' improper enrollment activities, and took the necessary action to rectify the situation and avoid reoccurrence of the fraudulent activities. Id. at 6. In response to the Grant Officer's determination that the subgrantees' fraudulent actions precluded the application of the allowability provision of Section 676.88(c) as to BAMC, the ALJ stated that he was unaware of any authority imposing strict liability on a grantee for the fraudulent activities of its subgrantees, id. at 6, and he relieved BAMC of its indebtedness to the Department. Id. at 10.

DISCUSSION

The ALJ correctly found that the Department retained authority to recoup misspent CETA grant costs subsequent to the repeal of CETA and the enactment of JTPA. ORO Development

^{5/}(...continued)

been collected from the parties, and the Grant Officer has revised and reduced to \$15,780.40 the determination of the remaining disallowed costs to be recouped. Grant Officer's brief at 3-4.

Corooration v. U.S. Dep't of Labor, Case No. 86-JTP-6, Sec. Dec. and Order, slip op. at 13-14; aff'd ORO Development Cornoration v. U.S. Dep't of Labor, No. 88-1363, slip op. at 2, (10th Cir. June 19, 1990).

The ALJ erred in saying that a CETA prime sponsor is not strictly liable for its subgrantees' misexpenditure of CETA funds. Contrary to the **ALJ's** statement that he knows of no authority that imposes strict liability on a prime sponsor, D. such 0. at 6, there is statutory, regulatory and case law imposing such liability. Section 106 of the 1978 Amendments to the basic CETA legislation reaffirmed the responsibility and full liability of grantees, providing "Nothing in this section shall be deemed to reduce the responsibility and full liability of prime sponsors and other recipients which receive funds directly from the Secretary." 29 **U.S.C.** § 816(k) (emphasis added). Although a grantee's control over the actions and expenditures of its subgrantees may be difficult to ensure, CETA grants provide administrative funds to grantees to install the necessary oversight procedures. The administrative regulations applicable to **BAMC's** grants here explicitly required that CETA grantees maintain effective control. "**The** recipient shall maintain effective control over and accountability for all project funds, property and other assets. The recipient shall safeguard assets and shall assure that they are used solely for authorized purposes." 41 C.F.R. § 29-70.207-2 (1984).

Extensive case authority, including decisions by the Supreme Court, the Federal circuit courts of appeals and the Secretary, upholds the Department's right to look directly to CETA grantees to recoup grant funds misspent by subgrantees. ^{6/} "[A CETA prime sponsor] must accept liability for . . . [its] **subgrantees'** actions." Commonwealth of Kentucky, 704 F.2d at 300.

The ALJ **also erred** in absolving BAMC of the indebtedness incurred through its **subgrantees'** wrongdoing by purporting to apply the regulation at 20 C.F.R. § 676.88(c) to the facts in this case. D. and O. at 3-6. The Section 676.88(c) regulation was promulgated to implement Sections 106(d)(1) and (2) added by the 1978 CETA Amendments. ^{7/} The amending language at Section 106(d)(1) created a presumption in favor of repayment of misspent

^{6/} Brock v. Pierce County, 476 U.S. 253, 265 (1986); Chicano Education and Manpower Services v. U.S. Dep't of Labor, 909 F.2d 1320, 1328 (9th Cir. 1990); City of Camden, N.J. v. U.S. Dep't of Labor, 831 F.2d 449, 450-51 (3d Cir. 1987); City of Gary, Ind. v. U.S. Dep't of Labor, 793 F.2d 873, 875 (7th Cir. 1986); Action, Inc. v. Donovan, 789 F.2d 1453, 1460 (10th Cir. 1986); Montgomery County, Md. v. U.S. Dep't of Labor, 757 F.2d 1510, 1513 (4th Cir. 1985); Coryor Dep't. of Kentuckyman Resources v. Donovan, 704 F.2d 288, 293 (6th Cir. 1983); U.S. Dep't of Labor v. City of Tacoma, Wash., Case No. 83-CTA-288, Sec. Dec., June 26, 1991, slip op. at 5-6. See also Florida DOLES v. U.S. Dep't of Labor, 893 F.2d 1319, 1320 (11th Cir. 1990), affirming recovery of interest on CETA debt arising from "certain costs incurred by DOLES's subgrantees. ..."

^{7/} See Chicano Education and Manpower Services, 909 F.2d at 1326 (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) since it applies to "any case in which the Grant Officer determines that there is sufficient evidence that funds have been misspent," Blackfeet Tribe v. U.S. Dep't of Labor, Case No. 85-CPA-45, Sec. Dec., Dec. 2, 1991, slip op. at 4 (emphasis added).

grant funds. ^{8/} Section 106(d)(2) authorizes the Secretary to waive repayment of misspent funds provided the questioned costs pertain to public service employment programs and the recipient demonstrates "**special** circumstances" to support the waiver. ^{9/} The implementing regulation likewise calls for recoupment of misspent funds unless such funds "**were** associated with ineligible participants and public service employment programs" and enumerates five requisite conditions. ^{10/} See Chicano, 909 F.2d

^{8/} CETA Section 106(d)(1) 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).

^{9/} CETA Section 106(d)(2) 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 shall, pursuant to paragraph (1) of this subsection, . . . 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),

29 U.S.C. § 816(d)(2) (emphasis added).

^{10/}

(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 ineliaible participants and public service emnlovmnt programs may be allowed when the Grant Officer finds:

(1) The activity was not fraudulent and the violation did not take place with

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at 1326-27. The waiver regulation is not applicable in this case because the disallowed costs were associated with subgrants to provide apprenticeship training programs funded under CETA Title II and not public service employment programs. In the Matter of American Indian Community House, Case No. 81-CTA-199, Sec. Dec. and Order, Jan. 28, 1992, slip op. at 7; In the Matter of Blackfeet Tribe v. U.S. Dep't of Labor, slip op. at 3-6.

Even if these grants were susceptible to review under Section 676.88(c), the fraudulently charged costs would not be allowed. Subsection 676,88(c)(1), as quoted in footnote 10, conditions its applicability on the Grant Officer's "**find[ing]**" that "**[t]he** activity was not fraudulent and the violation did not take place with the knowledge of the recipient or the **subrecipient[.]**" The documents in the case record indicate that officials of all three subgrantees either knew about the fraudulent enrollments, A.F. at 56-90, or, like the Carpenters' coordinator, Kenneth Larry Cobb, chose not to supervise the fraudulent activities of the Intake Secretary, even as they gave assurances of compliance with the program's requirements. D. and O. at 7. Therefore the qualifying condition of 29 C.F.R. **§ 676.88(c)(1)** can not be met. U.S. Dep't of Labor v. City of Tacoma, Wash., slip op. at 6.

¹⁰(. . .continued)

the knowledge of the recipient or subrecipient;

20 C.F.R. § 676.88 (emphasis added).

ORDER

The **ALJ's** order that the Carpenters District Council JATC is indebted to the Birmingham Area Manpower Consortium on behalf of the U.S. Department of Labor in the sum of **\$14,821.63** IS AFFIRMED. The ALJ's order relieving the Birmingham Area Manpower Consortium of its indebtedness to the U.S. Department of Labor IS REVERSED. The Grant Officer's determination that the adjusted sum of the debt of **\$15,780.46** in misspent funds must be repaid by the Birmingham Area Manpower Consortium IS AFFIRMED, and Birmingham Area Manpower Consortium is ordered to pay this amount to the U.S. 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 Birminsham Area Manpower Consortium v. U.S. Department of Labor and Carpenters District Council. JATC v. U.S. Department of Labor

Case No. : 88-CPA-1; 87-CTA-16

Document : Secretary's Final Decision and Order

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