

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: November 16, **1992**
CASE NOS. 82-CTA-107
82-CTA-235

IN THE MATTER OF

CONFEDERATED SALISH AND KOOTENAI
TRIBES OF THE **FLATHEAD** RESERVATION,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER
ON RECONSIDERATION

This case arises under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. § 801-999 (1976),^{1/} and its implementing regulations, 20 C.F.R. Parts 675-680 (1990). The Grant Officer (G.O.) filed exceptions to the Decision and Order (D. and O.) of the Administrative Law Judge (ALJ) insofar as it held that costs disallowed by the G.O. because of participation by non-Indians in programs under Title III of CETA would be allowed. The case was accepted for review in accordance with 20 C.F.R. § 676.91(f).

BACKGROUND

The grantee, the Confederated Salish and Kootenai Tribes of the **Flathead** Reservation, was the recipient of two CETA grants. The first grant, Number 99-7-031-30-91 (Grant **91**), in the amount

^{1/} CETA was repealed effective October 12, 1982. The replacement statute, the Job Training Partnership Act, 29 U.S.C. §§ 1501-1791 (1988), provides that pending proceedings under CETA are not affected. 29 U.S.C. § 1591(e).

of \$562,075.00, was for the period October 1, 1976, to September 30, 1978. Administrative File, Case No. 82-CETA-107 (A.F. #1), Section A 5b. The second grant, Number 99-9-031-30-84 (Grant 84), in the amount of \$1,437,691.00, was for the period October 1, 1978, to September 30, 1980. Administrative File, Case No. 82-CETA-235, (A.F. #2), Section A 3b. In final determinations dated September 18, 1981, and April 2, 1982, the G.O. disallowed \$51,990.00 under the two grants. A.F. #1, Section A 5b; A.F. #2, Section A 3b. Of this total, the ALJ allowed \$51,649.00, D. and O. at 9, of which \$44,986.00 pertained to non-Indians enrolled in Title III programs, \$26,011.00 under Grant 91 and \$18,975.00 under Grant 84.

It is undisputed that the Flathead Reservation has been comprised of both Indian and non-Indian residents. See id. at 5 & n.3. The ALJ noted that Congress' purpose in enacting Section 302 of CETA, ^{2/} 29 U.S.C. § 872, was to "help the members of Indian and Alaskan native communities." Id. at 5. (Emphasis in original). The ALJ then reasoned that the permissive language in

^{2/} Section 302(a) provides:

The Congress finds that (1) serious unemployment and economic disadvantage exist among members of Indian and Alaskan native communities; (2) there is a compelling need for the establishment of comprehensive manpower training and employment programs for members of those communities; (3) such programs are essential to the reduction of economic disadvantage among individual members of those communities and to the advancement of economic and social development in these communities consistent with their goals and life styles.

the implementing regulation, 29 C.F.R. § 97.132(a)(1) (1976), ^{3/} which states that an Indian may participate in a Title III program did not support the G.O.'s contention that only Indians could participate. ^{4/} Id. Finally, the ALJ alluded to the grantee's good faith in submitting quarterly reports during the grant periods, which clearly set forth the participation of **non-Indians** in the Title III programs. Id. at 7. Accordingly, the ALJ held that the grantee had the discretion to allow participation in Title III programs by non-Indian members of the Salish and Kootenai community. ^{5/} Id. at 5.

The **ALJ's** decision was reviewed by the Under Secretary of Labor who disagreed that CETA Section 302(a) and Section 97.132(a)(1) of the regulations allowed participation by **non-**

^{3/} Section 97.132(a)(1) provides:

An Indian or other person of native American descent who is economically disadvantaged, unemployed, or underemployed may participate in a program offered by the prime sponsor provided persons have their residence within the area covered by the prime **sponsor's** comprehensive plan.

^{4/} The ALJ contrasted Section 97.132(a)(1) with other regulations which provided that participants must be Indians and concluded that it did not limit participation to Indians only in the clear and certain terms of those regulations. D. and O. at 5.

^{5/} The ALJ discussed the conflict between Section 97.132(a)(1), as interpreted by the G.O., and the requirement of non-discrimination based on race contained in the assurances clause in Grant 91. He concluded that construing the conflict against the G.O. as the drafter of the clause would permit the grantee to allow non-Indian participants. D. and O. at 6. The grantee's Assistant Manpower Program Manager, however, testified that she was not aware of any conflict because she understood that anyone living on the reservation was eligible under Title III. Transcript (T.) at 175.

Indians in Title III programs. Under Secretary D. and O. at 3-6. The Under Secretary concluded, however, that because of the special obligation which exists between the federal government and American Indians, the government was required to respond to the quarterly reports showing non-Indian participants. Id. at 6-7, 11-12. The Under Secretary therefore adopted the **ALJ's** order allowing costs attributable to non-Indian participants in Title III programs. Id. at 13. The G.O. requested reconsideration of this decision and the request was granted.

DISCUSSION

The G.O. contends that the special relationship between the government and Indians does not modify the statutory mandate that misspent CETA funds be recouped. ^{6/} G.O. Brief at 2. While I do not disagree with this position, for the reasons stated infra, the special relationship can influence how the CETA and its regulations are interpreted and therefore be instrumental in determining the threshold question of whether funds are misspent.

^{6/} The grantee questions the Department of Labor's authority to reconsider the Under Secretary's decision. Grantee's Brief at 11-14. While neither the CETA nor the implementing regulations provides for reconsideration, it has been considered appropriate to grant reconsideration where a request complies with Rule 59(e) of the Federal Rules of Civil Procedure. In the Matter of U.S. Department of Labor v. Bergen County, New Jersey, CETA, Case No. 82-CTA-334, Sec. Ord. Aug. 31, 1992, slip op. at 2. In the instant case, the G.O. filed a request to which the grantee did not object and the Under Secretary granted the request. In none of the cases cited by the grantee was reconsideration being sought shortly after the decision was issued as with Rule 59(e). Accordingly, I hold that this case is properly before me for a decision upon reconsideration.

By virtue of the special relationship, statutes passed for the benefit of Indian tribes are to be liberally construed with ambiguous provisions interpreted to their benefit. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Enaineerina. P.C., 467 U.S. 138, 149 (1984). Standard principles of statutory construction do not apply in these instances. EEOC v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989). Unless the language of a statute is plain and admits of no more than one meaning, the duty of interpretation arises as the statute will be considered ambiguous. See McCord v. Bailey, 636 F.2d 606, 614-15 (D.C. Cir. 1980).

CETA Section 302(a) refers to conditions in and needs of Indian and Alaskan native communities. See supra note 2. Section 302(b) states that "programs shall be available to federally recognized Indian tribes, bands, and individuals and to other groups and individuals of native American descent" Looking only to the statutory language, these sections could be read as making Title III programs available to Indians within the communities or any other members of those communities, including non-Indians, and they are therefore ambiguous. Similarly, Section 97.132(a)(1) of the implementing regulations states only that an Indian may participate. See supra note 3. This language by itself could be interpreted as providing that only Indians may participate or as allowing others to participate as well and, therefore, it also is ambiguous. Interpreting these provisions

to the benefit of the grantee, as I am required to do, Blackfeet Tribe, 471 U.S. at 766, I conclude that, as to Grant 91, they permit the participation of non-Indians in Title III programs provided they are members of the Salish and Kootenai community. Accordingly, the money under Grant 91 cannot be considered misspent and I allow the **\$26,011.00** in costs disallowed by the G.O. See A.F. #1, Section A 5b.

As to Grant 84, further analysis is necessary. During the July 25, 1978, exit conference following the final audit of Grant 91, representatives of the grantee, including the Assistant Manpower Program Manager, were informed that the regulations prohibited the admittance of non-Indians in the Title III program. ²¹ T. at 297. See A.F. #1, Section B 8d at 46. Notwithstanding that the language of the statute and regulation is ambiguous, as of the exit conference the grantee had been given a clear interpretation as to how it would be applied and was under a duty to inquire further if it wished to continue

²¹ The grantee alleges that it was late 1979 when "the internal auditor interpreted the new regulations to possibly mean mandatory Indian hiring under Title III." Grantee's Brief at 10. This corresponds to the date the audit report was transmitted to the grantee, August 7, 1979. A.F. # 1, Section B 8b. Initially, it should be noted that the regulations in question were last amended on May 28, 1976, prior to the inception of Grant 91 and, therefore, were not "new" regulations. See 29 C.F.R. § 97.132 (1976). Moreover, the supervisory auditor testified that representatives of the grantee were told in July 1978 that "the regulations prohibited the admittance of non-Indians in the Title 3 program, ..." T. at 296-97. This testimony was not contradicted by any of the grantee's witnesses.

its practice of allowing non-Indians to participate under Title III. ^{8/}

Given that the grantee was aware of how eligibility for Title III participation was to be determined prior to the October 1, 1978, effective date of Grant 84, A.F. #2, Section A 3b, it is necessary to determine only if the G.O.'s interpretation is reasonable. In making this determination, as applied to Grant 84, it is not necessary or appropriate to consider the special relationship because the grantee could have avoided the adverse consequences of allowing non-Indians in Title III by complying with the G.O.'s interpretation. ^{9/} Accordingly, statutory construction principles may be considered. See Cherokee Nation, 871 F.2d at 939.

CETA Section 302(b) provides that Title III programs shall be available to Indian and native American groups and individuals. Under the statutory interpretation principle of

^{8/} Inasmuch as the grantee was on notice as to the interpretation of CETA Section 302(a) and Section 97.132(a)(1) of the regulations, holding it to that interpretation does not run afoul of the overriding duty of the federal government to deal fairly with Indians. See Morton v. Ruiz, 415 U.S. 199, 236 (1974).

^{9/} I specifically reject the Under Secretary's conclusion that the special relationship created an obligation to respond to the quarterly reports listing non-Indians as Title III participants. While the Department of Labor has the responsibility to provide assistance to grantees, it is not responsible for assuring that they misspend no CETA funds. Only where the Department retains authority for oversight and control of a program may it be held accountable for misspent funds. See U.S. Department of Labor v. New York City Department of Employment, Case No. 82-CTA-343, Sec. Dec., Sept. 29, 1987, slip op. at 8. The obligation to treat Indians fairly was met when the grantee was informed during the audit of Grant 91 that non-Indians could not participate in Title III programs.

expressio unius est exclusio alterius, there is an inference that where categories of eligible participants are stated, the omission of other categories is understood to be intentional. 2A Norman J. Singer, Sutherland Statutory Construction § 47.23 (5th ed. 1992). It would therefore be reasonable to conclude that Congress intended that Title III programs would not be available to non-Indians as they are not mentioned in Section 302(b).

Section 97.132 of the regulations, which serves as the Secretary's interpretation regarding Title III eligibility, see 29 U.S.C. § 982(a), when read in its entirety, also supports the view that Title III was not intended to benefit non-Indians. While Section 97.132(a)(1) could be interpreted as including non-Indians as eligible for Title III because it states only that an Indian may participate, other subsections refer to meeting the requirements or eligibility requirements of paragraph (a). See 29 C.F.R. § 97.132(b), (c), (d), (e) and (g). These references strongly suggest that eligibility for Title III as described in Section 97.132(a)(1) includes only those specifically mentioned. I therefore conclude that the G.O.'s interpretation that Title III is restricted to Indian participants is reasonable. Accordingly, I hold that the \$18,975.00 attributable to the participation of non-Indians in Title III programs under Grant 84 was misspent.

To determine if repayment of any of this amount may be waived, it is necessary to consider the criteria in 20 C.F.R.

§ 676.88(c). ^{10/} Chicano Education and Manpower Services v. United States Department of Labor, 909 F.2d 1320, 1327 (9th Cir. 1990). Assuming, without deciding, that these costs qualify for possible waiver, ^{11/} I conclude that waiver of repayment is not available in this case. Inasmuch as the grantee was aware, prior to the effective date of Grant 84, that non-Indians were not permitted to participate in Title III, it cannot satisfy either element 2 or 4 of the waiver criteria. This removes any discretion to allow questioned costs. In the Matter of Louisiana Department of Labor, Case No. 82-CPA-32, Sec. Dec., Aug. 23, 1990, slip op. at 3-4.

^{10/} Providing as follows:

(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.

^{11/} The record is not clear as to whether the costs were incurred in a public service employment program as required by Section 676.88(c).

CONCLUSION AND ORDER

For the foregoing reasons, I hold that the **\$26,011.00** disallowed by the G.O. under Grant 91 should be allowed and that the **\$18,975.00** disallowed by the G.O. under Grant 84 should be disallowed. The grantee, Confederated Salish and Kootenai Tribes of the **Flathead** Reservation, is therefore ordered to pay **\$18,975.00** to **the Department** of Labor. This payment shall be from non-Federal 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: Confederated Salish and Kootenai Tribes of the
Flathead Reservation

Case No. : 82-CTA-107 and 82-CTA-235

Document : Final Decision and Order on Reconsideration

A copy of the above-referenced document was sent to the following
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