U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: August 5, 1993
CASE NO. 82-CTA-367

IN THE MATTER OF

NATIONAL INDIAN YOUTH COUNCIL.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises pursuant to the Comprehensive Employment and Training Act, (CETA), 29 U.S.C. §§ 801-999 (Supp. V 1981) and its implementing regulations. [1] National Indian Youth Council (NIYC or the grantee), excepted to the September 12, 1985 Decision and Order (D. and 0.) of the Administrative Law Judge (ALJ). The Secretary asserted jurisdiction on October 29, 1985.

BACKGROUND

Consequent to an audit of NIYC's CETA grant expenditures during the period of October 1, 1978 through September 30, 1979, the Grant Officer (GO) issued a Final Determination on September 14, 1982, disallowing $65,113 in costs claimed by NIYC. [2]

NIYC appealed the Grant Officer's Final Determination and after a hearing, the ALJ reversed the GO's disallowances except

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[1] CETA was repealed effective October 12, 1982.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 administrative and judicial proceedings pending on that date or begun before September 30, 1984, were not affected. 29 U.S.C. § 1519(e). CETA regulations are found at 20 C.F.R. Parts 675-689 (1990).

[2] This amount was subsequently reduced to $64,802.

those costs associated with reimbursements to the grantee's On-the-Job-Training (OJT) contractors. See 20 C.F.R. § 688.81-2. The ALJ determined that based on the evidence before him and equitable considerations, he would affirm only one-half of the amount disallowed by the GO, or $2,978. D. and 0. at 6, 7.

DISCUSSION

I. Is the Grant Officer barred from attempting to recover misspent CETA funds because the Final Determination was issued more than 120 days after the issuance of the grant's audit?

Although the GO's Final Determination, [3] was issued more than 120 days after the audit upon which it was based, the Secretary does not lose the power to recover misspent CETA funds after the expiration of the 120-day period set forth at § 816(b). Brock v. Pierce County, 476 U.S. 253 (1986).

II. The Alleged Failure of The ALJ to Consider The "Equities" of NIYC's Case.

A. Section 133(a)(l) of the Act, 29 U.S.C. § 835(a)(l), and the pertinent regulation at 20 C.F.R. § 676.35(a) provide that every recipient of CETA funds shall keep and preserve such records as the Secretary requires. Also, all prime sponsors must ensure that their contractors and subrecipients maintain all necessary records which pertain to the operation of their programs and are consistent with the Department's retention of record requirements. 20 C.F.R. § 676.37(a)(3). The relevant grant in this case was subject to these requirements, including provisions of Federal Management Circulars (FMC) 74-4 and 74-7

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[3] Administrative File Tab A, p. 8, Exhibit (Ex.) G-l.

which were incorporated into the grant by reference. Ex. G-l, Tab A, p. 63; D. and 0. at 3.

NYIC questions the ALJ's determination that its failure to comply with Act's recordkeeping requirements is tantamount to a finding that it misspent grant funds. Alternatively, the grantee contends that if such a misexpenditure is held to exist, recoupment should be excused based on certain equitable factors which mitigate in its favor.

The disallowance of OJT costs rested on grounds that such costs were not supported by certified time and attendance records. [4] D. and 0. at 6. The ALJ found that the grant agreement required the grantee's payroll records to be supported by time and attendance records and "available for review", and that, "[n]one of the documentation submitted by respondent [NIYC] consists of time and attendance records certified by the participants". However, he also found "no doubt that respondent actually made payment of the amount billed to the OJT contractors: and a disallowance of the entire amount would be tantamount to a finding (which I am unwilling to make) that the contractor's billings and the participants' affidavits are fraudulent." D. and 0. at 6, 7. His decision to split the difference of the disallowed amount was, thus, the result of his desire to "reach an equitable solution and do substantial

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[4] According to the Grant Officer's Final Determination, the grantee states that the records of the second of its two OJT contractors, including the required time and attendance sheets, had been impounded by a bankruptcy court. Ex. G-l, Tab A, p.10.

justice," on the basis of his finding that, "OJT services were indeed provided but that the precise amount is in doubt." Id. at 7. [5]

Upon my review of the entire record, I agree with the ALJ that the grantee did not properly support grant expenditures or allow them to be determined with precision. The applicable regulations and pertinent case law support his conclusion that NIYC's "lack of time and attendance records precludes an assurance that the hours reimbursed were actually worked by the participants." D. and 0. at 7. See 29 C.F.R. § 676.90(b). [6]

NYIC argues that their alleged violation was no threat to the overall CETA program but, "only a problem in bookkeeping", and that since they were neither alleged nor found to have acted fraudulently, the ALJ's partial disallowance amounts to a finding that they did not misspend grant funds. [7] The grantee misapprehends the basis for the disallowance; it is based on their failure to comply with the requirements to maintain and produce required programs records.

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[5] I note that while the ALJ was not prepared to rule that the NIYC's evidentiary substitutes (e.g. contractor billings, canceled checks and participant affidavits) were fraudulent, it is clear that he found such evidence to be unreliable. D. and 0. at 6.

[6] See Montaomerv Countv. Marvland v. Department of Labor, 757 F.2d 1510, 1513 (4th Cir. 1985) (the burden of producing documentation to support its expenditures is on the recipient/grantee).

[7] Grantee's Exceptions (GE) at 5, 6. See also, NYIC's Brief to the Secretary at 9 (arguing that misuse is evidenced only by a showing of fraudulent submissions and that the ALJ specifically refused to find fraud).

The issue of whether recordkeeping deficiencies can be equated to a misexpenditure of funds is not novel. The United States Court of Appeals for the Fourth Circuit, in a decision which addressed precisely this question in the context of the recordkeeping requirements at 20 C.F.R. § 676.37(a)(3), held that a recipient who accepts federal funds in order to conduct a CETA program agrees to comply with CETA and its regulations, particularly, "the requirements for the maintenance of records." Montgomery County, Maryland, 757 F.2d at 1512. The Court went on to hold that:

> [B]y failing to comply with the recordkeeping requirements of CETA and its regulations, the County 'misspent' federal funds within the meaning of the statute. City of Oakland v. Donovan, 707 F.2d 1013 (9th Cir. 1983), and, that, ... [u]nless that burden of producing the required documentation is placed on recipients, federal grantees would be free to spend funds in whatever way they wished and obtain virtual immunity from wrongdoing by failing to keep required records. Neither CETA nor the regulations permit such anomalous results.

Id. at 1513. See also, Florida Department of Labor and Employment Services v. United States Department of Labor, 893 F.2d 1319 (11th Cir. 1990); Colorado Department of Labor and Employment v. United States Department of Labor, 875 F.2d 791 (10th Cir. 1989); State of South Carolina v. United States Department of Labor, 795 F.2d 375 (4th Cir. 1986), and City of St. Louis v. United States Deoartment of Labor, 787 F.2d 342 (8th Cir. 1986) reh'g denied May 14, 1986.

The recipient of federal funds bears the burden of maintaining and producing required records; NIYC's failure to comply amounts to a misexpenditure of grant funds and the ALJ's decision, to the extent it implied otherwise, is in error.

B. As a collateral matter NIYC excepts to the ALJ's failure "to consider the equities of [its] case pursuant to Quechan." GE at 5.

The grantee's reference is to the remand decision of the United States Court of Appeals for the Ninth Circuit in Quechan Indian Tribe v. U.S. Department of Labor, 723 F.2d 733 (1984) where, in a case also involving disallowed CETA grant funds, the Secretary was ordered to consider the "equities" and other "special circumstances" pertinent to that case as a precondition to a determination on whether repayment was warranted.

At issue (as in Quechan) is the scope of the Secretary's authority to recoup misspent grant funds under CETA Section 106(d), 29 U.S.C. § 806(d), and the implementing regulation at 20 C.F.R. § 676.88(c). [8/] The Act places the primary responsibility for ensuring compliance with the grant recipient. Commonwealth of Kentucky Department of Human Resources v. Donovan, 704 F.2d 288, 290 n.4, 293-294 (6th Cir. 1983). As a

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[8/] Section 676.88

(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 inelisible participants and public service employment programs may be allowed when the Grant Officer finds: [five enumerated conditions] (emphasis supplied).

result, a grantee's prayer for a waiver in equity must be narrowly interpreted in accordance with the Act as implemented and interpreted under relevant case law. In order for a grantee to qualify for a waiver of repayment of misspent CETA funds, the grantee must demonstrate the existence of special circumstances, 29 U.S.C. § 816(d)(2). However, CETA creates a presumption in favor of repayment and the exception to this rule is narrow. In the Matter of Onslow Countv. North Carolina, Case Nos. 81-CTA-185 and 79-CTA-241, Sec. Dec. and Order on Remand, March 13, 1992, slip op. at 4 (quoting Chicano Education and Manpower Services v. United States Department of Labor, 909 F.2d 1320, 1327 (9th Cir. 1990). (Secretary promulgated 20 C.F.R. § 676.88(c) to implement the "special circumstances" language of Section 106(d)(2) which, by its terms, applies when the "Secretary concludes that a public service employment program is being conducted in violation of [specific CETA sections].")

In this case however, the misspent grant funds pertained to program activities funded under Title III and were not awarded in connection with public service employment programs. Therefore, a consideration of "equities" is not warranted. [9]

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[9] Even if consideration of the equities was a requirement here, the grantee's arguments against recoupment would fail. NIYC was adequately notified of its recordkeeping obligations by the provisions of its grant agreement. Its claims of record unavailability and "substantial compliance" are equally without merit since a recipient's substantial compliance with grant requirements does not (absent special circumstances which might implement regulatory waiver) affect the [Secretary's] right to recover misspent funds. Bennett v. New Jersey, 470 U.S. 632 (1985) (as cited in the Secretary's Final Dec. in Quechan, slip op. at 5-6).

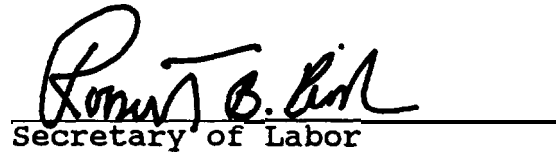
NYIC's reliance on the Tenth Circuit's remand decision in Action Inc. v. Donovan, 789 F.2d 1453 (1986) is inapposite since that court determined that the Labor Department did not specify which eligibility procedures the grantee in that case had failed to follow and did not identify the record evidence which supported its conclusion. This case does not involve eligibility procedures and the ALJ has clearly addressed the evidentiary concerns.

Having considered all arguments raised by the grantee, I find nothing in this record which justifies a waiver of the disallowed costs.

ORDER

That portion of the ALJ's decision which allowed a portion of the disallowed costs is REVERSED. The National Indian Youth Council is ordered to repay the Department of Labor $5,956 from non-CETA funds, 29 U.S.C. § 816(d)(2). Milwaukee County, Wisconsin v. Donovan, 771 F.2d 983, 993 (7th Cir. 1985), cert. denied, 476 U.S. 1140 (1986). The remainder of the ALJ's decision is, hereby, AFFIRMED.

SO ORDERED.



Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: National Indian Youth Council v. U.S. Department of Labor

Case No. : 82-CTA-367

Document : Final Decision and Order

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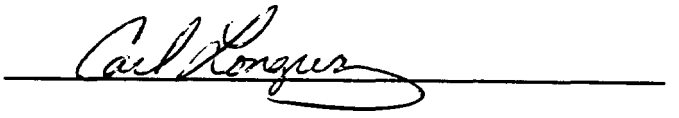

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