U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON. D.C.

DATE: Auguat 5, 1994
CASE NOS. 83-CTA-45 & 272

IN THE MATTER OF

U.S. DEPARTMENT OF LABOR,

v.

CHIPPEWA CREE TRIBE OF THE
ROCKY BOY'S RESERVATION AND
THE CHIPPEWA CREE TRIBE
BUSINESS COMMITTEE.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

These consolidated cases arise under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§ 801-999 (Supp. V 1981) and the implementing regulations at 20 C.F.R. Parts 675-80 (1990). [1]

BACKGROUND

These cases concern costs claimed by the Chippewa Cree Tribe (Tribe) pursuant to their CETA grants from 1977 through 1980, which were disallowed by the Grant Officer after an audit of the Tribe's records. Subsequently, adjudicatory hearings were held, but the Administrative Law Judge's (ALJ) decision concerning the Secretary's jurisdiction over this case was stayed pending a

[1] CETA was repealed effective October 13, 1982 and was replaced by the Job Training Partnership Act, 29 U.S.C. §§ 1501-1791 (1988), but CETA administrative or judicial proceedings pending as of that date were not affected. 29 C.F.R. § 1591(e).
1990 was the last year that CETA regulations were published in the Code of Federal Regulations.

decision by the Supreme Court on the 120 day rule [2] and then his decision on the merits was stayed pending the issuance of the Secretary's decision regarding his authority and responsibility to consider the equities of a case prior to ordering repayment of disallowed CETA costs. [3] In August 1993, the Secretary requested that the parties submit a status report on the case, and on January 3, 1994, a briefing schedule was issued. The decision before me for review is the ALJ's decision of September 11, 1986, (D. and 0.) wherein he affirmed the Grant Officer's disallowance of $83,716 [4] and partially reversed the Grant Officer's determination by allowing $68,688. D. and 0. at 8.

DISCUSSION

The issue in this case concerns the extent of the Secretary's discretion to require the repayment of disallowed CETA costs as a corrective action, or to waive the recoupment of such disallowed costs. The Secretary has held and the courts have affirmed, that this discretion is to be strictly construed

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[2] The Court decided that the failure to comply with CETA Section 106(b) or the pertinent regulations, which provided that the Secretary "shall" determine whether a CETA grantee had misused CETA funds within 120 days from receipt of a complaint, merely provided a timetable for the resolution of complaints and audits, and was not a jurisdictional bar to the Secretary's recovery of misused funds. Brock v. Pierce Countv, 476 U.S. 253, 262, 265 (1986).

[3] In the Matter of Ouechan Indian Tribe (Ouechan Tribal Council1 v. U.S. Dep't of Labor, Case No 80-BCA/CETA-97, Feb. 4, 1988, Sec. Order and Dec.

[4] This amount is reduced to $82,230. Grant Officer's Initial Brief at 8.

and must be exercised in accordance with the Act and the implementing regulations. It should be noted, however, that such a strict application of the implementing regulations does not preclude the Tribe from addressing the issue of its poverty and its apparent inability to repay the disallowed costs before the Employment and Training Administration's (ETA) Office of Debt Collection.

The Act provides that the Secretary "shall have the authority to . . . order such sanctions or corrective actions as are appropriate, including the repayment of misspent funds . . ." 29 U.S.C. § 816(d)(1). The pertinent regulations at 29 C.F.R. § 676.88(c) provide that if disallowed costs associated with ineligible participants are to be allowed, five requisite conditions must be present. [5/] Chicano Education and Manpower

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[5/] 20 C.F.R. § 676.88 provides 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:
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> (1) The activity was not fraudulent and the violation did not take place with the knowledge of the recipient or the subrecipient; and
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> (2) Immediate action was taken to remove the ineligible participant; and
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> (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

(continued...)

Services v. U.S. Dep't of Labor, 909 F.2d 1320, 1327 (9th Cir. 1990) (Secretary promulgated 20 C.F.R. § 676.88(c) to impiement the "special circumstances" language of CETA section 106(d)(2)). An agency is required to follow its own regulations, particularly since the exception to the statutory presumption in favor of repayment is narrow, and the Secretary need not go beyond the factors covered by the regulation); see Action, Inc. v. Donovan, 789 F.2d 1453, 1459-60 (10th Cir. 1986); U.S. Dep't of Labor v. Ya-Ka-Ama Indian Education and Development, Inc., Case No. 86-CTA-6, Sept. 29, 1993, Sec. Final Dec. and Order, slip op. at 3-4; California Indian Manpower Consortium, Inc. v. U.S. Dep't of Labor, Case Nos. 83-CTA-15, 85-CPA-15, Sept. 29, 1993, Sec. Final Dec. and Order, slip op. at 5-6. See also In the Matter of Blackfeet Tribe v. U.S. Dep't of Labor, Case No. 85-CPA-45, Dec. 2, 1991, (Secretary has determined that Section 676.88(c) was promulgated to implement both Section 106(d) (1) and (2) of the Act) .

The ALJ was guided in this case by the decision of the U.S. Court of Appeals for the Ninth Circuit in Quechan Indian Tribe v. U.S. Dep't of Labor, 723 F.2d 733 (1984), which remanded this other CETA case to the Secretary of Labor "to consider all the

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[5] (...continued)
causing the questioned activity or ineligibility; and

(5) The magnitude of the questioned costs is not substantial.

(Emphasis added).

equities in making an explicit determination whether the sanction of repayment ... is warranted". Id. at 736. The ALJ's decision antedated the Secretary's Quechan decision pursuant to the remand [6] and the Ninth Circuit's comment reaffirming its requirement in Quechan that the Secretary consider the equities in a case before ordering repayment, but likewise reaffirming the Secretary's obligation to follow the pertinent regulations. See Chicano, 909 F.2d at 1326. There is nothing in the record to indicate that the $17,522 in costs the ALJ allowed which concern Finding 4(a) and (b) in Grant 99-8-035-19-65 and Finding 4(a) in Grant 99-9-035-30-83 pertained to ineligible participants or public service employment programs, and therefore is beyond the scope of the regulations and inappropriate. D. and 0. at 2-4.

The Tribe's counsel presents a compelling picture of the Tribe's financial poverty that extended before the award of the first of the CETA grants in question and continues to the present time. The record likewise bears testimony to the fact that three prior counsel representing the Tribe since the advent of this case have sought relief from their position for lack of payment of their fees. Unfortunately, poverty alone, nor even the absence of fraudulent intent do not provide adequate grounds for the waiver of repayment of misapplied grant funds. It is not the exaction of a penalty that is sought but rather the protection of the integrity of the Federal grant process and the responsibility of grantees to fulfill their contractual obligations to safeguard

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[6] Footnote 3, supra.

the expenditure of public funds. See Bennett v. Kentucky Department of Education, 470 U.S. 656, 662-63 (1985). As mentioned above, the issue of the Tribe's poverty and its apparent inability to repay the disallowed costs is more properly addressed before ETA's Office of Debt Collection.

The Tribe's contention that the delay between the time of the audit and the issuance of the Grant Officer's determination was prejudicial is not persuasive. The Tribe was aware that the auditors had raised questions regarding its expenditures, and its records pertaining to these matters still in dispute should not have been "destroyed in the normal course of business". Tribe's Reply Brief at 6.

ORDER

The ALJ's Order requiring the Tribe to repay the amended amount of $82,230 IS AFFIRMED. The ALJ's determination to allow $68,688 IS PARTIALLY REVERSED, in that $17,522 pertaining to Findings 4(a) and (b) of Grant 99-8-035-19-65 and Finding 4(a) of Grant 99-9-035-30-83 is disallowed. The Chippewa Cree Tribe of the Rocky Boy's Reservation and the Chippewa Cree Tribe Business Committee is ordered to repay to the U.S. Department of Labor $99,752 from non-Federal funds. Milwaukee, Wisconsin v. Donovan, 771 F.2d 983, 993 (7th Cir. 1985).

SO ORDERED.

Robert B. Reich
Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: United States Department of Labor v. Chippewa Cree Tribe of the Rocky Boy's Reservation and Chippewa Cree Tribe Business Committee,

Case No. : 83-CTA-45 & 272

Document : Final Decision and Order

A copy of this above-referenced document was sent to the following persons on AUG-51994

Pam Horton

CERTIFIED MAIL

Monteau, Guenther, Smith & Parker, P.C.
Attn: Stephen A. Doherty, Esq.
410 Central Avenue, Suite 522
Great Falls, MT 59401

HAND DELIVERED

Associate Solictor for Employment
and Training Legal Services
Attn: Annaliese Impink, Esq.
U.S. Department of Labor
Room N-2101
200 Constitution Ave., N.W.
Washington, DC 20210

REGULAR MAIL

Chairman
Business Committee of the
Chippewa Cree Tribe
Rocky Boy's Reservation
Rocky Boy Route
Box Elder, MT 59521

Henry Mahlman
Assoc. Regional Solicitor
U.S. Department of Labor
1801 Calfornia Street
Denver, CO 80202

Bryan Keilty
Administrator
Office of Financial and Administrative
Management
Employment and Training Administration
U.S. Department of Labor
200 Constitution Ave., N.W.
Room N-4671
Washington, DC 20210

Linda Kontnier
Office of Financial and
Administrative Management
Division of Budget
Employment and Training Administration
U.S. Department of Labor
200 Constitution Ave., N.W.
Room S-5207
Washington, DC 20210

Charles A. Wood, Jr.
Office of Financial and
Administrative Management
Division of Debt Management
Employment and Training Administration
U.S. Department of Labor
200 Constitution Ave., N.W.
Room N-4716
Washington, DC 20210

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

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

Hon. Alfred Lindeman
Administrative Law Judge
Office of Administrative Law Judges
211 Main Street, Suite 600
San Francisco, CA 94105