

U.S. Department of Labor

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DATE: DEC 12 1994

CASE NO.: 93-JTP-1

ALJLS Lack Authority to
Rule on Validity of Regulations - 6/10/94

In the Matter of

CANDELARIA AMERICAN INDIAN COUNCIL,
Complainant,

v.

U.S. DEPARTMENT OF LABOR
Respondent.

DECISION AND ORDER

This matter arises under the Job Training Partnership Act (JTPA), 29 U.S.C. s 1501, et sea., and the regulations promulgated thereunder at 20 C.F.R. Parts 632 and 636.

Procedural Backaround

By way of a letter dated September 24, 1992, Candelaria American Indian Council (hereinafter l'Candelaria"), requested an administrative hearing with respect to the Final Determination of the U.S. Department of Labor (hereinafter "Department") to disallow \$65,163.00 of Candelaria's JTPA grant charges for the period from July 1, 1988, through June 30, 1990 (program years 1988 and 1989). The undersigned held a brief hearing in this matter on November 10, 1993, at which time the parties agreed that the issues were not sufficiently developed for a full evidentiary hearing. The parties agreed that the hearing should be continued and that they would submit briefs on the Department's Finding No. 3.

In an Order dated January 12, 1994, the undersigned scheduled the continued hearing for May 25, 1994. On January 31, 1994, the undersigned received Candelaria's brief on the Department's Finding No. 3. On February 4, 1994, the undersigned received the Department's brief on Finding No. 3. On May 23, 1994, the undersigned received a letter from counsel for the Department stating that the parties had resolved all issues with the exception of Finding No. 3 of the Department's Final Determination. On June 8, 1994, the undersigned received a document entitled "Stipulation of Dismissal With Prejudice" which appears to be signed by counsel for Candelaria and the Department. By way of this document Candelaria and the Department agree that Finding Nos. 1, 2, 4, and 5 of Case No. 93-JTP-1 be dismissed with prejudice. Thus, the parties have settled the issues in this matter with the exception of the Department's Finding No. 3.

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EIA/ODAS/COOM
DIVISION OF AUDIT
CLOSEOUT & APPEALS
RESOLUTION

EALJ 0434

The Record

Prior to November 10, 1993, as part of the Pre-hearing exchanges, Candelaria submitted to the Office of Administrative Law Judges two volumes of documents marked as groups A-K, and the Department submitted documents marked as RX 1-12 (RX-1 being the administrative file). Neither Candelaria or the Department explicitly requested that these submissions be admitted into evidence. The undersigned opened the record in this matter at the time of the brief hearing of November 10, 1993. However, no witnesses were called, the parties did not request that exhibits be admitted into evidence, and the undersigned did not admit exhibits into evidence. By way of a letter dated May 31, 1994, Candelaria submitted exhibits marked as CX-11 and CX-20,¹ and indicated that these were the exhibits which the undersigned would need to resolve the remaining issue (Finding No. 3). The Department did not submit additional exhibits subsequent to the pre-hearing exchanges.

It is clear from Candelaria's letter dated May 31, 1994, that Candelaria sought to have Complainant's Exhibits 11 and 20 be considered as evidence for the resolution of Finding No. 3. The exhibits which accompanied Candelaria's letter dated May 31, 1994, are hereby identified as Complainant's Exhibits 11 and 20 and admitted into evidence.²

The Department has never formally requested that the documents which it submitted as part of the pre-hearing exchanges be admitted into evidence for the resolution of Finding No. 3. However, the Department's AMENDED PREHEARING STATEMENT dated September 22, 1993, states the Department's intent to *rely* on the administrative file, which the Department identified as Exhibit 1, and on the documents which the Department submitted to Candelaria and the Office of Administrative Law Judges as part of the pre-hearing exchange, which the Department identified as Exhibits 2-12. Further, the undersigned believes that the admission of these documents into evidence is essential for a proper resolution of the issue at hand. Therefore, the exhibits which the Department's AMENDED PREHEARING STATEMENT lists are hereby identified as Administrative Law Judge Exhibits 1-12 and admitted into evidence.

¹The following abbreviations will be used:

CX = Complainant's exhibit
ALJ = Administrative law judge exhibit
CB = Complainant's brief
RB = Respondent's brief

²It is noted that Complainant has not sought to have any exhibits identified as Complainant's Exhibits 1-10 and 12-19 admitted into evidence, and that no exhibits marked as such have been submitted to the undersigned.

Candelaria has never requested that all the documents which it submitted to the Office of Administrative Law Judges as part of the pre-hearing exchanges be admitted into evidence for the resolution of Finding No. 3. However, some of the documents submitted by Candelaria as part of the pre-hearing exchanges are relevant and are not included in the other groups of documents which have already been admitted into evidence. Therefore, the documents contained in the two volumes submitted by Candelaria as part of the pre-hearing exchanges are hereby identified as Administrative Law Judge Exhibits A-K and are admitted into evidence.

The record in this matter is hereby closed.

Issue

As a result of the parties' stipulation of dismissal, the remaining issue is Finding No. 3 of the Department's Final Determination. In its Finding No. 3 the Department accepted its auditors' position that Candelaria had maintained excessive cash balances during program years 1988 and 1989 (ALJ-1 at 8). The Department determined that it should recover the amount of \$5,226.00 for interest costs related to Candelaria's cash drawdowns (Au-1 at 8).

Findings of Fact and Conclusions of Law

Pursuant to 20 C.F.R. § 632.44(a) (1994), the sanctions which the Secretary of Labor may impose upon a Native American grantee for violation of the JTPA, the JTPA's regulations, or grant terms and conditions, include:

(2) Determining the amount of Federal cash maintained by the grantee or its subgrantee or contract or (sic] in excess of reasonable grant needs, establishing a debt for the amount of such excessive cash, and charging interest on that debt.

This Department of Labor regulation was published on October 20, 1983, at 48 Fed. Reg. 48,763.

In the case at hand, the action taken by the Department as described in Finding No. 3 of its Final Determination is the action described at 20 C.F.R. § 632.44(a)(2). The Department's auditors determined the average month-end cash balance of Candelaria's JTPA funds to be \$43,644.00 during Program Year 1989 and \$23,460.00 during Program Year 1988. The Department's auditors determined that Candelaria's average 3-day cash need for its JTPA program was \$3,388.00 during these same program years. Based on these figures, the Department's auditors established debts consisting of the average cash balances in excess of the average 3-day cash need and calculated interest on these debts using the approximate Treasury borrowing rate of eight percent. The Department's auditors

calculated the total interest for the debts from both program years to be \$5,226.00, which is what the Department now seeks to recover. (AU-1 at 41-42). Candelaria raises various arguments in opposition to the Department's Finding No. 3.

A. The Meaning and Validity of 20 C.F.R. § 632.44(a)(2)

Candelaria argues that the regulation at 20 C.F.R. § 632.44(a)(2) is invalid unless it is limited to charging interest on excessive cash balances only in cases where a grantee has received interest on the excess cash (CB at 6). Otherwise, Candelaria contends, the regulation would be inconsistent with the JTPA and would possibly raise constitutional issues of equal protection (CB at 5-6).

The undersigned does not consider Candelaria's interpretation of 20 C.F.R. § 632.44(a)(2) to be reasonable. The language of the regulation simply does not state that the Department's ability to establish a debt and charge interest on that debt depends on whether or not the grantee received interest on its cash balance. Based on the plain language of the regulation, the undersigned interprets it to provide that when a grantee has maintained a JTPA cash balance which is excessive for its program needs the Department can establish a debt based on the excessive cash balance and charge interest on that debt, regardless of whether the grantee has received interest on the excessive cash balance.

Neither does the undersigned accept Candelaria's contention that if 20 C.F.R. § 632.44(a)(2) is interpreted to cover the situation where the grantee has received no interest on an excessive cash balance then the regulation is invalid. Candelaria appears to argue that the language of the JTPA shows Congress' intent that recipients not be sanctioned by making them pay money to the United States which the recipients have not directly or indirectly received from the United States (CB at 5). Based on this reading of the statute, Candelaria argues that because Candelaria did not receive interest on its cash balances it would be inconsistent with the JTPA to sanction Candelaria in the manner described in the Department's Finding No. 3 (CB at 5-6). The Department does not dispute that Candelaria did not earn interest on the cash balances in question (DB at 8). However, because the JTPA specifically states that the remedies which it expressly provides for "shall not be construed to be exclusive remedies," 29 U.S.C. § 1574(h), the undersigned reads the JTPA to reflect Congress' intent to allow the Secretary discretion in promulgating sanctions regulations. The undersigned considers the regulation described at 20 C.F.R. § 632.44(a)(2), as interpreted to mean that the Department can establish a debt and charge interest on that debt even where the grantee did not earn interest on its excessive cash balance, to fall within this discretion. Even though Candelaria did not receive interest for the cash balance in question, Candelaria did receive the money which created the cash

balance from the United States. Upon requesting and receiving this money, Candelaria deprived the United States Of the opportunity to earn interest with this money.

Candelaria also argues that 20 C.F.R. § 632.44(a)(2), which is found in the regulations pertaining to Native American JTPA grantees, might raise constitutional issues of equal protection because "There is no corresponding provision for the other Job Training Partnership Act programs" (CB at 5). However, there is in fact a corresponding provision at 20 C.F.R. § 633.322(a)(2) (1994) for migrant and seasonal farmworker programs. Native American and migrant and seasonal farmworker programs both fall under Subchapter IV of the JTPA, the subchapter for federally-administered programs. With respect to the programs of subchapters II and III, the JTPA provides that "[e]ach State shall establish such fiscal control and fund accounting procedures as may be necessary to assure the proper disbursement of, and accounting for, Federal funds." 29 U.S.C. § 1574(a)(1). The states act as "administrator and conduit" of federal funds. U.S. v. Long, 996 F.2d 731, 733 (5th Cir. 1993). Because the Secretary's regulation at 20 C.F.R. § 632.44(a)(2) does not make an explicit classification based on a suspect trait, it seems to the undersigned that in order for the regulation to receive heightened equal protection scrutiny Candelaria would have to show that the Secretary intended to discriminate on the basis of ethnicity in promulgating the regulation.³ Because the Secretary has promulgated the sanction provision in question according to whether a JTPA program is administered at the federal or state level, the undersigned doubts that Candelaria would be able to show such intent.⁴ If the regulation received only "rational basis" scrutiny, the difference in administration would appear to constitute a rational basis for the Secretary's decision to promulgate the regulation only for the federally-administered programs.

In any event, the undersigned must base this Decision and Order on the assumption that the JTPA regulations promulgated by the Secretary of Labor are valid. As an administrative law judge (ALJ), the undersigned would be able to disregard one of the Secretary's regulations as invalid only if (1) administrative law judges had the inherent authority to rule on the validity of the Secretary's regulations; or (2) the JTPA or its regulation⁶ vested

³Under the suspect class branch of current equal protection doctrine, laws that have disproportionate impact on fully-suspect or quasi-suspect classes escape heightened scrutiny if no discriminatory purpose is found. Washington v. Davis, 426 U.S. 229, 239-45 (1976).

⁴Where there is no explicit classification, discriminatory purpose may be difficult to prove. Gerald Gunther, Individual Rights in Constitutional Law 359 (4th ed., 1986).

administrative law judges with this authority. Gibas v. Saginaw Mining Company, 748 F.2d 1112, 1117 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985). Unlike Article III courts, administrative officers (such as administrative law judges) do not have the inherent authority to rule on the validity of the Secretary of Labor's regulations. Id. And, the JTPA and its regulations do not expressly give administrative law judges this authority. In fact, the JTPA provides that upon the timely request of a party dissatisfied with an AU decision the Secretary of Labor may accept the case for review. 29 U.S.C. § 1576. Because the JTPA gives the Secretary the discretion to review ALJ decisions in JTPA disputes, and because the JTPA and its regulations do not expressly allow an ALJ to rule on the validity of the Secretary's regulations, the undersigned lacks the authority to rule on the validity of 20 C.F.R. § 632.44(a)(2) as interpreted above.

B. Whether the Cash Maintained by Candelaria Exceeded Its Reasonable Grant Needs

Having found that the Department's action as described at Finding No. 3 of the Final Determination is the action described at 20 C.F.R. § 632.44(a)(2), having concluded that this regulation allows sanctioning even where the grantee did not receive interest on its cash balance, and having concluded that the regulation as so interpreted is either valid or at least must be assumed valid by the undersigned, the next question is whether the cash maintained by Candelaria exceeded its reasonable grant needs. As described above, the Department adopted the view of its auditors that the portions of Candelaria's average cash balances which exceeded Candelaria's average 3-day cash needs for its JTPA program were excessive (ALJ-1 at 8, 41-42). An implicit and integral component of this determination is that Candelaria's 3-day cash needs were equivalent to its reasonable grant needs. In other words, the Department determined that on the average it would have been reasonable for Candelaria to maintain enough cash to satisfy its 3-day grant needs, and no more.

Candelaria's brief argues that "utilizing approved cash drawdown procedures" it was "nearly impossible" for Candelaria to limit its "cash on hand" to 3-day cash needs, and that there was no regulatory requirement that Candelaria do so (CB at 1-2). The undersigned agrees with Candelaria that during the 1988 and 1989 program years there was no express regulation to the effect that grantees must maintain no more cash than that required for their 3-day grant needs. However, the regulation at 20 C.F.R. § 632.44(a)(2) was in effect during these program years. This regulation provides that the Department may establish a debt based on cash maintained in excess of reasonable grant needs. Therefore, if, on the average, Candelaria's reasonable grant needs were its 3-day cash needs, then the Department's Finding No. 3 is correct. On the other hand, if Candelaria reasonably needed to have more cash on hand than that required for its 3-day grant needs, then the

Department's Finding No. 3 is incorrect.

1. Candelaria's Arguments That It Could Not Maintain a 3-Day-Needs Cash Balance

Candelaria's assertion that utilizing approved drawdown procedures it was "nearly impossible" to limit its cash balance to its 3-day cash needs must be examined. Candelaria asserts, "For the period covered by the audit, July 1, 1988 through June 30, 1990' [Candelaria] utilized DOL-approved procedures to request advances of JTPA funds, typified by Standard Form 270" (CB at 3). Based on Candelaria's response to the Department's audit (ALJ-1 at 44), and the lack of evidence to the contrary, the undersigned finds that beginning in late 1987 Candelaria began to request federal cash through Standard Form 270. However, Candelaria has failed to explain why it could not have used Standard Form 270 in such a manner as to limit its average cash balance to its average 3-day needs. Standard Form 270 is entitled "REQUEST FOR ADVANCE OR REIMBURSEMENT" (CX-11 at 99). As observed by Candelaria, the form contains space for a statement of advances required for the next three months, the form indicates that the amount requested shall be based on the needs for the advance period which the grant recipient has indicated on the form, and the form provides for adjustments to account for previous advance requests and program outlays. None of these characteristics of Standard Form 270 take away from the fact that grant recipients have control over when and how often they request advances with the form.

In fact, as part of the pre-hearing exchanges, Candelaria provided the undersigned with a copy of the Department's DINAP BULLETIN 85-24, which is dated June 30, 1986, and is addressed to all Native American JTPA grantees (AU-F). This bulletin states, "the recipient is required to request cash advances as close to the time of disbursement as possible." The bulletin further states that Native American grant recipients shall:

draw down only enough cash to cover the immediate cash need as defined in Part 3 of this bulletin. This may result in an increase in the number of drawdown requests. This increase is acceptable since there are no restrictions on the number of requests allowed, other than the existing minimum drawdown requirement of \$5,000 which remains in effect (AU-F).

Thus, pursuant to this bulletin Native American grantees can make drawdown requests as often as necessary so long as the \$5,000.00 minimum is requested. Standard Form 270 is merely a tool available to grant recipients for requesting advances. The fact that the form is DOL-approved does not absolve grantees of their responsibility to use the form in such a manner as to minimize their cash balances.

Candelaria makes the following arguments:

The [Candelaria] **JTPA** program accrues expenses in general categories such as rent, salaries, **equipment**, etc. **CX 20, p.172'**. Though the expenses are accrued on a particular date, the cash outlay occurs at a later date due to delays in billing and check cashing. Though [Candelaria] could accurately estimate its expenses for a three-month period for the purposes of Standard **Form 270**, its cash outlays did not occur within three days of receiving its cash advances. The program has subsequently switched to an electronic fund transfer system which assures there is virtually no **"float"** for JTPA program funds, but for the period in question, that system was not available and, utilizing the system which was available, it was impossible to achieve a three-day cash needs goal.

While these arguments describe Candelaria's general expenses and the general accounting and billing processes for these expenses, they include no facts which substantiate Candelaria's assertion that it could not have met a **3-day** cash needs goal utilizing Standard Form 270. The assertion that Candelaria's **"cash** outlays did not occur within three days of receiving its cash advances" is precisely the reason for the Department's Finding No. 3. Because Candelaria had control over its requests for cash advances, it was Candelaria's responsibility to request cash advances in such a manner as to minimize its cash balance.

Candelaria has submitted into evidence the November 18, 1991, audit report of Francis Billedeaux, CPA (CX-20). This report appears to cover only Program Year 1989, and not Program Year 1988 (CX-20 at 185). This report states that in the opinion of Francis Billedeaux Candelaria's major federal financial assistance programs were in compliance with laws and regulations pertaining to claims for advances and reimbursements during the year ended June **30, 1990 (ALJ-20** at 179-80). This opinion could be construed as an opinion that the Department's Finding No. 3 is incorrect. *However*, I find this opinion unpersuasive. The Francis Billedeaux report does not address the key question of whether Candelaria could have maintained, on the average, a cash balance limited to its **3-day** needs. Nor does the report state that Francis Billedeaux considered Candelaria's obligation to maintain only the cash balance necessary for its reasonable grant needs. The Francis Billedeaux report does *not* contradict the Department's findings as to Candelaria's average cash balances and average **3-day** cash needs during the relevant program years.

Also as part of the pre-hearing exchanges, Candelaria submitted to the undersigned an audit report of Farber & Hass, Certified Public Accountants, dated January 15, 1993 (AU-A). This report specifically addresses and disputes the Department's Finding

No. 3. However, the report does not address the question of whether Candelaria could have maintained a 3-day-needs cash balance. Rather, the report questions the Department's Finding No. 3 on the grounds that Candelaria did not earn interest on its cash balance, there was no regulation explicitly requiring a 3-day-needs cash balance, and the eight percent approximate Treasury rate used in determining Candelaria's liability was higher than interest rates available at banks. (AU-A). The first two of these grounds have already been addressed and rejected above. The last will be addressed below.

2. Evidence that Candelaria Could Have Maintained a 3-Day-Needs Cash Balance During Program Years 1988 and 1989

There is evidence on the record to the effect that, on the average, Candelaria could have maintained its cash balance at the level of its 3-day needs during program years 1988 and 1989.

First, OMB Circular A-110, Attachment G, states that the sponsoring agency may "require [recipients] to report in the 'Remarks' section (of the Report of Federal Cash Transactions, Standard Form 272) the amount of cash advances in excess of three days* requirements ... and to provide short narrative explanations of actions taken by the recipients to reduce the excess balances." (Attachment G at 3(b)(3); CX-11 at 93). Granted, the drafters of this statement almost certainly did not have the specific circumstances of Candelaria in mind. Nonetheless, the statement does suggest that most recipients of federal grants can, on the average, maintain cash balances at the levels of their 3-day cash needs. If most grant recipients can do this, and if there is no evidence that Candelaria was under some handicap during program years 1988 and 1989 which precluded or significantly hindered achievement of this goal, it would follow that Candelaria's reasonable grant needs during program years 1988 and 1989 were equivalent to its 3-day cash needs.

Candelaria's brief argues that an electronic funds transfer system was not available to Candelaria during program years 1988 and 1989 (CB at 3-4). Thus, it appears to be Candelaria's position that the unavailability of an electronic funds transfer system during program years 1988 and 1989 was a handicap which caused Candelaria to maintain more than 3-days needs of cash on hand. One difficulty with this argument is that Candelaria has submitted no evidence in support of the proposition that it could not have utilized an electronic funds transfer system during program years 1988 and 1989. As of March 12, 1987, Candelaria's business address was 2635 Wagon Wheel Road, Oxnard, California (Au-1 at 64). Recent documents in the ALJ file indicate that this address remains current as of this Decision and Order. The undersigned takes administrative notice that Oxnard, California, is a city with a population of more than 100,000 people. The undersigned also takes administrative notice that Oxnard is approximately 50 miles from

Los Angeles, California. Given these circumstances, it seems likely that there was a financial institution within a reasonable distance from Candelaria during program years 1988 and 1989 which could have received federal funds by electronic transfer if Candelaria had sought to make such arrangements. Candelaria concedes that it has subsequently commenced receiving JTPA funds through electronic funds transfer (CB at 3-4). The language of DINAP BULLETIN 85-24, dated June 30, 1986, indicates that the Department encouraged the use of electronic funds transfer at least two years before the commencement of Program Year 1988 (ALJ-F). As Candelaria states in its brief, there is "virtually no 'float'" for JTPA funds with such a system (CB at 4).

Further, it seems to the undersigned that Candelaria could, on the average, have maintained a 5-day-needs cash balance during program years 1988 and 1989 utilizing Standard Form 270. The Department's DINAP BULLETIN 85-24, which was quoted from above, does not state that grantees using Standard Form 270 would on the average be able to maintain their cash balances at their 3-day-needs levels. However, the bulletin does state that Native American grantees shall "draw down only enough cash to cover the immediate cash need as defined in Part 3 of this bulletin," and that this might require an increase in the number of advance requests. Part 3 of the bulletin states, "Those recipients whose banks do not receive their EFT (electronic funds transfer) drawdowns directly from the Treasury Department should determine the average number of days it takes from their request for funds to their receipt of the funds, and request funds that number of days prior to expected disbursements." (AW-F). It seems to the undersigned that if a grantee which utilized Standard Form 270 followed the procedure suggested by this bulletin the grantee would be able to maintain average cash balances at average 3-day-needs levels.

Because the Department's auditors based Candelaria's cash balance debt on the average cash balances in excess of Candelaria's average 5-day cash needs (Au-1 at 41-42), it was obviously the opinion of these auditors that Candelaria could, on the average, have maintained its cash balance at the level of its 5-day needs during program years 1988 and 1989. However, the Department's auditors failed to state why they believed that Candelaria could do so, which weakens the evidentiary value of their opinion.

The Department's brief asserts that the Department designated Candelaria with a letter of credit which permitted Candelaria to draw down funds from the U.S. Treasury (RB at 5). If this were true it would mean that Candelaria was able to draw down funds through a Federal Reserve bank and Candelaria's commercial bank (OMB Circular A-110, Attachment I at 2(a); CX-1 at 103). This capacity would establish Candelaria's ability to maintain an average cash balance at average 5-day need levels. However, the Department has submitted no evidence in support of its assertion

that it provided Candelaria with a letter of credit, nor asserted the date that it provided Candelaria with this letter.

3. Conclusion as to Candelaria's Reasonable Grant Needs During Program Years 1988 and 1989

The Department has met its burden, 29 C.F.R. § 636.10(g) (1994), of producing evidence to support the determination that Candelaria could, on the average, have maintained its cash balance at the level of its 3-day needs during program years 1988 and 1989. It became Candelaria's burden to persuade the undersigned that Candelaria could not have done so. Id. Considering all the evidence, the undersigned views the evidence that Candelaria could not, on the average, have maintained its cash balance at the level of its 3-day needs as unpersuasive. Therefore, the undersigned finds that with reasonable effort Candelaria could have maintained, on the average, its cash balances at the level of its 3-day needs during program years 1988 and 1989. Therefore, the cash balances which Candelaria did in fact maintain were in excess of its reasonable grant needs during the program years 1988 and 1989. Further, as Candelaria has produced no evidence contradicting the amounts which the Department determined to be Candelaria's average cash balances and Candelaria's average 3-day needs, the undersigned accepts the amounts of the program year debts as determined by the Department.

C. The Interest Rate

As stated above, the Department adopted the view of its auditors that interest for the established debt of Finding No. 3 should be calculated at the approximate U.S. Treasury borrowing rate of 8 percent, which resulted in a total of \$5,226.00 for both program years (ALJ-1 at 8, 42). The audit report of Farber & Hass, Certified Public Accountants, questions the Department's Finding No. 3 in part on the ground that the eight percent approximate Treasury rate used in determining Candelaria's liability was higher than interest rates available at banks (AU-A). Candelaria's brief does not contest the use of this interest rate or the Department's calculations. The undersigned agrees with the Department that the approximate U.S. Treasury borrowing rate was appropriately used since Candelaria's excessive cash balances denied the U.S. Treasury the use of the excessive cash balances. In the absence of evidence to the contrary, the undersigned accepts the Department's auditors' calculation of the \$5,226.00 amount.

D. Equity Considerations

Candelaria argues that a consideration of the equities in this matter supports a waiver of sanctions, as there is no allegation of fraud or gross negligence, Candelaria has not enjoyed improper benefit, and the situation has been corrected (CB at 6). Candelaria also argues that while Candelaria used JTPA funds to

temporarily cover other program costs, these other programs were United States Department of Labor programs (CB at 2). Therefore, according to Candelaria, Candelaria's use of JTPA funds to temporarily cover other programs actually saved interest for the U.S. Treasury (CB at 2-3).

Candelaria cites Chicano Education and Manpower Services v. United States Department of Labor, 909 F.2d 1320 (9th Cir. 1990), and ~~Quechan Indian Tribe v. United States Department of Labor~~, 3 F.2d 733 (9th Cir. 1984), for the proposition that equities should be considered in this matter. Both of these cases involved Comprehensive Employment and Training Act (CETA) grants. In Chicano, the Ninth Circuit relied on Quechan and held that provisions in the CETA (at § 106(d)(2)) and the Secretary of Labor's CETA regulations (at 20 C.F.R. § 676.88(c) (1979)) required the Secretary to consider certain equities in CETA sanctions cases. Both of these provisions applied generally to public service employment programs and allowed that where certain conditions were met repayment could be waived despite statutory and regulatory violations. Chicano at 1325-27.

In 1982, Congress replaced CETA with the JTPA. 29 U.S.C. § 1591. Upon reviewing the JTPA, the undersigned finds no general provision for waiver of sanctions. There is only a provision which makes waiver of sanctions against a recipient possible where the violations occurred at the subgrantee level. 29 U.S.C. § 1574(e). Similarly, the only waiver provisions in the regulations which implement the JTPA are those addressing the waiver of sanctions against a recipient for violations at the subgrantee level. E.g., 20 C.F.R. § 632.44. Because the matter at hand arises under the JTPA rather than CETA, and because the JTPA does not contain general waiver provisions such as the CETA provisions which the Ninth Circuit interpreted to compel administrative consideration of equities, the Ninth Circuit's holdings in Chicano and Quechan do not require consideration of equities here. In fact, in light of the requirement that U.S. Department of Labor administrative law judges follow the "regulations and rulings of the statute or regulation conferring jurisdiction," 29 C.F.R. § 18.57(b), and the JTPA regulation at 20 C.F.R. § 632.44(a)(2), which authorizes the Department's Finding No. 3, the undersigned appears to lack the authority to rule against the Department's Finding No. 3 on the basis of equities.

However, even assuming that the undersigned has the authority to consider Candelaria's equities arguments, the undersigned does not find these arguments persuasive. The undersigned agrees that there is no fraud or gross negligence involved in the Department's Finding No. 3. However, Candelaria's failure to maintain its cash balance at reasonable levels is Candelaria's fault. Regulations promulgated prior to program years 1988 and 1989, such as those at 20 C.F.R. § 632.44(a)(2), and 41 C.F.R. § 29-70.207-2(e), and the specific advisement of DINAP BULLETIN 85-24, gave Candelaria

adequate notice of the need to minimize its JTPA cash balance. Further, the Department's auditors state in their report that Candelaria had failed to maintain appropriate cash balances in previous years, that the auditors had discussed this problem in the previous audit report, and that Candelaria had acknowledged the problem in its response (AU-1 at 43). Yet, Candelaria did not remedy the problem for the program years 1988 and 1989 (ALJ-1 at 43).

Candelaria's argument that it saved the U.S. Treasury interest by using JTPA funds to temporarily cover other Department programs is unpersuasive. Candelaria was presumably not authorized to spend federal funds on these other programs until such time as it received funds earmarked for these programs. Certainly, JTPA funds should not have been used to pay for other programs. 41 C.F.R. 29-70.207-2(~), made applicable by 20 C.F.R. § 632.31.

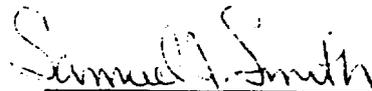
ORDER

It is HEREBY ORDERED:

1. Complainant, Candelaria American Indian Council, shall pay Respondent, the United States Department of Labor, the amount of \$5,226.00 in interest costs in satisfaction of Finding No. 3 of the Department's Final Determination in this matter.

2. Per the stipulation of dismissal entered into between Complainant and Respondent, the issues presented by Finding Nos. 1, 2, 4, and 5 of the Department's Final Determination are dismissed with prejudice.

Entered on this 12th day of December 1994, at Long Beach, California.



SAMUEL J. SMITH
Administrative Law Judge