

judgment and supporting argument on April 5, 1989. Nevada responded on April 14, 1989 with a memorandum in opposition to the motion for summary judgment and a request for oral argument on the motion. The Grant Officer submitted a reply memorandum on April 21, 1989. The request for oral argument was denied by Order dated June 13, 1989. The stipulations of the parties are accepted as findings of fact.

FINDINGS OF FACT

1. In its letter of August 29, 1983 to Don Balcer, Regional Administrator of the Employment and Training Administration (ETA), Nevada requested approval to use ETA grant funds to buy a new computer system "with the balance financed for five years."
2. By letter dated September 22, 1983, Don Balcer of ETA notified Nevada that the ETA regional office had reviewed and approved Nevada's plan of August 29, 1983 to use ETA grant funds to buy, inter alia, a new computer system.
3. On August 6, 1984, Gerald Peterson, Assistant Inspector General, issued a memorandum to regional inspectors general establishing an audit policy of not questioning lease-purchase interest costs as long as they were reasonable, allocable to the grant, and approved by the Grant Officer.
4. In its letter of August 29, 1984 to Joseph Henneman, Associate Regional Administrator for Unemployment Insurance, ETA, Nevada requested funds from the ADP Investment Fund to supplement the grant funds it had already allotted for the computer.
5. On September 6, 1984, Gerald Peterson issued a memorandum to regional inspectors general rescinding the audit policy stated in his memorandum of August 6, 1984, and requiring regional inspectors general to question lease-purchase interest costs. Mr. Peterson's memorandum of September 6, 1984 also instructed regional inspectors general to require ETA to disallow the interest costs that grant officers had allowed on the basis of his August 6, 1984 memorandum.
6. On September 19, 1984, Stanley Jones and Steve Watson of Nevada met with Don Balcer at the ETA regional office in San Francisco to discuss Nevada's grant request. Don Balcer told the Nevada officials that its proposal to buy the computer was a proper use of the grant funds. Nevada maintains that the question of whether the funds could be used to pay the finance charges for this purchase was not specifically discussed. The Grant Officer maintains that there was no discussion, specific or general, of this issue. Both sides agree that there was no discussion of the Inspector General's new audit policy on lease-purchase interest charges as set out in Gerald Peterson's memorandum of September 6, 1984.
7. In November 1984, Nevada entered into a lease-purchase agreement with IBM to buy a computer for \$1,522,845. The agreement called for a down payment of \$352,126 to be followed by four equal annual payments, including finance charges, of \$359,858. Nevada used its 1983 grant funds to make the down payment on November 13, 1984. Nevada also made a \$300,000 payment in April of 1985.

8. On December 7, 1984, Bert Lewis, Administrator for Regional Management, ETA, notified the ETA regional administrators of the Inspector General's new audit policy on lease-purchase interest charges.

9. By letter dated March 29, 1985, Joseph Henneman, Associate Regional Administrator for Unemployment Insurance, ETA, informed Nevada that its request for a supplemental grant to buy the computer had been approved.

10. On July 17, 1985, Nevada used the supplemental funds to pay the balance due on the computer. The amount due included \$870,719 for the computer and \$70,369 for finance charges from November 1984 to July 1985.

11. On April 2, 1987, the Grant Officer issued his Initial Determination, disallowing the finance charges of \$70,369 under OMB Circular A-87, Attachment B, paragraph D. 7, codified at 41 C.F.R. § 1-15.713-7.

12. On June 11, 1987, the Grant officer issued his Final Determination, which again disallowed the finance charges of \$70,369. The Grant Officer rejected Nevada's claim that the finance charges were allowable under OMB Circular Attachment B, paragraph C. 1.

13. On June 23, 1987, Nevada requested a hearing on the disallowance pursuant to 20 C.F.R. § 658.707 and Employment and Training Order No. 5-85.

14. The Office of Management and Budget is now proposing a revision of Circular No. A-87 to allow interest costs on acquisition of capital equipment completed on or after January 1, 1989. 52 Fed. Reg. 40.360 (1988) (proposed October 14, 1988).

DISCUSSION

Stanley Jones, Executive Director of the Nevada Employment Security Department (Nevada) wrote to Don Balcer, Regional Administrator of the ETA on August 29, 1983, requesting approval of the use of Unemployment Insurance and Employment Service grant monies to purchase an IBM computer system. Nevada proposed to purchase the equipment with savings from its fiscal year 1983 Unemployment Insurance and Employment Service grants with the "balance financed for five years." Stanley Jones explained that "future savings generated by such purchases will go toward making the monthly payments." Don Balcer, by letter dated September 22, 1983, informed Nevada that the ETA office had reviewed and approved Nevada's plan.

Nevada subsequently determined that it needed additional monies to purchase the computer. It requested additional unemployment insurance funds from ETA in an August 29, 1984 letter to Joseph Henneman, Associate Regional Administrator for the Unemployment Insurance and Employment Service and ETA. On March 29, 1985, Joseph Henneman approved additional funding of \$660,000 from the fiscal year 1985 Unemployment Insurance and Employment Service Automation Support Account for the computer.

The computer was ultimately paid for by a down payment of \$352,126 on November 13, 1984 from savings in 1983 Unemployment Insurance and Employment Service funds, an installment payment of \$300,000 in April 1985 and a final payment on July 17, 1985, consisting of a principal payment of \$870,719 and a finance charge payment of \$70,369.

An audit by the Office of Inspector General, U.S. Department of Labor, for the period October 1, 1982 to September 30, 1985, found that the finance charge of \$70,369 should be disallowed because it violated federal regulations and guidelines.

Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." F.R.C.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Nilsson v. Louisiana Hydrolec, 854 F.2d 1538, 1542 (9th Cir. 1988). On a motion for summary judgment, the facts and the inferences must be viewed in the light most favorable to the opposing party. Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Danner v. Himmelfarb, 858 F.2d 515, 516 (9th Cir. 1988). The movant is entitled to judgment as a matter of law when the opponent has failed to make a sufficient showing on an essential element of its case on which it has the burden of proof. Celotex, 477 U.S. at 323; Danner, 858 F.2d at 517.

Here, it is determined that the record taken as a whole does not reveal a genuine issue for trial and thus summary judgment is appropriate.

Regulatory Authority

OMB Circular A-87, Attachment B, Paragraph D. 7 (January 15, 1981), codified at 41 C.F.R. § 1- 15.713-7, provides in part:

Interest on borrowings (however represented), bond discounts, cost of financing and refinancing operations, and legal and professional fees paid in connection therewith, are unallowable

Nevada does not contest the existence of Paragraph D. 7, or its applicability to this claim. Rather, it argues Paragraph D. 7's effect is muted by Paragraph C. 1 of Attachment B, which provides that:

The cost of data processing services to grant programs is allowable. This cost may include rental of equipment or depreciation on grantee-owned equipment. The acquisition of equipment, whether by outright purchase, rental-purchase agreement or other method of purchase, is allowable only upon specific prior approval of the grantor Federal agency as provided under the selected item for capital expenditures.

Nevada argues that Paragraphs D. 7 and C. 1 must be read together to provide that a lease-purchase plan and the accompanying finance charges, are allowable so long as the plan has received prior approval by the appropriate ETA official..

Nevada's argument is rejected. Paragraphs C. 1 and D. 7 are not inconsistent. Paragraph C. 1 permits the purchase of equipment by the lease-purchase method with prior approval. Paragraph D. 7 merely precludes the assessment of the resulting finance charges against the federal grant. The interest costs are severable and, under Paragraph D. 7, the responsibility of the grantee.

Nevada also argues that the finance charges should be allowed because Nevada has sought and received prior approval of those charges. The facts do not support Nevada's argument. The parties never specifically discussed whether grant monies could be used to pay the finance charges (See Finding of Fact No. 6). Moreover, approval by an official of ETA cannot prevent the government from disallowing the finance charges, if their payment is precluded by law. Goldberg v. Weinberger, 546 F.2d 477, 481 (2d Cir. 1976). In Kicking Horse Job Corps Center, 86-BCA-15 (Oct. 15, 1987), the Board of Contract Appeals rejected the argument that approval of lease-purchase method of payment must, by necessity, include approval of accompanying finance charges. Board Member Lawrence speaking for the Board held that "...the approval of the purchase rental agreement does not imply that interest costs in connection therewith are also approved for reimbursement contrary to established principles." See also, Wisconsin Dept. of Industry, Labor and Human Relations v. U.S. Dept. of Labor, 87-ESA-2 (Dec. 21, 1988) and Management and Training Corp. v. U.S. Dept. of Labor, 86-BCA-26 (May 4, 1988) for the same holdings.

Nevada refers to internal memoranda of the Inspector General's Office to support its argument that payment of finance charges should be allowed. These internal policy memoranda display an initial reluctance to disallow such finance charges and a subsequent reversal of position. The initial memorandum, issued on August 6, 1984 to regional inspectors general, recommended an audit policy of not questioning lease-purchase interest costs as long as they were reasonable and approved by the Grant Officer. The second memorandum issued thirty days later, rescinded the August 6, 1984 memo and required the disallowance of lease-purchase interest costs. The second letter went so far as to recommend disallowance of costs that the Grant Officers had permitted based on the Inspector General's August 6, 1984 letter. The third memorandum issued on December 7, 1984 by the ETA Administrator was intended to inform the Regional Administrators that the position of the Inspector General was now to disallow interest charges. These memoranda reflect an uncertainty and some disagreement among Department of Labor officials over whether these finance charges should be disallowed. However, they have no effect on Nevada's obligations. They are internal correspondence interpreting governing regulations. They provide no authority for either approval of, or disallowance of, the finance charges.

In sum, it is determined that Department of Labor Regulation 41 C.F.R. § 1-15.713-7 requires ETA to disallow the finance charges incurred by Nevada in its purchase of the computer system.

Estoppel

Nevada argues that the Department of Labor should be estopped from disallowing the finance charges because its officials approved the lease-purchase method of purchase without advising that the accompanying finance charges would not be allowed.

As a threshold matter, it is possible for the federal government to be estopped under certain circumstances. See, e.g., Walsonavich v. U.S., 335 F.2d 96 (3d Cir. 1964); U.S. v. Georgia Pacific Co., 421 F.2d 92 (9th Cir. 1970). However, estoppel against the government is limited, and normally the government is not estopped by statements or representations made by officials not authorized to make them. See Goldberg v. Weinberger, 546 F.2d 477 (2d Cir. 1976), cert. denied, 431 U.S. 937 (1977), in which the court reasoned:

The government could scarcely function if it were bound by its employees' unauthorized representations. Where a party claims entitlement to benefits under federal statutes and lawfully promulgated regulations, that party must satisfy the requirements imposed by Congress. Even detrimental reliance on misinformation obtained from a seemingly authorized government agent will not excuse a failure to qualify for the benefits under the relevant statutes and regulations. 546 F.2d at 481.

In the Ninth Circuit, the ordinary elements of estoppel are:

(1) The party to be estopped must know the facts; (2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) The latter must be ignorant of the true facts; and (4) He must rely on the former's conduct to his injury. United States v. Ruby Co., 588 F.2d 697, 703 (1978).

Estoppel against the government requires not only the satisfaction of the above listed traditional elements of estoppel but also a showing that the conduct complained of was an affirmative misrepresentation or affirmative misconduct. The Circuit Court of Appeals for the Ninth Circuit in Wagner v. Director Federal Emergency Management Agency, 847 F.2d 515 (9th Cir. 1988), reviewed the United States Supreme Court cases applying the estoppel principal against the federal government and concluded that the federal government may not be estopped on the same ground as other litigants. The Court held that:

A party seeking to raise estoppel against the government must establish 'affirmative misconduct going beyond mere negligence'; even then, estoppel will only apply where the government's wrongful act will cause a serious injustice and the public interest will not suffer undue damage by imposition of the liability. Wagner v. Director, *supra*, 847 F.2d 515 at 519.

ETA's approval of Nevada's plan to purchase the computer included approval of the method of purchase by finance agreement. It would have been preferable for ETA, as part of its approval to alert Nevada that finance charges could not be paid out of grant funds. The parties agree that they never specifically discussed the disallowance of finance charges and it is suspected that Nevada never asked for approval of, or otherwise inquired about, finance charges because it never considered that they might not be allowed. However, ETA's failure to inform does not rise to the level of affirmative misconduct. There was no intentional misrepresentation or intentional concealment. In Heckler v. Community Health Service, Inc., 467 U.S. 51 (1984), the Court found actual incorrect advice by a government official to be insufficient to estop the government because there was no affirmative misconduct. The Court in United States v. Ruby Co., supra, held that a mere failure to inform or assist does not justify application of equitable estoppel. See also, TRW, Inc. v. FTC, 647 F.2d 942 (1981).

In three cases involving the issue of disallowance of finance charges, it was held that the federal government was not estopped from disallowing interest on a lease purchase contract because of approval of the lease purchase agreement. Kicking Horse Job Corps Center, supra; Management and Training Corp. v. U.S. Dept. of Labor, supra; and Wisconsin Dept. of Industry, Labor and Human Relations v. U.S. Dept. of Labor, supra. In Wisconsin the administrative law judge reasoned that ETA was not estopped from disallowing interest costs incurred on the lease-purchase of computer equipment because the state agency failed to show that it suffered any detriment by having the interest costs disallowed.

Here, as in the Wisconsin case, Nevada has not alleged facts which would support a finding that it acted to its detriment because it was not informed that the interest costs would not be paid out of the ETA grant funds. Nevada's options upon learning that the ETA grant funds would not pay for the interest costs would have been to purchase the \$1,522,845 computer system under a lease-purchase contract at a cost to itself of \$70,000, or to delay purchasing the computer until it received a supplemental grant. From Nevada's characterization of its need for the computer, it does not appear that Nevada would have been able to delay the purchase to save the \$70,000. Nevada explained its situation:

"[Nevada] had a critical need for immediate installation of the computer and faced a potential increase in the purchase price as well as continued delays in deliver if the order was not placed immediately."¹

Nevada did receive a benefit for its \$70,000 expenditure, use of the computer while awaiting the supplemental appropriation from ETA.

Nevada also points to the office of Inspector General's August 6, 1984 memorandum as a misrepresentation on which estoppel should be based. However, Nevada could not have relied on the Office of Inspector General's policy memorandum because Nevada was not aware of the memorandum while it was in effect.

¹Nevada's pre-hearing submission, p. 3; submitted August 29, 1988.

Nevada has not shown that the Department of Labor should be estopped from disallowing the interest costs, in that Nevada has not shown an affirmative act of misrepresentation or concealment on the part of the ETA, nor has Nevada shown that it suffered a detriment because of the acts of ETA.

It is concluded that Nevada must pay to the U.S. Department of Labor the sum of \$70,369 for reason that 41 C.F.R. § 1-15.713-7 disallows payment of the interest on the computer system purchased by Nevada and Nevada has not shown that the U.S. Department of Labor should be estopped from collecting the interest payment.

CONCLUSIONS OF LAW

1. Summary judgment is appropriate in this case as the record does not reveal a genuine issue for trial.
2. Department of Labor Regulation 41 C.F.R. Q 1-15.713-7 requires the ETA to disallow finance charges incurred by Nevada in its purchase of the computer system.
3. The Department of Labor is not estopped from disallowing the finance charges incurred by Nevada in its purchase of the computer system.

ORDER

AND NOW, this 27th day of July, 1989, IT IS HEREBY ORDERED that:

1. U.S. Department of Labor's motion for summary judgment is granted;
2. Respondent, Nevada Employment Security Department, pay \$70,369, representing interest on the lease purchase of the computer system, to the U.S. Department of Labor, from non-federal funds.

THOMAS M. BURKE
Administrative Law Judge

TMB/maa

DATED: July 27, 1989
Pittsburgh, Pennsylvania