

**U.S. Department of Labor**

Office of Administrative Law Judges  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 14 February 2007**

**Case No.: 2003-JTP-00003**

*In the Matter of*

**AMERICAN INDIAN COMMUNITY HOUSE, INC.,**  
*Complainant,*

v.

**U.S. DEPARTMENT OF LABOR,**  
*Respondent.*

**BEFORE: JOHN M. VITTONI**  
Chief Administrative Law Judge

**ORDER DENYING SUMMARY DECISION**  
**AND OTHER RELIEF**

On December 18, 2002, the Chief, Division of Resolution and Appeals, Employment and Training Administration, signing as the Contract/Grant Officer, ("Grant Officer" or "Respondent") issued a Revised Final Determination relating to an audit of a Title IV-A Job Training Partnership Act ("JTPA") program operated by the American Indian Community House, Inc. ("AICHI" or "Complainant").<sup>1</sup> The Revised Final Determination disallowed and made subject to debt collection questioned costs of \$293,419. On January 10, 2003, AICHI requested an administrative hearing pursuant to 20 C.F.R. § 629.57, and the matter was docketed before the Office of Administrative Law Judges ("OALJ").

On April 23, 2003, the Complainant filed a "Motion for Summary Judgement and For Other Relief." Upon reassignment to the undersigned, all motions to file reply and responsive briefs were granted. In essence, the Complainant's motion is grounded on the contention that the Grant Officer acted outside his authority in issuing a Revised Final Determination because an earlier Final Determination in this matter had already been appealed to OALJ. I deny summary

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<sup>1</sup> The JTPA was repealed effective July 1, 2000, and replaced by the Workforce Investment Act.

decision based on the Secretary's of Labor' decision in *Florida Dept. of Labor and Employment Security v. USDOL*, 1992-JTP-21 (Sec'y Aug. 16, 1994).

### **STANDARD FOR RULING ON MOTION FOR SUMMARY DECISION**

Motions for summary decision in proceedings before the U.S. Department of Labor, Office of Administrative Law Judges are governed by the rules set out in 29 C.F.R. §§ 18.40 and 18.41. Those rules provide that an administrative law judge may grant a party's motion for summary decision when "there is no genuine issue as to any material fact and that party is entitled to summary decision." 29 C.F.R. § 18.40(d). This standard is essentially the same as the standard applicable to motions for summary judgment under Federal Rule of Civil Procedure 56. *See Hasan v. Burns and Roe Enterprises*, ARB No. 00-080, ALJ No. 2000-ERA-6 at 6 (ARB Jan. 30, 2001).

If the moving party can establish that there is no genuine issue of material fact and that they are entitled to decision as a matter of law, the burden is shifted to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Seetharaman v. General Electric. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-21 at 4 (ARB May 28, 2004). The non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings to carry this burden, but rather, must set forth specific facts on each issue upon which he would bear the ultimate burden of proof. *Id.*, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). If the non-moving party fails to meet this burden as to any of the required elements of his case, all other factual issues become immaterial and there can be no genuine issue of material fact. *Id.*, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In deciding a motion for summary decision, all evidence must be considered in the light most favorable to the non-moving party. *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001). *See also Commonwealth of Puerto Rico, Dept. of Labor & Human Resources v. United States*, No. 98-828C (Court of Federal Claims Mar. 28, 2001).

### **BACKGROUND**

1. *OIG Audit.* The U.S. Department of Labor, Employment and Training Administration awarded Grant No. B-5247-5-00-1-55 to AICHI under Title IV-A of the JTPA to provide training and other services to Native Americans who face serious barriers to employment. On January 24, 2002, the U.S. Department of Labor, Office of Inspector General ("OIG") issued an audit report on AICHI's claimed costs for the period from July 1, 1997 through June 30, 1998. Of claimed costs of \$550,235, OIG questioned \$293,419. [AF at Tab B]<sup>2</sup>
2. *Grant Officer's Initial Determination.* On July 31, 2002, the Grant Officer issued an Initial Determination tentatively disallowing \$293,419. [AF at Tab A, pages 35-42]

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<sup>2</sup> AF refers to the Grant Officer's Administrative File filed with OALJ on March 3, 2003. In this recitation of the background to the motion for summary decision, Official Notice is taken of the filings in Case Nos. 2003-JTP-2 and 3. *See* 29 C.F.R. § 18.45.

3. *Grant Officer's Revised Initial Determination.* On August 16, 2002, the Grant Officer issued a Revised Initial Determination correcting an inadvertent omission from the July 31, 2002 Initial Determination that did not change the total amount of questioned costs. [AF at Tab A, pages 27-34]
4. *Grant Officer's Final Determination.* On October 4, 2002, the Grant Officer issued a Final Determination allowing \$269,420 of the questioned costs, and disallowing \$23,999. [AF at Tab A, pages 21-26]
5. *AICHI's Request for Hearing on Final Determination.* By letter dated October 23, 2002 [AF at Tab A, page 6] and received by OALJ on October 24, 2002, [Administrative File in Case No. 2003-JTP-00002] AICHI filed a request for an administrative hearing on the disallowance of the \$23,999. OALJ docketed this appeal as Case No. 2003-JTP-00002.
6. *Grant Officer's Revised Final Determination.* On December 18, 2002, the Grant Officer issued a Revised Final Determination which now disallowed the original questioned amount of \$293,419. [AF at Tab A, pages 7-20] The Grant Officer stated that this revised determination was issued "because a review by both ETA Regional Office staff and the Grant Officer of additional documentation submitted by AICHI disclosed that the documentation did not support the allowance of any of the questioned costs." [AF at Tab A, pages 8 and 11]
7. *AICHI's Hearing Request on Revised Final Determination.* On January 10, 2003, AICHI filed a request for an administrative hearing on the December 18, 2002 Revised Final Determination. [AF at Tab A, page 5] OALJ docketed this appeal as Case No. 2003-JTP-00003.
8. *Grant Officer's Motion to Dismissal 2003-JTP-00002.* By letter dated February 14, 2003, counsel for the Grant Officer requested that the Associate Chief Administrative Law Judge dismiss Case No. 2003-JTP-00002 on the ground that the December 18, 2002 Final Determination "was superseded by a revised final determination from which appeal was taken on January 10, 2003." The letter states that AICHI had been contacted and had no objection to the request to dismiss Case No. 2003-JTP-00002. [Administrative File in Case No. 2003-JTP-00002]
9. *Dismissal of 2003-JTP-00002.* On March 12, 2003, the Associate Chief Administrative Law Judge issued an Order Granting Motion to Dismiss in Case No. 2003-JTP-00002. [Administrative File in Case No. 2003-JTP-00002]
10. *Entry of Appearance of Complainant's Counsel.* On March 17, 2003, James W. Tello, Esquire filed an entry of appearance on behalf of AICHI in Case No. 2003-JTP-3. [Administrative File in Case No. 2003-JTP-00002] Prior to this time AICHI was proceeding pro se.
11. *AICHI's Motion for Summary Decision.* On April 23, 2003, AICHI filed the motion for summary decision which is currently before the undersigned.

AICHI's motion makes the factual allegations that the Revised Final Determination was issued because OIG had pressured the Grant Officer to reconsider his decision to reduce the amount disallowed to \$23,999. AICHI contends that counsel for the Grant Officer telephoned its executive director to request her acquiescence in the dismissal of Case No. 2003-JTP-00002, leading her to understand that "this was simply a housekeeping matter of no importance" and that "essentially ... AICH was giving up no rights to which it was entitled." AICHI argues that this understanding was the basis on which the executive director agreed to the dismissal. AICHI argues that had it been explained to its executive director that "she might be waiving the right to limit the amount to be disallowed to \$22,340, [sic] she would never have given her consent to the dismissal." AICHI argues that its executive director did not knowingly give her consent, and noted that at the time it was not represented by counsel. These contentions are supported by a Declaration of Rosemary Richmond, Executive Director of the American Indian Community House, Inc.

AICHI's motion for summary decision is grounded in an argument that the Revised Final Determination was "null and void."

The first ground for the contention that the Revised Final Determination was void is that DOL failed to comply with regulatory time limits for issuance of the Final Determination. AICHI argues that under the JTPA regulations, a Final Determination is to be issued not later than 180 days after the receipt by the Grant Officer of the final approved audit report, 20 C.F.R. § 636.8(e), and that the Revised Final Determination was issued almost eleven months after the audit report.

AICHI's second ground for summary decision is, essentially, that once it appealed the original Final Determination that determination was considered final agency action on provisions of the determination not specified for review. *See* 20 C.F.R. §§ 636.10(a)(2) and 636.11. The motion makes passing reference to *res judicata* and law of case in support of the notion that issues not appealed were foreclosed from further review by the Grant Officer, and then analogizes to a district court's loss of jurisdiction once an appeal is filed. AICHI argues that "the Grant Officer had no remaining jurisdiction to expand those sums disallowed irrespective of the outcome of the appeal to [OALJ]." Finally, AICHI noted that DOL has been rigorous in enforcing time limitations on appeals on grant recipients, citing *Gamble v. Wisconsin Counties of Racine, Walworth and Kenosha*, 1994-CETA-1 (ARB June 29, 1996) and *Carmona v. Office of the Governor of Puerto Rico*, 1999-JTP-18 (ALJ Aug. 18, 1999), and argued that it should be equally firm in foreclosing the Grant Officer from untimely changing his own audit conclusions under pressure from OIG.

AICHI's motion also requests that the dismissal of 2003-JTP-00002 be vacated because it was allegedly entered on the false premise that AICHI knowingly consented to the dismissal (which I interpret as an argument that AICHI would not have consented if it had known the potential implications of the dismissal).

Finally, AICHI's motion requests that Case Nos. 2003-JTP-00002 and 2003-JTP-00003 be consolidated for decision before a single ALJ.<sup>3</sup>

12. *Grant Officer's Response to the Motion for Summary Decision.* The Grant Officer responded to the motion for summary decision on May 22, 2003. In regard to the 180-day time limit for issuance of a Final Determination, the Grant Officer cited *Brock v. Pierce County*, 476 U.S. 253, 206062 (1986), for the proposition that DOL's failure to act within the time provided by statute or regulation does not constitute a jurisdictional bar to agency action. INSERT DISCUSSION OF BARNHART The Grant Officer noted that subsequent federal court decisions have followed *Brock*, as did the ALJ and the ARB in a JTPA case, *Florida Dept. of Labor and Employment Security v. USDOL*, 1992-JTP-21 (ALJ May 26, 1993), *aff'd* (ARB Aug. 16, 1994). The Grant Officer argued, therefore, that he had the authority to issue the Revised Final Determination even though more than 180 days had elapsed since receipt of the OIG Audit Report.

The Grant Officer's argues that the decisions in *Gamble* and *Carmona* cited by the Complainant are inapposite. The Grant Officer observed that *Gamble* was based on excessive administrative delay, and that the ruling in *Carmona* was only that OALJ never gained jurisdiction over a matter where the respondents had not requested a hearing.

The Grant Officer's reply is supported by a declaration. In the declaration, the Grant Officer acknowledges that after he had issued the Final Determination which only disallowed \$23,999 of the questioned costs, OIG had urged him to take a "second look" at the documentation submitted by the grantee. The Grant Officer's declaration states that a member of his staff contacted AICHI on October 24, 2002 "regarding the possibility that the FD would be rescinded unless the grantee provided additional documentation relative to its cost allocation plan/method." The declaration goes on to contend that the Revised Final Determination was issued because the documentation supplied by AICHI for PY 97/98 disclosed that space and staff costs were allocated directly to JTPA even though other programs were also benefiting from that space and staff.

13. *AICHI's Reply to the Grant Officer's Response.* On June 9, 2003, AICHI filed a reply to the Grant Officer's response to its motion for summary decision. It argues that *Barnhart* is not controlling because the delay in issuance of the Revised Final Determination was not based on factors beyond the control of the Grant Officer, but rather on pressure from the OIG. AICHI argued that in *Barnhart* the court's ruling was based in large part on the fact that the statute in that case did not specify a consequence for noncompliance with the time deadline, whereas the JTPA regulations at 20 C.F.R. §§ 636.10(a)(2) and 656.11 impose finality on issues not appealed to OALJ. AICHI argues that its appeal of October 23, 2002 was limited to the disallowance of \$18,000 for accounting and audit fees and \$4,300 for health insurance. AICHI observes that it tendered a check for \$1,659 for board expenses disallowed by the Final Determination. Thus, it argues, the remainder of the decision became final, including the determination allowing the bulk of the questioned costs.

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<sup>3</sup> The motion also requests a delay in the schedule for a prehearing exchange. Since I will be setting a new prehearing schedule, this request is moot.

AICHI argues that to permit the Grant Officer to reopen matters resolved favorable to the grant recipient would hand him a bludgeon to use at any stage in the proceedings, and to nullify the right to a fair hearing under 29 U.S.C. § 1576(a). AICHI argues that it is not in the public interest to withhold finality from any disposition favorable to grant recipients.

Finally, AICHI argued that the Grant Officer did not contest its position that if the Revised Final Determination was void, the order dismissing the appeal in Case No. 2003-JTP-00002 must be vacated.

14. *Grant Officer's Reply to AICHI's Reply.* On June 26, 2003, the Grant Officer filed a reply to AICHI's reply, arguing that it had misinterpreted *Barnhart*, which does not hinge on the existence of factors beyond the agency's control. The Grant Officer also observes that 20 C.F.R. § 636.10(a)(2) places the burden on the grantee to identify the issues for its requested administrative proceeding, and that such a burden does not limit the Grant Officer's ability to protect JTPA funds. Similarly, the Grant Officer maintains that 20 C.F.R. § 656.11 "simply addresses the result of a grantee's decision to appeal (or not) the findings in a GO's final determination. It does not address, much less limit, the GO's ability to recover misspend JTPA funds." The Grant Officer replies to AICHI's "bludgeon" argument with the argument that "[a] grantee should not be allowed to keep JTPA money to which it is not entitled simply because the GO did not, initially, demand repayment." In summary, the Grant Officer argued:

There is a clear public interest in revisiting a final determination which did not fully address the misuse of JTPA funds. While it is easy to understand how the "finality" claimed by AICH (see Reply at 4) is in the Complainant's interest, there is no public interest in treating an incomplete determination as final. Further, the GO's issuance of the [Revised Final Determination] did not, in any way, prejudice AICH's ability to define its use of JTPA funds. Any explanation or defense that has ever been available is still available. In short, the focus should be on determining what costs incurred by AJCH were allowable, not on arguing the validity of the [Revised Final Determination].

## **DISCUSSION**

### ***The Secretary's Decision in Florida Dept. of Labor and Employment Security v. USDOL, 1992-JTP-21***

In *Florida Dept. of Labor and Employment Security v. USDOL, 1992-JTP-21* (Sec'y Aug. 16, 1994), the Grant Officer issued an Initial Determination disallowing approximately 1.2 million dollars in JTPA funds pertaining to funds used by the State of Florida for computer hardware, software, courseware and computer maintenance contract. The Initial Determination was based on a finding that less than 11% of users were actually enrolled JTPA participants. In a Final Determination, the Grant Officer reduced the sum disallowed to be closer to 1 million dollars. The reduction was based on a finding that funds could be allocated to non-enrolled, but JTPA eligible, persons. The State of Florida timely requested a hearing before an ALJ.

Approximately one year later, the Grant Officer filed with the ALJ a motion to withdraw the Final Determination without prejudice. The presiding ALJ quoted the Grant Officer's basis for the motion:

[D]iscussions with several agencies within the Department of Labor revealed that the Final Determination did not reflect the policy of the Department with respect to the expenditure of JTPA funds. It is the Department's policy that, in a program for JTPA participants, funds must be spent exclusively for the benefit of individuals who are to be determined eligible for and formally enrolled in the JTPA program prior to the receipt of any program services. The JTPA program must be compensated or reimbursed for any use of JTPA property, equipment, supplies or program services by nonenrolled individuals. Given this policy, the Grant Officer wishes to reconsider his Final Determination in this case.

*Florida Dept. of Labor and Employment Security v. USDOL*, 1992-JTP-21 (ALJ May 26, 1993). The ALJ granted the motion, the State appealed the ALJ's order to the Secretary of Labor, and the Secretary asserted jurisdiction.<sup>4</sup>

The Secretary reviewed the procedures governing the resolution of disputes between the Department of Labor and a JTPA grantee, and held:

The Final Determination constitutes the final agency action unless a hearing is requested by the affected grantee pursuant to 20 C.F.R. § 636.10, as the state did here, in which case the agency's final action is held in abeyance until a final decision by the Secretary. A Grant Officer's Final Determination is not a final agency action once it is challenged until after a hearing and the consequent decision issued. 20 C.F.R. § 636.11.

The regulations do not provide for the Grant Officer to challenge his own Final Determination before the OALJ since the usual adverse effect of the determination requires the grantee to return disallowed JTPA grant funds. The regulation at 20 C.F.R. § 636.10(a)(2) restricts the OALJ's adjudicatory review to those issues specifically challenged by the grantee, but it does not act as a check on any subsequent action by the Grant Officer with regard to his reconsideration of the challenged determination.

... The regulations and the Act are silent with regard to the Grant Officer's authority to reconsider the final determination once it has been made but before it is the agency's final action. ... Since there was no final agency action here, there is no ground on which to deny the Grant Officer the opportunity to reconsider the bases for the Final Determination.

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<sup>4</sup> The Administrative Review Board, which now hears appeals of ALJ decisions in JTPA matters, was not formed until 1996. See 61 Fed. Reg. 19982 (1996). Prior to the formation of the ARB, such appeals went directly to the Secretary of Labor.

1992-JTP-21, slip op. at 3-4 (Sec'y Aug. 16, 1994) (footnote omitted). The Secretary noted that the Grant Officer's request for an opportunity to reconsider the Final Determination did not appear to be mere convenience or quirk—or even a subsequent change in policy—but rather was based on "a serious concern regarding the propriety and legality of that part of [the Final Determination that allowed costs to "eligible" JTPA users]." *Id.* at 4-5. The Secretary observed that the State had an interest in wanting to limit its liability to the amount arrived at in the Final Determination, but that there was a competing public interest in having the Grant Officer reach a proper result. The Secretary determined that "the Grant Officer's belated resolve to do it right the second time is appropriate." *Id.* at 5. The Secretary expressed concern about the one year delay between the Final Determination and the motion to withdraw, but determined that the Grant Officer was nonetheless properly granted the motion to withdraw to reconsider. *Id.* at 6-7. The Secretary found that res judicata was not applicable to the Final Determination because the Grant Officer's function was administrative rather than judicial. Finally, the Secretary observed that the ALJ had correctly cited *Brock v. Pierce County*, 476 U.S. 253 (1986), to find that the JTPA rule directing that the Final Determination be issued within 180 days after receipt of a final approved audit report is not jurisdictional. *Id.* at 10-11.<sup>5</sup>

***Application of  
Florida Dept. of Labor and Employment Security v. USDOL, 1992-JTP-21  
to the instant case***

I find that the Secretary's decision in *Florida Dept. of Labor and Employment Security v. USDOL*, 1992-JTP-21 (Sec'y Aug. 16, 1994), compels the dismissal of AICHI's motion for summary decision and other relief.

It would have been better procedure for the Grant Officer to request the ALJ to dismiss the matter before him because of withdrawal of the original Final Determination for reconsideration, prior to issuing a Revised Final Determination. Indeed, the Secretary's decision in *Florida Dept. of Labor and Employment Security* suggests that a motion to dismiss may be less favorably viewed if it is based merely on convenience, quirk or subsequent change in policy. Nonetheless, *Florida Dept. of Labor and Employment Security* makes it clear that the Grant Officer had the authority to reconsider the Final Determination prior to full adjudication by the ALJ. Moreover, viewing the facts in the light most favorable to the non-moving party, it appears that the Grant Officer's decision to reconsider was not based on convenience, quirk or subsequent

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<sup>5</sup> In *Administrator, Wage and Hour Division, ESA, USDOL v. Synergy Systems, Inc.*, ARB No. 04-076, ALJ No. 2003-LCA-22 (ARB June 30, 2006), the ARB held that the rationale of *Brock v. Pierce County*, 476 U.S. 253 (1986) – holding in a CETA case that the word "shall" when setting deadlines for agency actions is not, standing alone, jurisdictional and does not remove the Secretary of Labor's power to act after the deadline has expired – applies to LCA time limits found in the Immigration and Nationality Act and the relevant regulatory provisions. Thus, the Administrator's and OALJ's failure to act within those time frames did not remove the Administrator's jurisdiction to prosecute the case. The ARB noted that some prior authority had mischaracterized the *Pierce County* holding as requiring a statute to specify a consequence for to comply with a deadline. The ARB clarified that this was not a holding in that case. Rather, more precisely, the Court in *Pierce County* held that such a statutory deadline "was clearly intended to spur the Secretary [of Labor] to action, not to limit the scope of his authority." 476 U.S. at 265.

change in policy – but rather a return to the original reasons for questioning costs as advocated by the OIG.

Although a Grant Officer's reconsideration and revision of a Final Determination prior to final adjudication by the ALJ should not be the normal procedure, in the instant case the only thing being denied to the grantee is the opportunity to limit its liability based on a possibly egregious mistake made by the Grant Officer in the original Final Determination. AICHI will still be afforded a full and fair opportunity in an adjudicatory setting to establish that the disallowances were erroneous.

Upon review of the history of this matter, it is strongly suggested that the parties consider an effort to resolve this matter through alternative dispute resolution. It is noted that the Office of Administrative Law Judges maintains a voluntary settlement judge program which has a good track record of facilitating settlements, and which is offered at no cost to the parties.

### **ORDER**

Based on the foregoing, **IT IS ORDERED** that

1. AICHI's motion for summary decision and other relief is **DENIED**.
2. The parties shall provide (or update) their pre-hearing statements as directed in paragraph 3 of the January 31, 2003 Notification of Receipt and Request for Hearing and Prehearing Order **in time to reach this office no later than close of business (5:00 pm EST) on Thursday, March 1, 2007**. Upon receipt of these statements, I will set a time and location for the hearing.
3. If the parties jointly agree to appointment of a settlement judge, I will delay setting a hearing on this matter for a reasonable period of time, and request that an Associate Chief Judge immediately appoint an experienced settlement judge.

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**JOHN M. VITTON**  
Chief Administrative Law Judge