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Issue Date: 24 October 2017

Case No.: 2014-WIA-00004

In the Matter of

**STATE OF NEW JERSEY
DEPARTMENT OF LABOR AND
WORKFORCE DEVELOPMENT**
Complainant

v.

**U.S. DEPARTMENT OF LABOR,
EMPLOYMENT AND TRAINING
ADMINISTRATION**
Respondent

Appearances:

Joseph Latoff
Chief Financial Officer
New Jersey Department of Labor and Workforce Development
For Complainant

Jerry Calamia
Director, Internal Audit
New Jersey Department of Labor and Workforce Development
For Complainant

Jonathan Hammer, Esq.
For Respondent

DECISION AND ORDER

The above-captioned matter arises from a claim brought under the Workforce Investment Act (“WIA” or “the Act”), 29 U.S.C. § 2801 *et seq.*, and its implementing regulations, 20 C.F.R. Parts 660 to 671 and 29 C.F.R. Part 37. Pursuant to a Notice of Hearing and Prehearing Order issued on August 8, 2014, the parties appeared before the undersigned for a hearing on January 5, 2015 in Cherry Hill, New Jersey.

Respondent, the U.S. Department of Labor, Employment and Training Administration (“ETA”) offered into evidence the Administrative File (“AF”) and the testimony of Paul J. Kelly, Financial and Grants Management Specialist for ETA. Complainant, State of New Jersey, Department of Labor and Workforce Development (“New Jersey” or “DLWD”) offered no additional evidence or testimony. Both parties filed closing briefs. The undersigned has considered all of the evidence and the parties’ arguments in issuing this Decision and Order.

I. STATEMENT OF THE CASE

A. DOL Argument

ETA argues that the Grant Officer (“GO”) carried its burden of production for the \$143,186 in questioned costs that the GO disallowed. Kelly testified that the documentation submitted by DLWD did not sufficiently support the expenditure of the funds under OMB Circular A-133 and the applicable regulations.¹ Under the law, factors considered include that expenditures must be

- (a) necessary and reasonable for proper and efficient performance and administration of Federal awards,
- (b) allocable to Federal awards under the provisions of 2 CFR part 225,
- (c) authorized or not prohibited under State or local law,
- (d) in conformity with federal laws and regulations and the terms and conditions of the award,
- (e) consistent with policies and regulations that apply to federal awards and other activities in the governmental unit,
- (f) accorded consistent treatment in the grantees’ filings,
- (g) in accordance with generally accepted accounting principles, and
- (h) not included as a cost to any other federal award, the net of all applicable credits, and adequately documented.

See 2 C.F.R. Part 225 Appendix A(C)(1).

Kelly focused on three factors that ETA found DLWD had not met. He looked at whether the expenditures were reasonable (whether the costs exceed what a prudent person under similar circumstances would expend). He asked whether they were necessary (necessary or beneficial to the operation of the grant and within the rules governing the grant). Finally, he looked at whether they were properly allocated (whether the expenditures benefit more than one grant that the grantee is administering and whether the proportion of the costs allocated to the

¹ OMB Circular A-133 establishes principles for determining the allowable costs incurred by States, Local Governments, and Non-Profit Organizations under grants, cost reimbursement contracts and other agreements with the Federal Government.

grant in question aligns with the relative benefit received). (Administrator's Brief "Ad.Br.", p. 6.)

According to ETA, the government met its burden of production for ETA's decision to disallow \$87,770 in expenditures to TransNet. ETA argues that the documentation submitted did not clearly explain what the City of Newark ("the City") purchased from TransNet or how DLWD allocated the expenditures among the grants that the Newark Workforce Investment Board ("WIB") administers. DLWD submitted City of Newark Resolutions authorizing purchases from TransNet. One resolution dated within the grant period allowed the City to purchase "various data communications and networking equipment, products, maintenance, and training resources." (AF1 at 194-96, 791-98.) The City also submitted invoices and purchase orders from 2007 and early 2008. (AF1 at 802-14.) ETA argues that these documents do not demonstrate that the expenses are allowable. The resolutions do not detail what the City actually purchased and do not mention the purchases for the Newark WIB. The invoices and purchase orders likewise do not provide sufficient detail to demonstrate what the City of Newark purchased. Invoices referencing the purchase of the software do not explain what the software was and why the City of Newark needed it. Moreover, some of the invoices are dated 2007 and early 2008, whereas the period covered by the Final Determination lasted from July 1, 2008 to June 30, 2009.

ETA further argues that the government met its burden of production for the disallowance of \$55,416 in expenditures to Zelenkofske Axelrod ("ZA"). According to ETA, DLWD received credit for the majority of its expenditures to ZA. However, DLWD did not properly document all of the expenditures to ZA and DLWD's allocation of the expenditures to multiple grants it implemented was unclear. DLWD provided minutes of Newark WIB Board of Directors meetings and invoices from ZA. However, the GO found there was no documentation for a portion of the expenditures to ZA.

Defending against the State's assertion, ETA argues that the Cohan rule does not apply to this matter. This common law rule based on Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930) allows taxpayers to rely on reasonable estimates when they are unable to produce records of actual expenditures, as long as some factual basis exists for the estimate. This rule does not apply here, as the policy concerns of expenditures of funds given to a grantee by the federal government differ from that of the collection of taxes. In Montgomery County Maryland v. DOL, 757 F.2d 1510 (4th Cir. 1985), the court held that failure to keep records is a misexpenditure of funds under the Comprehensive Employment and Training Act (the precursor to WIA). See also State of La. Department of Labor v. US DOL, 1108 F.3d 614, 618 (5th Cir. 1997); Edmonds v. Chao, 449, F.3d 51, 58 (1st Cir. 2006).

Finally, ETA asserts that DLWD did not properly document the expenditures, so the government cannot determine what the expenditures were, let alone whether they were necessary for implementation of the WIA grant. The State also did not document how many other grants the Newark WIB administered, or the purpose of those grants, so ETA cannot determine whether the expenditures benefitted those grants instead. While expenses for computer networking are not *per se* unallowable, the State needs to document the purpose of the network so that ETA can determine that the network is necessary for fulfillment of the grant. The documents do not

specify what DLWD acquired, only that the acquisitions were network-related. For example, an invoice reflects payment for a software program called Trans-soft, which the State said it purchased to monitor the progress of the participants that the software serves. However, DLWD did not present evidence proving the utility of software. An invoice would not have been sufficient—DLWD needed to produce an allocation methodology, which it did not do. (Hearing Transcript “Tr.” at 24-25).

Furthermore, ETA did accept a large portion of expenditures to ZA. ETA only disallowed those expenditures that DLWD itself initially determined were not documented properly.

B. State of NJ Argument

The State points out that 29 CFR § 97.20(a) requires that states expend and account for grant funds “in accordance with State laws and procedures” and argues that ETA has not established that NJ violated any State laws or procedures. 29 CFR § 97.20(a)(2) requires that fiscal control and accounting procedures of the State be sufficient to “permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.” According to the State, ETA was able to identify two specific items of costs, enabling it to trace the costs to the WIA grant. The regulation requires proof that the State used the funds in violation of a statute and DOL has not identified a violation of a statute. The documents DLWD submitted to DOL showed that the costs directly related to the WIA grant. NJ state law allowed municipalities to “piggyback” on State contracts, as Newark WIB did when it piggybacked on NJ’s contract with TransNet. The State further argues that they complied with 20 CFR § 97.20(b)(2), which requires financial management systems of grantees and subgrantees maintain accounting records which adequately identify the source and application of funds. DLWD supplied 829 pages of documentation. DOL did not ask for “accounting records” as required in the regulation, but rather sought copies of the contract between TransNet and Newark WIB. Newark WIB did not have a contract with TransNet because it piggybacked on the State contract with TransNet, as allowed under NJ state law, which allowed for the services that Newark WIB requested of TransNet.

Similarly, the State argues that it complied with 29 CFR § 97.20(b)(6), which requires that accounting records be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc. The State asserts that DLWD provided sufficient source documentation, including letters from then-Executive Director of Newark WIB, addressing procurement of services from ZA, and minutes of Newark WIB meetings addressing procurement of services from ZA, and resolutions of City of Newark allowing use of TransNet as a vendor. Newark WIB did not have to produce a unique contract with TransNet because it had a valid state contract with TransNet. WIB did not violate any of the requirements of the aforementioned regulations. It timely prepared reports and the questioned costs did not violate any State or Federal regulations.

Finally, the state argues that WIA federal statute 29 USC § 2864(d)(4)(E) provides that where funds allocated to a local area are limited, “priority shall be given to recipient of public assistance.” Newark WIB received funding from DLWD for two major programs – WIA and

Workfirst. Workfirst served Temporary Assistance for Needy Families (“TANF”) and General Assistance (“GA”) recipients (*i.e.*, people classified as receiving public assistance). Individuals eligible for these programs constitute the same population receiving services under WIA so the WIA would have allowed the questioned costs under the WIA statute. DOL never challenged the costs as misspent funds or argued that the expenditures were improper. Newark WIB spent the network costs on developing and maintaining a computer system to track client status, an appropriate charge under the WIA statute. A computer system of such a significant size would have required some regular and ongoing upkeep or maintenance. It also appears that the reviewer who rejected these costs did not take into account the services or output that TransNet provided. According to the State, these were necessary costs.

Finally, the State argues that the ZA costs were also necessary and reasonable. WIB contracted with ZA to report expenditures under the WIA and Workfirst program. This served the same client base, so ZA expenditures could properly be charged to WIA.

C. Evidence

ETA offered into evidence the entirety of the Administrative File, as required by 20 C.F.R. § 667.810(e).

1. Administrative File (“AF”) – The file consists of five exhibits.
 - a. Exhibit A describes the Audit Resolution Process and includes the Initial Determination dated April 14, 2014, the Final Determination letter dated July 7, 2014, a Memo to File dated October 29, 2014 from Eugene P. Smith, Audit Resolution Specialist re: Audit Resolution Process and the Notice of Hearing
 - b. Exhibit B is the Monitoring Review, including a letter dated April 8, 2010 from Holly C. O’Brien, Acting Regional Administrator, ETA to Harold J. Wirths, Acting Commissioner NJDOL and WD, explaining that ETA conducted a review from August through September 8, 2009 of the WIA, Wagner-Peyser (W-P) and Unemployment Insurance (UI) programs and grants administered by NJ DOL and WD. ETA advised the State that a response to corrective action requirements would be due in thirty days. The Executive Summary details several problems with the programs including communication, customer satisfaction, finance and administration (identifying \$357,552 in costs without adequate documentation), performance, labor market information, re-employment services, WIA youth, WIA state-wide activities, oversight, management of discretionary awards, local governance, migrant and seasonal farmworkers, work opportunity tax credit,

northern New Jersey WIRED grant, and central New Jersey WIRED grant.

Relevant to this case, the report details the results of the financial, administrative and performance review of the City of Newark, beginning at D-1 (AF, p. 79). The cost allocation and distribution findings are set out (AF, p. 80) as are the findings on allowability of costs (AF, p. 81). The table clearly identifies, among other issues, inadequate documentation for transactions involving ZA and TransNet, at issue here (AF, pp. 82-83).

- c. Exhibit C sets forth the relevant block grants to the State.²
- d. Exhibit D sets out the relevant regulatory authorities ETA is relying upon.³
- e. Exhibit E includes other documents gathered by ETA, including correspondence between the agency and the DLWD throughout the audit process.

² The nine block grants involved include:

- Block Grant under the Workforce Investment Act (WIA) to NJ for \$120,816,273.37 beginning 10/01/2004, ending 9/30/2009 (AF, p. 93)
- Block Grant under the WIA to NJ for \$106,644,907.00 beginning 10/01/2005, ending 9/30/2010 (AF, p. 101)
- Block Grant under the WIA to NJ for \$107,742,657.20 beginning 10/01/2006, ending 12/31/2009 (AF, p. 108)
- Block Grant under the WIA to NJ for \$119,365,311.09 beginning 10/01/2007, ending 12/31/2010 (AF, p. 115)
- Block Grant under the Social Security Act to NJ for \$146,345,706.46 beginning 10/1/2008, ending 6/30/2012 (AF, p. 122)
- Block Grant under the WIA to NJ for \$76,561,877.00 beginning 4/01/2005, ending 6/30/2008 (AF, p. 130)
- Block Grant under the WIA to NJ for \$59,176,717.00 beginning 4/01/2006, ending 6/30/2009 (AF, p. 134)
- Block Grant under the WIA to NJ for \$63,014,111.00 beginning 4/01/2007, ending 6/30/2010 (AF, p. 138)
- Block Grant under the WIA to NJ for \$118,535,495.00 beginning 4/01/2008, ending 6/30/2011 (AF, p. 142)

³ 20 C.F.R. §§ 97.20(a), (a)(2), (b), (b)(2), (b)(6).

Exhibit E includes a letter to Commissioner Harold J. Wirths from Regional Administrator Holly O'Brien dated June 11, 2012, confirming the resolution of forty-three findings to date, with eleven outstanding (three in Newark). O'Brien advised that regional staff would schedule an onsite visit. (AF, p. 213).

A letter to Holly O'Brien dated July 26, 2012 from Harold J. Wirths responded to ETA's June 11, 2012 letter. (AF, p. 210). On September 19, 2013, Regional Administrator O'Brien sent a letter to Commissioner Wirths providing an assessment of costs from July 1, 2012 to June 30, 2013, including the remaining \$143,186 in unresolved costs from Newark (AF, p. 199). Exhibit E also includes a memo to Stephen L. Daniels, Director, Division of Policy Review and Resolution from Holly C. O'Brien, Regional Administrator, ETA Region 1, dated December 11, 2013, advising that \$143,186 in questioned costs still exists, even after working with staff from the NJ Dept. of LWD and the State's Director of Internal Audit (AF, p. 197).

Finally, on June 11, 2014, Commissioner Wirths sent a letter to the GO providing additional documentation to support the use of ZA to assist the WIB fiscal office (AF, p. 146). These documents included:

- Letter dated December 17, 2007 to Stefan Pryor, Deputy Mayor, City of Newark from Zelenkofske Axelrod presenting proposal to assist Newark Works in reconciling its financial records and determining available funding (Phase I). Phase II would assist Newark Works in identifying and resolving potential disallowed costs while Phase III would assist in strengthening internal controls and developing written policies and procedures to deal with the issues that created the financial imbalances (AF, p. 173).
- First page of letter dated July 14, 2008 from Rodney Brutton, Executive Director, Newark WIB to Mary Puryear, Chairperson, Newark WIB stating, "We will use WIB administration funds from our 2008-2009 allocation(s)" (AF, p. 152).
- Memo from Tyronda Johnson-Walden, Special Assistant to Rodney Brutton, Executive Director dated July 16, 2008 summarizing a conference call with Newark WIB Executive Committee where they voted to move forward with proposal from ZA (AF, p. 153).
- Letter dated July 21, 2008 from ZA to Rodney Brutton, Executive Director, Newark WIB detailing Phase II proposal to assist Newark Works in preparing budget amendments for FYE 6/30/08 and a budget for FYE 6/30/09 (AF, p. 176).
- Letter dated September 30, 2008 from ZA to Rodney Brutton, ED, Newark WIB presenting proposal to assist Newark Works in preparing its monthly financial reports to the State of NJ (AF, p. 178-79).
- Full Board Meeting Minutes dated November 14, 2008 (AF, p. 154). Harry Nelson, Chief Financial Officer of Newark Works, gave a fiscal update, noting that the Newark WIB "solicited services from [ZA], an outside accounting firm, to help with some of the agency's challenges." (AF, p. 157.)

- Newark WIB Resolution Authorizing the Award of a Non-Fair and Open Contract for ZA for period July 1, 2009 through December 31, 2009, for an amount not to exceed \$50,000. (AF, p. 182-83.)
- Executive Committee Meeting Minutes dated December 4, 2009 (AF, p. 158) documenting the discussion regarding the consultant contract for ZA. One Stop CFO said they anticipated the ZA charges would not exceed \$50,000 for the period July 1, 2009 through December 31, 2009. The Executive Committee approved a motion to extend the contract until December 31, 2009 with a \$50,000 cap on charges.
- Full Board Meeting Minutes dated January 26, 2010 (AF, p. 159) noting that the ZA contract ended December 31, 2009, but that Patricia Cooper, Acting Executive Director, would remain until March 31, 2010.
- Executive Committee Meeting Minutes dated March 19, 2010 (AF, p. 164). Arcelio Aponte of the City of Newark stated that the ZA contract was terminated on December 31, 2009 and “process for final payment should be finalized.”
- Executive Committee Meeting Minutes dated April 23, 2010 (AF, p. 168). “On December 4, 2009 there was a motion for the ZA contract to begin on July 1, 2009 and end on December 31, 2009. At the finance committee it was determined the bills have exceeded the contract amount by \$70,000.” Motion to authorize additional funding (not to exceed an additional \$80,000) made, seconded, amended, and passed (AF, p. 170).
- Scope of Services prepared by ZA: “to provide technical accounting assistance and related services to ensure Newark WORKS is in compliance with the [WIA] guidelines.”(AF, p. 181).

That same June 11, 2014 letter from Commissioner Wirths included documents to demonstrate that TransNet was an approved vendor, including:

- An undated memo, with an unidentified author, captioned “Ref: Agreement between TransNet and Newark WORKS” (AF, p. 188) which states:

I have been informed that during the period that TransNet Corp. provided the service in question, Newark WORKS, then MOET (Mayor’s Office of Economic & Training), was an integrant part of the City of Newark. As such, work performed by TransNet for Newark WORKS was covered under the City of Newark contract – NJ State Contract A81194.

- Resolution of the City of Newark No. 7RU, adopted October 6, 2004 (AF, p. 189) authorizing the City Purchasing Agent to enter into several contracts, including contract A81194 with TransNet, to provide “Minicomputer, Microcomputer, Workstation and Associated Products” needed for the City to

upgrade its “ financial system and related needs” (AF, p. 190) Several tables of state contracts referenced contract A81194”:

- Table of Active State Contracts 2004 (AF, p. 191)
- Table of Active State Contracts 2006 (AF, p. 192)
- Table of Active State Contracts 2007 (AF, p. 193)
- Resolution of the City of Newark No 7RI-G, adopted June 17, 2009 authorizing the purchase of data communications and network equipment, identifying TransNet as a dealer/distributor for Cisco systems (AF, p. 194)

2. Testimony

The Administrator presented the testimony of Paul Kelly, Financial and Grants Management Specialist for ETA. Complainant presented no witnesses. Kelly testified as follows:

Paul J. Kelly works for the United States Department of Labor Employment and Training Administration (ETA) in Boston, Massachusetts as the Financial and Grants Management Specialist. He has worked for DOL for over five years, starting as a Systems Accountant. (Tr. 19.) After receiving an MBA, Kelly started his professional career with Arthur Andersen in Boston. He worked there for five years (1972 through 1978) and achieved the Certified Public Accountant certificate. He then spent the balance of his career as a chief financial officer for two publicly traded companies, until starting at ETA in August 2009. (Tr. 41.)

As a Financial and Grants Management Specialist with ETA, he is responsible for the oversight of the fiscal team in Region 1 in Boston, and works as a systems accountant with fiscal oversight of two states, including New Jersey. (Tr. 19.) ETA monitors WIA grants at the state level once every three years. Two teams visit the state, one focused on performance matters, the other on fiscal matters. Kelly focusses on the fiscal review of financial activities. He typically starts the monitoring process at the state level and then visits a number of local areas in the state that are sub-recipients of the grant. (Tr. 20.)

Beginning in 2011, he spent a lot of time reviewing the findings in this matter and working with the State to resolve the findings. The parties engaged in an iterative process starting with eleven transactions selected for review. (Tr. 20, 22.) The objective was to determine whether adequate documentation existed to support the transactions. Of the eleven items initially selected, with questioned costs of \$357,000, the parties resolved all but six items, two relating to Zelenkofske Axelrod (ZA) and the remaining four items involving TransNet. (Tr. 20, 22.) Kelly did all the follow up. He communicated with New Jersey about the monitoring report through email and telephone calls. Once, he traveled to the State to meet with them. (Tr. 21.) New Jersey had an opportunity to submit additional documentation in response to the monitoring report and ETA considered all of the additional documentation. (Tr. 22.)

ETA looked at whether the costs charged to the grant were necessary, reasonable, and allocable. To determine whether a cost is "reasonable," ETA applies a prudent person theory, asking whether a person in similar circumstances would find the cost reasonable. A “necessary”

expenditure is essential to the achievement of the programmatic and/or the administrative requirements of the grant. ETA determines if the expense is "properly allocated" by measuring the relative benefit received by a particular grant from a particular expenditure. (Tr. 23.) ETA ultimately disallowed two sub-contractors, or sub-grantees, who received funds, ZA and TransNet Corporation. (Tr. 23.)

TransNet received approximately \$87,700 in grant money. New Jersey provided several documents to substantiate the expenditures, including a copy of the contract between the State and TransNet and a copy of the original request for proposal related to that contract. ETA received a variety of invoices from the State showing that TransNet incurred costs and invoiced them to the Newark WIB. The then-Financial Director of the WIB explained the methodology he used to allocate the costs to the Workforce Investment Act grant. (Tr. 24.) However, the documentation did not demonstrate that the expenditures were reasonable and necessary. ETA could not connect the costs invoiced by TransNet to the WIA grant. A fundamental part of the service or product provided by TransNet was a software program identified as Trans-soft, which was supposed to monitor the progress of the program participants. (Tr. 24.) However, New Jersey provided nothing to document that TransNet, in fact, sold this Trans-soft software package to the Newark WIB, nor to document what Trans-soft was meant to do, its utility, or its ultimate benefit to the WIA grant. (Tr. 25.) Kelly testified that Newark WIB needed to provide more than just an invoice that charged \$150,000 for Trans-soft. He needed documentation that described Trans-soft's purpose, enabling him to review the allocation methodology used to allocate costs to the WIA grant. (Tr. 25.)

Kelly reviewed the invoices related to the TransNet contract that the State provided. (Tr. 48.) He could not tie the detail on the invoices to the WIA grant. He could not make any connection to any of the activities that would have affected WIA. (Tr. 50.) AF, p. 802 shows an invoice Newark submitted for TransNet costs. The invoice is for "Maintenance integrated hardware software solution." Kelly does not know what that means. (Tr. 69, AF, p. 802.) He could not determine, from the invoice, whether this expenditure was necessary for grant purposes. (Tr. 70.) AF, p. 808 is an invoice for TransNet for "Quantity of one network implementation, monthly web maintenance contract, November 2007 for Moet 27.70 hours, line number 115, LAN admin cost (\$135 per hour), New Jersey State Contract A81194, Invoice No. 272090." Kelly could not ascertain from that invoice whether the expenditure was necessary for WIA grant purposes. (Tr. 70, AF, p. 808.) New Jersey submitted a copy of the TransNet contract and the request for proposal but neither document provided any specificity as to the cost allocated or incurred for WIA at Newark WIB. (Tr. 70.) AF, p. 809 is an invoice with the description "network implementation, Trans-soft customization" dated October 2007. However, Newark did not provide documentation explaining what Trans-soft is. Kelly could not determine whether the expenditure benefitted the WIA grant. (Tr. 71, AF, p. 809.)

ZA received approximately \$55,000.00 in disallowed costs. (Tr. 26.) The costs presented two issues: a lack of methodology explaining the allocation of the costs and documentation that did not establish the benefit of the services provided by ZA to WIA. (Tr. 57.) To substantiate the expenditures, the State offered various minutes of the WIB Board of Directors meetings indicating a need to procure accounting services to facilitate a transition in the financial management of the WIB at the time. The State provided invoices from ZA for a

variety of services provided to the WIB. ETA did not receive any allocation methodology, other than a handwritten note on one of the invoices that said, "allocate \$50,000 to WIA Adult," which is a sub-part of the WIA program. (Tr. 26.) The initial determination made by the New Jersey Department of Labor and Workforce Development ("DLWD") referenced several invoices received from and payments made to ZA. Ultimately, DLWD disallowed \$55,000.00, an amount significantly less than the two invoices that ETA initially selected for documentation to be established. The State received credit for a large portion of the expenditures to ZA, but there was no documentation that allowed ETA to establish the relative benefit received by WIA from the disallowed \$55,000.00, nor was there any methodology provided that would have established an allocation process. The State initially determined that DLWD had not adequately documented the expenditure, and ETA agreed. (Tr. 27.)

New Jersey later reduced that finding to \$4,000, without submitting documentation supporting this reduction. (Tr. 28.) New Jersey did submit documentation including Board resolutions expressing the need to hire an accounting firm, as well as invoices charged to the Newark WIB. The invoices were typical professional invoices and not overly descriptive. ETA needed documentation that would establish the relative benefit received by the Workforce Investment Act grant from this expenditure. New Jersey did not submit any information showing that these expenditures were allocable to WIA grant. (Tr. 29.) The only document related to allocation was a handwritten notation on an invoice that said, "Allocate \$50,000 to WIA Adult," which refers to one of the sub-grants. (Tr. 30.)

Kelly referenced the final determination issued by DLWD to the Newark WIB, dated August 20, 2010. (Tr. 31, AF, p. 611.) "Findings 2 and 11" involved ZA. The final determination reads, "However, LWD's internal audit continues to question the funding source to which payments were charged. Newark must prepare a schedule showing where all payments to the consultant were charged. A reallocation of such charges may be necessary unless Newark can provide justification for the existing allocation." (Tr. 31, AF, p. 611.) Kelly explained that the internal audit staff at DLWD could not determine which funding source (the WIA federal grant or one of the State grants) they should charge for the invoices submitted by ZA. They asked the Newark WIB to prepare a schedule indicating where all of the payments to the consultant were charged, and told the Newark WIB that they might need to reallocate such charges unless the Newark WIB could provide justification for the existing allocations. Kelly never saw a justification for the allocations. He could not explain why the State ultimately found the expenditures allowable. (Tr. 32.)

Normally, a cost allocation plan is established at the beginning of the grant for the funding period that determines the various activities of the organization. It would describe which activities the WIA federal grant funds and which activities other sources fund. (Tr. 32.) This cost allocation plan would generally describe the types of expenditures expected over the course of executing the requirements of the grant and how those costs would be allocated. For example, typically, the plan would allocate rent costs by the square footage of the various departments that occupy space within the building or the office. Other costs may be allocated based on participants. Kelly did not receive a cost allocation plan or other documentation explaining the allocation of the ZA costs. (Tr. 33.)

ETA issues grants under WIA to the State. The State is the primary recipient of the grant. The State, in turn, allocates the money to nineteen local areas, or sub-grantees (allowing the State to take into account the diverse needs of its different localities). (Tr. 34.) The primary recipient, however, is the State of New Jersey Labor and Workforce Development. Once ETA executes its fiduciary responsibilities by conducting monitoring every three years, ETA considers it the responsibility of the primary grantee, the State, to resolve those findings referenced in the monitoring report. (Tr. 35.) It is the State's responsibility to resolve the findings at the local areas, and here, the State issued a final determination to the Newark WIB based on its review of the matter. (Tr. 35, AF, p. 611.) In turn, the State shares the final determination with ETA to explain what they found. (Tr. 36.)

When ETA visits a local area, they typically spend four days on site conducting a review. The reviewers use a core-monitoring guide to set the scope of review. They start with the quarterly financial reports that the State submits to ETA. The grants to the nineteen separate reporting areas are consolidated into one report and forwarded to ETA. (Tr. 36.) The reviewers select a particular quarter ending and walk back all the way from that report through the accounting records of the state and the local areas. They then make a random selection of various transactions and request the State to pull documentation for those requests. ETA does a sampling because they have limited time; therefore, ETA conducts only a monitoring review, not a full audit. Separate audits are conducted at the state level. (Tr. 37.)

When ETA formally issues the monitoring report under the signature of the regional administrator to the commissioner of the NJ LWD, the commissioner has time—generally thirty days—to provide a formal response. ETA hopes that the responses and the supporting documentation adequately resolve the findings. ETA then writes a determination in response stating whether the parties have reached a resolution. It is an iterative process which, in this case, continued from 2010 up to the point where the Grant Officer made a final determination disallowing the costs. (Tr. 39.)

Kelly monitors two states, New Jersey and Vermont. Lourdes Rivera, not Kelly, originally reviewed this case. He does not know why ETA picked Newark and Middlesex County for the review because he did not have input into the selection or the monitoring review at the time. (Tr. 42.) ETA uses any number of criteria to determine which WIBs to review. Kelly did not work for ETA at the time in 2009 when ETA made these decisions, but typically it considers a number of criteria in selecting a WIB for review. (Tr. 60.) For instance, in deciding which transactions to select, one factor weighed by the federal project officer would be geographic dispersion. Size of the grant also enters into the selection criterion, but is not a singular criterion in and of itself. (Tr. 64.) Kelly joined ETA in August 2009 and the review took place in August and September of 2009. Lourdes Rivera, an accountant who now reports to Kelly, reviewed the matter at the time. (Tr. 61.) Kelly's only experience monitoring the State of New Jersey occurred at the state level, at Essex WIB, at Atlantic/Cape May, and by reviewing and becoming engaged in the 2009 monitoring report for Middlesex and Newark. (Tr. 43.)

The allowable cost principles are codified at 2 C.F.R. Part 225. (Tr. 72.) There are ten cost standards, including the requirements that costs are necessary, reasonable, allocable, adequately supported with documentation, and consistently applied, in accordance with GAAP. (Tr. 51.) Reasonableness is defined as what a prudent person would consider reasonable. The necessary standard refers to the cost as essential to the program and the administration thereof. (Tr. 52.) The regulations codified at 2 C.F.R. § 225 do not prescribe the details of the cost allocation plan. It can be whatever the grantee feels is appropriate. 2 C.F.R. § 225 does permit direct allocation. (Tr. 43.)

The requirement for a “Circular A-133” audit, or an independent audit, depends on the expenditure of federal funds. At that time, any entity that expended more than \$500,000 of federal funds in a year had to undergo an A-133 audit. (Tr. 57.) Kelly did not know the amount of WIA’s award. He did not know the amount of funds awarded to the Newark WIB by the State of New Jersey back in 2009. The State of New Jersey issued a sub-grant that awarded funds under WIA to the Newark WIB. (Tr. 59.) The U.S. Department of Labor ETA awards the WIA grant to the state, in this case, the New Jersey Department of Labor and Workforce Development. The State then reallocates the majority of the award to local areas. (Tr. 62.) The local areas are designed to represent the workforce in a particular geographic area. Nineteen organized local areas exist at the county level within the State of New Jersey. Within each local area, One-Stop service areas (now called American Job Centers) allow individuals to receive a variety of services, such as unemployment insurance or training under WIA. (Tr. 63.)

Kelly met with Mr. Calamia in Trenton, New Jersey. He did not go to Newark to investigate. Instead, he reviewed documentation exchanged over the last five years. (Tr. 47.) There was no reason to go to Newark to review the documentation. The monitoring review is a report that follows a monitoring visit. The reviewers on site make determinations whether there were findings. (Tr. 47.) The findings contain a number of elements. They include a citation to the federal regulation identifying the source of the issue. ETA describes the circumstance they found. ETA will discuss the cause if ETA can identify the cause. Finally, the finding describes the required action. (Tr. 66.) In the required action, ETA describes as explicitly as possible what actions the grantee needs to take in order to resolve the finding. (Tr. 66.)

II. FACTUAL BACKGROUND

A. Initial Determination

ETA began its review in August or September 2009. (Tr. 61; AF Exhibit B.) As explained by Mr. Kelly, ETA selected eleven transactions to review. (Tr. 20, 22.) Of the eleven selected transactions, the parties were unable to resolve six: two involving payments to ZA, an accounting firm, and four involving payments to TransNet, a computer company. (*Id.*) On April 14, 2014, ETA sent out its Initial Determination, which stated that there was a balance of \$143,186 in questioned costs remaining after the Consolidated Compliance Review. (AF Exhibit A, p. 13.) ETA identified violations of 29 C.F.R. §§ 97.20(a), (a)(2), (b)(2) and (b)(6). (AF Exhibit A, p. 16.) Thus began the iterative process in which representatives from ETA and the State worked to resolve the findings. The State submitted documentation to ETA; these documents appear in the Administrative File offered into evidence in this case. In addition to

reviewing documentation from the State, Kelly traveled to Trenton, New Jersey to meet with Mr. Calamia and review documents on-site. (Tr. 21, 47.)

B. Final Determination

On July 7, 2014, ETA issued its Final Determination letter. In that letter, ETA found that NJ DLWD owed \$143,186 to the U.S. Department of Labor and advised DLWD of its right to a hearing before the Office of Administrative Law Judges. (AF, Exhibit A, p. 8.) Although the State had resolved certain of the TransNet and ZA expenditures to its satisfaction, ETA disagreed. Kelly testified that he did not understand why the State determined the findings were resolved. (Tr. 32.)

The State disagreed with the Final Determination and asked for a hearing before the Office of Administrative Law Judges.

III. LEGAL BACKGROUND

A. Statutory and Regulatory Basis

Under the authority of Title I of the Workforce Investment Act of 1998 (the “Act”) and its implementing regulations (20 C.F.R. Part 660 to 671), the Department of Labor’s Employment and Training Administration provides funds to eligible recipients. The use of funds by entities that are awarded grants are restricted and grantees must comply with uniform fiscal and administrative requirements for grants, including cost principles and audit requirements, as explained in OMB Circulars and Departmental regulations. 20 C.F.R. §667.200(a), (b), (c). A grant recipient is required to produce periodic financial reports and to continuously monitor grant-supported activities. 20 C.F.R. §§ 667.300, 667.400. The regulations also set forth procedures for the conduct of audits and investigations (citing OMB Circular A-133), as well as for the imposition of sanctions or corrective action. 20 C.F.R. §§ 667.500 to 667.510, 667.700 to 667.740. See also 29 C.F.R. Parts 96 and 99. Hearings before the Office of Administrative Law Judges are conducted under 20 C.F.R. §§ 667.800 to 667.860.

B. OMB Circular A-133

The WIA regulations look to OMB Circular A-133 for audit and investigation procedures. The Circular “sets forth standards for obtaining consistency and uniformity among Federal agencies for the audit of States, local governments, and non-profit organizations expending Federal awards.” OMB Circular A-133.

C. Burdens of Proof

In determining whether to sustain the Grant Officer's findings that certain expenditures were not allowable under the WIA, the burden-shifting framework provided at 20 C.F.R. § 667.810(e) applies. Section 667.810(e) states:

The Grant Officer has the burden of production to support her or his decision. To this end, the Grant Officer prepares and files an administrative file in support of the decision which must be made part of the record. Thereafter, the party or parties seeking to overturn the Grant Officer's decision has the burden of persuasion.

See Westchester-Putnam Counties Consortium for Worker Education and Training, Inc. v. United States Department of Labor, ARB No. 10-081 (ARB October 18, 2010). "This requires evidence sufficient for a reasonable person to conclude that the Federal grant funds were spent unlawfully. If the recipient's records are inadequate to show that the Federal grant funds were spent lawfully, the Grant Officer may meet his burden by establishing the inadequacy of the records." Id. (citations omitted).

IV. DISCUSSION

A. The Grant Officer Has Met His Burden of Production

In this matter, ETA does not allege that NJ DLWD spent Federal grant funds unlawfully. Rather, the Grant Officer found the NJ DLWD's records were inadequate as they did not meet generally accepted accounting principles. Kelly testified that ETA looked for documents that would show that the expenditures charged to the grant were necessary, reasonable, and allocable. (Tr. 23.) The Administrative File establishes that there was significant back and forth between the parties as ETA sought documents that could establish how the expenditures for ZA and TransNet related to the grant. Unfortunately, a thorough review of the documents submitted does not reveal sufficient information to determine that the expenditures were necessary, reasonable, and allocable.

1. ZA Charges

Zelenkofske Axelrod (ZA) is an accounting firm that contracted with Newark WIB to provide certain accounting consultation services. Apparently, ZA's relationship with the Newark WIB began in late 2007 when it presented a proposal to assist Newark Works in reconciling its financial records and determining available funding (Phase I). Phase II would assist Newark Works in identifying and resolving potential disallowed costs, while Phase III would assist in strengthening internal controls and developing written policies and procedures to deal with the issues that created the financial imbalances. See Letter dated December 17, 2007 to Stefan Pryor, Deputy Mayor, City of Newark from Zelenkofske Axelrod (AF, p. 173). ZA prepared a statement defining the scope of services as "to provide technical accounting assistance and related services to ensure Newark WORKS is in compliance with the [WIA] guidelines..." and also to comply with State of NJ guidelines for TANF, Workforce Learning Link, and FS/GA,

including the preparation and filing of monthly financial statement reports with the State of New Jersey. (AF, pp. 181, 379.)

For the grant period under review here, ZA received approximately \$55,000.00 in disallowed costs. (Tr. 26.) According to Kelly, ETA had two concerns with the ZA costs. First, the documentation did not explain the allocation of the costs. Secondly, the documentation provided did not establish the benefit of the services provided by ZA to WIA. (Tr. 57.) The only documentation addressing allocation was a handwritten⁴ note on one of the invoices from ZA directing an allocation of \$50,000 to WIA Adult (a sub-part of the WIA program). (Tr. 30.) ETA credited the State for many of their payments to ZA, but DLWD provided no documents that would allow ETA to establish the relative benefit received by WIA from the disallowed \$55,000.00, nor did it provide any methodology that would have established an allocation process. In fact, ETA agreed with the State's initial determination that DLWD had not adequately documented the expenditures. (Tr. 27.) The State later reduced its finding to only \$4,000 of inadequately documented expenditures; however, the State did not provide ETA with any documentation supporting this reduction. (Tr. 28.) Kelly testified that although the State submitted a variety of documents, including minutes and resolutions made by the Board reflecting a need to hire an accounting firm, as well as non-descript invoices charged to WIB, ETA needed documentation that would establish the relative benefit received by the Workforce Investment Act grant from this expenditure. For example, some of the items described in these documents include "resource allocation," "network allocation," and "trainsoft⁵ implementation." (AF at 802-814.) This information did not show that these expenditures were allocable to the WIA grant. (Tr. 28-29; See also AF, p. 611.) "LWD's internal audit continues to question the funding source to which payments were charged. Newark must prepare a schedule showing where all payments to the consultant were charged. A reallocation of such charges may be necessary unless Newark can provide justification for the existing allocation." (Tr. 31, AF, p. 611.) According to Kelly, DLWD's internal audit staff could not determine which funding source (the WIA federal grant or one of the State grants) to charge for the invoices submitted by ZA. They asked the Newark WIB to prepare a schedule indicating where all of the payments to the consultant were charged, and told the Newark WIB that they might need to reallocate such charges unless the Newark WIB could provide justification for the existing allocations. Kelly never saw a justification for the allocations. He could not explain why the State ultimately found the expenditures allowable. (Tr. 31-32.)

According to Kelly, grantees should establish a cost allocation plan at the beginning of the funding period, describing which activities the WIA federal grant funds and which activities other sources fund. (Tr. 32.) The plan should generally describe the types of expenditures expected and the allocation of those expenditures. NJ DLWD did not provide a cost allocation plan or other documentation explaining the allocation of the ZA costs. (Tr. 33.) The Administrative File does not include a cost allocation plan.

⁴ The author of the handwritten note is unidentified.

⁵ The record does not clarify whether "trainsoft" is the same as the "trans-soft" software; in which case this charge is probably more relevant to the TransNet expenditures than the ZA expenditures.

NJ DWLD presented a letter showing that, at least in July 2008, it planned to pay ZA with WIB administration funds from the 2008-2009 allocations. See Letter dated July 14, 2008 from Rodney Brutton, Executive Director, Newark WIB to Mary Puryear, Chairperson, Newark WIB (AF, p. 152). The Administrative File includes other documents that show discussions about the ZA proposal and authorizations to proceed with Phase II. (AF, pp. 154, 157-159, 176, 179, 182.) The relationship with ZA terminated on December 31, 2009. (AF, p. 165.) At a WIB Executive Committee Meeting, the finance committee reported that the bills from ZA exceeded the contract amount by \$70,000. The Executive Committee approved a motion to authorize additional funding (not to exceed an additional \$80,000). See Executive Committee Meeting Minutes April 23, 2010 (AF, p. 170.)

NJ DLWD produced two checks to ZA. Check #1018 dated May 27, 2009 paid ZA \$74,147.04 for accounting services provided to the Newark One-Stop, as documented by invoices #09-076, 09-210, and 09-211. (AF, p. 709.) ETA found no valid contract and a lack of information to demonstrate that costs meet the applicable cost principles. Check #166367 dated December 1, 2008 paid ZA \$126,671.08 for invoices #08-0508, 08-0364, and 08-0359. (AF, p. 719-20.) ETA found no valid contract and a lack of information to demonstrate that costs met the applicable cost principles.

NJ DLWD also produced several invoices from ZA.

- Invoice on Newark One-Stop Career Center letterhead listing Workforce Investment Board as Vendor for “2009 WIB Conference, Consultant Services 2009 WIB Conference → \$3,677.00 Consultant Services; First Source Solutions → \$33,248.00 – ZA → 74,147.04” with additional note “Payment for 2009 WIB Conference & Consultant Services” with a total amount due of \$112,000. (AF, p. 715.)
- Invoice #09-076 dated January 31, 2009 for professional services rendered by Mark Morgan at an hourly rate of \$295/hour and Corey Troutman at an hourly rate of \$195/hour, as well as \$498.84 in out-of-pocket expenses, with a total amount due of \$25,883.84. (AF, p. 716.)
- Invoice #09-210 dated April 16, 2009 for professional services rendered by Mark Morgan (36 hours-March FSR; 1 hour-Answer State Questions; 1 hour-Drawdowns; and 4.5 hours- Reconcile Suspense & Labor Distribution Results) at same hourly rate and by Corey Troutman (6 hours-March FSR and 3 hours-Labor Distribution Results) at same hourly rate with a total amount due of \$14,218.75. (AF, p. 717.)
- Invoice #09-211 dated March 31, 2009 for professional services rendered by Mark Morgan (35 hours-February FSR; 18 hours-Meetings with State; 6 hours-Meeting with City; 3 hours-Meeting with Arcellio; 5.25 hours-Drawdowns; 2.25 hours-Reconcile Suspense & Payroll FICA; 2.5 hours-Answer Questions; 1 hour-Liquidation of Obligations; 4 hours-TANF Transfers; 1 hour-Arcellio E-Mail Response) at same hourly rate and by

Corey Troutman (50 hours-February FSR and 3.5 hours-Answer State Questions) at same hourly rate with a total amount due of \$34,044.45. (AF, p. 718.)

- Invoice #08-0359 dated July 31, 2008 for professional services rendered by Briana Ellis (42 hours at \$75/hour); Christine Almonrode (58.5 hours at \$85/hour); Corey Troutman (46 hours at \$195/hour); Shana Weinzierl (44 hours at \$150/hour); Sophia Vitoroulis (26 hours at \$115/hour); Mark Morgan (67 hours at \$295/hour); and Donna 33.5 hours at \$295/hour) “related to Phase I (reconciliation of financial information to city and state and preparation of June 30, 2008 report to state)” with a total amount due of \$61,773.41.⁶ (AF, p. 721.)
- Invoice #08-0364 dated August 31, 2008 for professional services rendered by Mark Morgan (123.75 hours at \$295/hour); Ed Zack (20 hours at \$195/hour); and Corey Troutman (38 hours at \$195/hour) with a discount of \$8,316.25 and out-of-pocket expenses of \$208.05 (Troutman) and \$1,464.49 (Morgan) “related to Phase II of contract” with a total amount due of \$41,172.54. (AF, p. 722.)
- Invoice #08-0508 dated October 31, 2008 for professional services rendered by Mark Morgan (56 hours at \$295/hour) and Corey Troutman (34 hours at \$195/hour) with out-of-pocket expenses of \$575.13 “related to reporting to state and related meetings” with a total amount due of \$23,725.13.⁷ (AF, p. 723.)

The documentation in the Administrative File (letters, board meeting minutes, checks and invoices) do not establish the allocation plan for the funds paid to ZA or explain the connection between the services provided by ZA and the grant. The most detailed documents in the record that explain the services rendered by ZA to DLWD appear in Invoice #09-210 and Invoice #09-211. (AF, p. 717-18.) These invoices reflect not only the hourly rates of the individuals consulted, but they also break down how they spent their hours, whether they met with the State or City, answered questions, worked on the FSR for the month, or engaged in some other task. Although the invoices provide some semblance of detail of ZA’s responsibilities as agreed upon, they still do not shed any light on how its services were reasonable or necessary for proper and efficient performance and administration of the WIA grant, nor did they show how the funds were allocated. Therefore, ETA has met its burden to show that NJ DLWD’s records for these expenditures were inadequate to show that the ZA expenditures were necessary, reasonable, and allocable.

⁶ This invoice includes a handwritten note “Chg 50,000 to Adult, Bal 11,773.41 to TANFA” signed by Harry Nelson and dated November 17, 2008.

⁷ This invoice includes the handwritten note “Charge to TANF” with no further information about who wrote the note.

2. TransNet

In this instance, the evidence of record adequately described allocation⁸, but did not adequately justify the expenditures as reasonable and necessary. TransNet received approximately \$87,700 in grant money. Kelly testified that the documentation did not demonstrate that the expenditures were reasonable and necessary. ETA could not connect the costs invoiced by TransNet to the WIA grant. He testified that TransNet supposedly supplied a software program identified as Trans-soft, intended to monitor the progress of the program participants. (Tr. 24.) However, Kelly testified that the provided documents did not show that TransNet sold the Trans-soft software package to the Newark WIB, did not explain what Trans-soft was meant to do, its utility, or its ultimate benefit to the WIA grant. (Tr. 25.) Kelly needed a description of Trans-soft so that he could review the allocation methodology used to allocate costs to the WIA grant. (Tr. 25.)

Kelly reviewed the invoices related to the TransNet contract that the State provided. (Tr. 48.) He could not tie the detail on the invoices to the WIA grant. He could not make any connection to any of the activities that would have affected WIA or whether the documents were reasonable or necessary for grant purposes. (Tr. 50, 69-70; See also AF, p. 802 (TransNet invoice for "maintenance integrated hardware software solution")). Another TransNet invoice describes "Quantity of one network implementation, monthly web maintenance contract, November 2007 for Moet 27.70 hours, line number 115, LAN admin cost (\$135 per hour), New Jersey State Contract A81194, Invoice No. 272090." (AF, p. 808.) An invoice with the description "network implementation, Trans-soft customization" dated October 2007 does not explain what Trans-Soft is, according to Kelly. (AF, p. 809.) Kelly could not determine whether the expenditure benefitted the WIA grant. (Tr. 71.) Indeed, Kelly testified that the TransNet contract and request for proposal provide no specificity as to the cost allocated or incurred for WIA at Newark WIB. (Tr. 70.) Based on his testimony, such technical descriptors did not sufficiently explain Trans-soft's function, role, or the value it added to the grant.

The State appears to argue that ETA rejected the TransNet costs because the authorization to contract with TransNet lies within a larger, statewide contract, which they provided to ETA. See Memo, undated, author unidentified, captioned "Ref: Agreement between TransNet and Newark WORKS."

I have been informed that during the period that TransNet Corp. provided the service in question, Newark WORKS, then MOET (Mayor's Office of Economic & Training), was an integrant part of the City of Newark. As such, work performed by TransNet for Newark WORKS was covered under the City of Newark contract – NJ State Contract A81194. The contract is attached in a separate file.

⁸ According to Kelly, New Jersey provided several documents to substantiate the expenditures, including a copy of the contract between the State and TransNet and a copy of the original request for proposal related to that contract. The State provided invoices showing that TransNet incurred costs and invoiced them to the Newark WIB. The then-Financial Director of the WIB explained the methodology he used to allocate the costs to the Workforce Investment Act grant. (Tr. 24.)

(AF, p. 188.)

The State describes this arrangement as “piggybacking,” where municipalities throughout the State operate under contracts agreed to by the State. NJ DLWD Br. at 4. While the State may function through this arrangement, it does not change Kelly’s unrebutted testimony that when he reviewed the statewide TransNet contract and the request for proposal, he could not determine the specific costs allocated or incurred for WIA at Newark WIB. (Tr. 70.)

Therefore, ETA has met its burden of production by showing that the documents the State submitted were insufficiently detailed to determine whether the TransNet expenditures were reasonable or necessary for implementation of the grant.

B. NJ has not met its burden of persuasion

As discussed *supra*, once ETA meets its burden of production, the party or parties seeking to overturn the Grant Officer’s decision has the burden of persuasion to show that the costs it incurred were reasonable and necessary to the grant. Westchester-Putnam Counties Consortium, ARB No. 10-081 (ARB October 18, 2010). See also 20 C.F.R. § 627.802(e). “Overcoming a prima facie case requires the grantee to present cogent evidence and argument on how it has either met the specific requirements imposed by the [grantor] or otherwise compensated for any deficiencies.” Fla. Agency for Workforce Innovation v. United States Dep’t of Labor, 176 Fed. Appx. 85 *, 2006 U.S. App. LEXIS 10166 (11th Cir. 2006)(unpublished) (citing In re Massachusetts, ARB Nos. 02-211, 02-201, 2002 WL 1482177, at *7 n.7 (Dep’t of Labor June 13, 2002)). Here the State presented no additional evidence other than that contained in the Administrative File compiled by ETA and presented no witnesses in its defense. Kelly’s testimony stands unrebutted.

In argument, the State relies on 29 CFR § 97.20(a)(2), which requires that fiscal control and accounting procedures of the State be sufficient to “permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.” Tautologically, the State argues that as DOL managed to identify two specific items of costs, it was able to trace the costs to the WIA grant. The State then argues that they did not violate §97.20(a)(2) because ETA did not show that the funds were used in violation of a statute. However, the regulation does not limit ETA to proving that the State used the funds in violation of a statute. The regulation also requires the State to maintain its documents in such a level of detail that DOL can trace exactly how the State used the funds.⁹ As discussed above, the documents DLWD submitted to DOL do not show that the expenditures directly related to the WIA grant or that the State spent the funds so that they benefitted the grant. The documents do not establish that the consultant services supplied by ZA had anything to do with the WIA grant, or establish that the computer products and services provided by TransNet benefitted the grant in any way.

⁹ See 29 CFR § 97.20(b)(2): Accounting records. Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities.

20 CFR § 97.20(b)(2) requires financial management systems of grantees and subgrantees to maintain accounting records which adequately identify the source and application of funds. The State points out that DLWD supplied 829 pages of documentation. However, quantity of documents does not substitute for quality or relevance. None of the 829 pages of documents show how the State allocated the ZA expenses or explained why the TransNet costs were necessary or reasonable. The State further argues that 29 CFR § 97.20(b)(6) requires that accounting records be supported by such source documentation as cancelled checks, paid bills, and payrolls and that DLWD provided sufficient source documentation, including letters from then-Executive Director of Newark WIB, addressing procurement of services from ZA, and minutes of Newark WIB meetings addressing procurement of services from ZA and resolutions of City of Newark allowing use of TransNet as a vendor. Kelly's testimony that these source documents lacked the specificity necessary for ETA to determine whether the expenditures were allocable, reasonable and necessary, however, stands unrebutted.

Finally, the State argues that WIA statute 29 USC § 2864(d)(4)(E) provides that where funds allocated to a local area are limited, "priority shall be given to recipients of public assistance." Newark WIB received funding from DLWD for two major programs – WIA and Workfirst. Workfirst served Temporary Assistance for Needy Families ("TANF") and General Assistance ("GA") recipients (*i.e.*, people receiving public assistance). The State avers that the Workfirst population is the same population receiving services under WIA, and then leaps to the conclusion that the questioned costs would have been allowed under the WIA statute. The logical gymnastics to support this conclusory assertion are difficult to follow. The State contends that the network costs incurred by WIB were for the purpose of developing and maintaining a computer system that allowed the WIB to track the status of its clients served. Again, the State fails to explain how such a computer system serves the ends of the grant beyond the generalized notion that it helps serve its clients. The undersigned is hard put to find a connection between the statutory priority of providing funds to recipients of public assistance and the failure of the State to document how payments to ZA and TransNet related to the grant.

V. CONCLUSION

ETA has met its burden of production and the State has failed to meet its burden of persuasion. The Administrator's findings that \$87,770 in expenditures to TransNet and \$55,416 in expenditures to Zelenkofske Axelrod are disallowed.

VI. ORDER

The Grant Officer's determination to disallow the expenditures to Zelenkofske Axelrod and TransNet is AFFIRMED. Accordingly, it is ORDERED that the State of New Jersey shall repay from funds other than funds received under its grant the sum of \$143,186 to the United States Department of Labor.

SO ORDERED.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file exceptions (“Exception”) with the Administrative Review Board (“Board”) within twenty (20) days of the date of issuance of the administrative law judge’s decision. *See* 20 C.F.R. § 667.830. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the exceptions with the Board, together with one copy of this decision. If you e-File your exceptions, only one copy need be uploaded.

Your Exception must specifically identify the procedure, fact, law, or policy to which exception is taken. You waive any exceptions that are not specifically stated. Any request for an extension of time to file the Exception must be filed with the Board, and copies served simultaneously on

all other parties, no later than three (3) days before the Exception is due. *See* 20 C.F.R. § 667.830; Secretary's Order 1-2002, ¶4.c.(42), 67 Fed. Reg. 64272 (2002).

A copy of the Exception must be served on the opposing party. *See* 20 C.F.R. § 667.830(b). Within forty-five (45) days of the date of an Exception by a party, the opposing party may submit a reply to the Exception with the Board. Any request for an extension of time to file a reply to the Exception must be filed with the Board, and a copy served on the other party, no later than three (3) days before the reply is due. *See* 20 C.F.R. § 667.830(b).

If no Exception is timely filed, the administrative law judge's decision becomes the Final Decision and Order of the Secretary of Labor pursuant to 20 C.F.R. § 667.830(b) unless the Board notifies the parties within thirty (30) days of the date of issuance of the administrative law judge's decision that it will review the decision. Even if an Exception is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the filing of the Petition notifying the parties that it has accepted the case for review. *See* 20 C.F.R. § 667.830(b).