

DATE: DEC 15 1994

CASE NO.: 90-JTP-17

In the Matter of

PHOENIX INDIAN CENTER, INC.,
Complainant,

v.

U.S. DEPARTMENT OF LABOR
Respondent.

DECISION AND ORDER

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

Procedural Background

By way of a letter dated March 16, 1990, the Phoenix Indian Center (hereinafter "Phoenix") requested an administrative hearing of a Final Determination of the U.S. Department of Labor (hereinafter "Department"). The Final Determination disallowed \$14,304.00 of costs which the Phoenix Indian Center charged to a JTPA grant for Program Year 1987-1988 (RX-1 at 11). On April 7, 1993, Deputy Chief Administrative Law Judge John M. Vittone issued a Decision and Order which ordered dismissal of the request for hearing and entry of a default judgment on the ground that Phoenix had failed to participate in the proceeding. Following a motion by Phoenix, on July 21, 1993, the Secretary of Labor remanded this matter back to the Office of Administrative Law Judges with specific instructions to address whether (1) an Order to Show Cause issued November 24, 1992, was sent to a former address and was not received by Phoenix; (2) Phoenix did not receive notice of the entry of default dated April 7, 1993, until May, 1993; (3) the Department was aware of Phoenix's change of address prior to its last move; and (4) other pertinent matters of fact and law.

'The following abbreviations will be used:

Tr. = Hearing transcript
cx = Complainant's exhibit
RX = Respondent's exhibit
CB = Complainant's brief
RB = Respondent's brief

After this matter was assigned to the undersigned, the undersigned held a hearing on October 12, 1994, in Phoenix, Arizona. At this hearing Complainant's Exhibits 1-3 and Respondent's Exhibits 1-2 were admitted into evidence (Tr. at 8-10). At the hearing counsel for the parties described the issues at hand. The undersigned did not instruct the parties to submit briefs. However, upon reviewing the evidence it was clear that counsel for the parties had incorrectly framed one of the issues. The Department's print shop disallowance was not based on the view that the print shop generated a net income during the Program Year 1987-1988. At the hearing, counsel for Phoenix asked for the opportunity to submit additional arguments if the undersigned found the print shop issue to be different than was described at the hearing. Therefore, on November 22, 1994, the undersigned issued an Order Allowing the Parties to Submit Briefs on the issue of the print shop disallowance, if so desired. Phoenix submitted a brief which was received December 7, 1994. The Department submitted a brief which was received December 12, 1994.

Stipulations

At the hearing, counsel for Phoenix and the Department entered into the following stipulations:

1. The Order to Show Cause issued on November 24, 1992, was sent to a former address and was not received by Phoenix.
2. Phoenix did not receive notice of the entry of default dated April 7, 1993, until May of 1993.
3. The Department was aware of Phoenix's change of address prior to its last move.

The undersigned accepts these stipulations into evidence and they are therefore binding on Phoenix and the Department, 29 C.F.R. § 18.51 (1994).

As indicated above, at the hearing counsel for Phoenix and the Department characterized the issue of the print shop disallowance as turning on whether the print shop generated a net income during the Program Year 1987-1988 (Tr. at 11-19, 63-71). Phoenix might contend that there is a stipulation that the print shop disallowance is only appropriate if the print shop generated a net income during this program year. However, the regulations provide for stipulations of fact, not law. 29 C.F.R. § 18.51 (1994). Further, stipulations must be received into evidence to be binding. Id. Because the Department's print shop disallowance was not based on the view that the print shop generated a net income during the Program Year 1987-1988 (as explained in the Order of November 22, 1994), the undersigned declines to accept into evidence the possible stipulation that the print shop issue turns on whether the print shop generated a net income during the Program Year 1987-

1988.

Issues

Based on the parties' statements at the hearing and a review of the evidence, the undersigned finds it necessary to resolve the following issues:

1. Whether the amount of \$6,229.00 should be disallowed as a partial gross income offset to the \$13,545.00 of print shop operating costs which Phoenix charged to its JTPA grant.

2. Whether the amount of \$8,075.00 which Phoenix charged to its JTPA grant for consultant work performed by John A. Chapman during Program Year 1987-1988 should be disallowed.

Summary of Evidence

Complainant's Exhibit 1 consists of a portion of a report of an independent audit of the Phoenix Indian Center for the year commencing July 1, 1987, and ending June 30, 1988. Ed Contreras, Certified Public Accountant, prepared this report, which is dated September 28, 1990. The portions of the report in evidence include Ed Contreras' statement of his methods and an apparently comprehensive table showing support, revenue, expenditures, and fund balances. Complainant's Exhibit 2 consists of a series of documents entitled (1) JTPA APPLICATION FOR INTAKE ELIGIBILITY/ENROLLMENT and (2) JTPA EMPLOYMENT SERVICES EMPLOYABILITY DEVELOPMENT PLAN. Complainant's Exhibit 3 consists of a Phoenix Indian Center form with "SO" designated as a training activity. The sheet indicates various participant names and contains information as to the training site, type of training, and dates of training.

Respondent's Exhibit 1 consists of the Department of Labor's administrative file (Tr. at 9). As stated in the index to the administrative file, the file contains photocopies of regulations, the grant agreement and its modifications, an audit report dated November 10, 1988, and documents generated as part of the Department's initial and final determinations (RX-1). Respondent's Exhibit 2 consists of various memoranda and records which Phoenix sent to the Department prior to the hearing. The memoranda were written by personnel at Phoenix by way of explanation of Phoenix's position on disputed issues. Most of the records in Respondent's Exhibit 2 are also found in Complainant's Exhibits.

Findings of Fact and Conclusions of Law

Federal funds are available for obligation to a JTPA grant on the basis of a program year which begins on July 1 of the fiscal year for which the appropriation is made. 29 U.S.C.A. § 1571(a) (1985). After these funds have been obligated, the recipient of a

JTPA grant receives and spends JTPA funds as needed to cover JTPA expenses, through either advances or reimbursement. 41 C.F.R. § 29-70.210-1 (1984).² Thus, a grantee makes a determination as to whether an expense is an allowable JTPA cost at the time the expense arises. The regulations which apply to Native American grantees provide that "[t]o be allowable, a cost must be necessary and reasonable for proper and efficient administration of the grantee's program, be allocable thereto under these principles, and, except as provided herein, not be a general expense required to carry out the overall responsibilities of the grantee." 20 C.F.R. § 632.37(a) (1994). Costs are charged to the JTPA grant as one of four cost categories: administration, training, employment, and other. 20 C.F.R. § 632.38 (1994). Generally, grantees must report "outlays, program income, and other financial information" quarterly and annually by way of Standard Form 269, which is entitled "Financial Status Report." 41 C.F.R. § 29-70.208-2 (1984). The Office of the Inspector General of the U.S. Department of Labor is responsible for arranging and conducting audits of Native American grantees. 20 C.F.R. § 632.33 (1994).

Given this system of JTPA grant expenditures, reporting, and auditing, the general process for determining whether a Native American grantee's allocation of costs to its grant is appropriate, or whether disallowance is necessary, is simple. First, it is necessary to determine how much the grantee has allocated, or charged, to its JTPA grant for the item in question. Then, it is necessary to determine how much the grantee could have properly allocated. If the amount which the grantee charged to its grant exceeds the amount which the grantee could have properly charged, then disallowance is necessary.

A. The Print Shop Disallowance

1. The Amount Charged by Phoenix

Thus, with respect to the Department's proposed print shop disallowance the first question is how much Phoenix charged to its JTPA grant for its print shop costs. The evidence which bears on this question does not conflict. The audit report prepared by Conrad & Associates at the behest of the Department states that Phoenix charged to its JTPA grant the amount of \$13,545.00 as operating costs for the Phoenix print shop for the Program Year 1987-1988 (RX-1 at 23, 31). As this evidence is uncontradicted, the undersigned finds that for Program Year 1987-1988 Phoenix charged the amount of \$13,545.00 to its JTPA grant as operating costs for the Phoenix print shop.

²41 C.F.R. pt. 29-70 is made applicable by 20 C.F.R. § 632.31 (1994).

2. The Print Shop's Actual Costs and Income for Program Year 1987-1988

The next question, how much Phoenix could have properly charged to its JTPA grant for print shop costs, requires more discussion. The first step in answering this question is determining the costs and income which resulted from the print shop during Program Year 1987-1988. The evidence conflicts. As stated in the Order Allowing the Parties to Submit Briefs which the undersigned issued on November 22, 1994, the Department's auditors had the understanding that during Program Year 1987-1988 the print shop had gross operating costs of \$45,150.00 ($\$13,545.00 \div .30$) and a gross income of \$20,763.00 (RX-1 at 31). This amounts to a net deficit of \$24,387.00 ($\$20,763.00 - \$45,150.00$).³ On the other hand, the independent audit report prepared by Ed Contreras, dated September 28, 1990, and in evidence as one of Phoenix's exhibits, shows the total print shop expenditures to be \$32,875.00, and gross print shop income to be \$20,708.00. This report also indicates that there were \$2,010.00 in contributions which supported the print shop and \$3,685.00 in "program income" which supported the print shop. The amount of contributions should not be considered part of the gross print shop income, as it represents gifts rather than earnings. See 20 C.F.R. § 632.4 (1994). It is unclear what the \$3,685.00 designated "program income" under the heading "SUPPORT" represents.

The two audit reports in evidence both have flaws as bases for determining the costs and income which resulted from the print shop during Program Year 1987-1988.

As for the Conrad & Associates report (the Department's report), this report indicates that it is based on an examination of the "JTPA Indian/Native American Program Financial Status Report" which Phoenix prepared and submitted to the Department of Labor (RX-1 p. 26). However, the "JTPA FINANCIAL STATUS REPORT" which was prepared by Phoenix and which accompanies the Conrad & Associates report (RX-1 at 40) contains only general categories of costs. It does not contain a breakdown of costs sufficiently specific to include the print shop. Clearly, Conrad & Associates must have examined documents pertaining to the print shop. Otherwise, Conrad & Associates would not have been able to state its understanding as to the print shop's costs and income as described above. However, there is no indication in the Conrad & Associates report that Conrad & Associates made an effort to determine what the actual costs and income related to the print shop were. It may be that Conrad & Associates accepted the representations of Phoenix as to actual print shop costs and income

³The Order Allowing the Parties to Submit Briefs shows the net deficit as \$24,337.00, which was a mathematical or typographical error.

and simply attempted to determine whether Phoenix's allocation of these given costs to its JTPA grant was appropriate. The "summary" which Conrad & Associates made of Phoenix's Joint Financial Status Report is merely a restatement of the general information contained in that report (RX-1 at 39, 40) and was not "intended to present either the financial results of operations or financial position in conformity with generally accepted accounting principles" (RX-1 at 26). Phoenix's own comptroller, Paul Cervenka, testified at the hearing that Phoenix's records for Program Year 1987-1988 were "not in terribly great shape," and that one of Ed Contreras' tasks was to help update these records (Tr. at 56). Thus, Conrad & Associates had poor records to work with.

As for Ed Contreras' report, this report is sufficiently specific to list categories of support, revenues, and expenditures for the print shop (CX-1). Thus, it is clear that Ed Contreras attempted to determine the print shop's actual costs and income for Program Year 1987-1988. However, as discussed above, it is unclear what the \$3,685.00 designated "program income" under the heading "SUPPORT" represents (CX-1). Further, Ed Contreras' report fails to list any costs for the Four Directions program for Program Year 1987-1988 (CX-1). Testimony at the hearing established that John Chapman worked as a consultant in support of the Four Directions program during Program Year 1987-1988 (Tr. at 20-54). Therefore, the failure of Ed Contreras' report to show any costs under the heading "Four Directions" for Program Year 1987-1988 is a ground for doubting the accuracy of the report.

After considering the evidentiary flaws of both reports, the undersigned finds the Ed Contreras report to be the best evidence of the print shop's costs and income for Program Year 1987-1988. The numerous specific entries under the column heading "Print Shop" of the Ed Contreras schedule show that significant effort was made to obtain an accurate statement of the print shop's costs and revenues. Because the \$3,685.00 designated "program income" falls under the heading "SUPPORT," the undersigned finds that this amount does not refer to print shop earnings during Program Year 1987-1988. However, because this amount is designated "program income" and is under the column heading "Print Shop," it seems probable that this amount represents print shop income from a previous program year(s) which was carried over into Program Year 1987-1988. Assuming this to be true, the \$3,685.00 represents print shop earnings and should be included with the gross print shop income earned in Program Year 1987-1988, See 20 C.F.R. § 632.4 (1994), in determining the print shop's net costs for Program Year 1987-1988. Based on the Ed Contreras report, the undersigned finds that the print shop had a gross income of \$20,708.00 and gross operating costs of \$32,875.00 during Program Year 1987-1988, and that print shop income from a previous year(s) in the amount of \$3,685.00 was used to support the print shop in Program Year 1987-1988. Subtracting costs from earnings, the net deficit for Program Year 1987-1988 is \$8,482.00 [(\$20,708.00 + \$3,685.00) - \$32,875.00].

3. The Correct Allocation Formula

The Department's auditors concluded that it was appropriate for Phoenix to offset 30% of its gross print shop operating costs by 30% of its gross print shop income and to charge the costs remaining after this offset to Phoenix's JTPA grant (RX-1 at 31). Phoenix's actual cost allocation and its current position that no print shop disallowance is appropriate reflect the view that Phoenix could properly charge 30% of its gross print shop operating costs to its JTPA grant, with no offset for print shop income. For reasons explained below, the undersigned disagrees with both of these formulas for the print shop cost allocation.

The regulations promulgated by the Secretary of Labor for the administration of Native American JTPA grants, at 20 C.F.R. § 632.37(b) (1994), provide that unless otherwise indicated costs shall be charged in accordance with 41 C.F.R. 29-70. 41 C.F.R. § 29-70.205-3(c) (1984) provides that program income other than income resulting from the sale of property and royalties shall be retained by the recipient and that "in accordance with the terms of the grant or agreement" the recipient shall:

(1) Add the income to funds committed to the project, and use the funds to further eligible program objectives; or

(2) Deduct the funds from the total project costs for the purpose of determining the net costs on which the DOL share of costs will be based; or

(3) Use the funds to finance the recipient matching requirement.

Thus, if Phoenix's grant or agreements indicate one of these three options as the proper method for allocating the print shop income, and if there is no contrary method contained in the regulations at 20 C.F.R. pt. 632, then the option indicated by the grant or agreement should be followed.

The first question is whether Phoenix's grants or agreements addressed the allocation of print shop income. The undersigned finds that in order for such an agreement to be binding for the purposes of 41 C.F.R. § 29-70.205-3(c) (1984), the agreement must have been reached prior to or shortly after commencement of Program Year 1987-1988. Otherwise, if the agreement were reached well after Program Year 1987-1988 had commenced, the agreement would be more akin to a settlement (or attempted settlement) than to a binding contract.

One possible agreement or grant term regarding the print shop costs arises from the Department's auditors' finding that prior to Program Year 1987-1988 the print shop had been approved as a

"community benefit project" by the Department, with the net costs of the print shop to be charged to the JTPA, but that the print shop was not approved as a "community benefit project" for Program Year 1987-1988 (RX-1 at 31). Unfortunately, there is no document in evidence which shows the details of the Department's disapproval of the print shop as a "community benefit project" for Program Year 1987-1988. The JTPA regulations do not define "community benefit project" and the evidence does not explain what a "community benefit project" is. The evidence does not show whether the disapproval of the print shop as a "community benefit project" included disapproval of the print shop's costs as JTPA training costs. Testimony at the hearing established that JTPA participants were trained to do print shop work during Program Year 1987-1988 (Tr. at 27). If the disapproval of the print shop as a "community benefit project" did not extend to disapproval of the print shop as a training activity, then the disapproval would not preclude the charging of print shop costs as training costs. In any event, the evidence does not establish the disapproval as one of the terms of Phoenix's grant or agreements for Program Year 1987-1988. The evidence does not indicate when the disapproval occurred or when and how it was communicated to Phoenix. If the disapproval occurred before the commencement of Program Year 1987-1988, and was clearly communicated to Phoenix before the commencement of Program Year 1987-1988, the disapproval would be one of the terms of the grant or agreements for Program Year 1987-1988. However, given the evidence on the record the undersigned cannot find that the disapproval was one of the terms of the grant or agreements for Program Year 1987-1988.

Another possible agreement regarding the print shop costs arises from evidence regarding a meeting of May 23, 1988. Phoenix's response to the Department's audit included a statement that on May 23, 1988, representatives from Phoenix and the Department met and discussed the print shop costs (RX-1 at 46). According to Phoenix the federal representative opined at this meeting that "30% was a reasonable cost to charge to the JTPA program for training" and the budget was revised to reflect this change (RX-1 at 46). The Department's auditors agreed that this meeting had occurred, although they did not indicate the date of the meeting (RX-1 at 31). As this meeting occurred approximately one month before Program Year 1987-1988 ended, the agreement reached at that meeting does not constitute a binding agreement for the purposes of 41 C.F.R. § 29-70.205-3(c) (1984). Another reason for not treating the result of the May 23, 1988, meeting as a binding agreement is that the evidence does not show whether the Phoenix and Department representatives agreed to 30% of gross costs or 30% of net costs.

The strongest evidence of a binding agreement regarding the print shop costs relates to Phoenix's proposed budget for Program year 1987-1988. Phoenix's response to the Department's audit included a statement that it had understood that the print shop

costs would be allocated to its JTPA grant as provided by a proposed budget which Phoenix had submitted to the Department prior to Program Year 1987-1988, and which the Department's Grant Officer signed and approved on July 1, 1987 (RX-1 at 32, 45-48). The portion of the proposed budget referred to by Phoenix falls under the general heading "TRAINING" and the specific heading "Training Support" (RX-1 at 48). This portion of the proposed budget indicates \$21,600.00 as reproduction costs for the program year, \$14,520.00 as "Allocations & Print Shop Sales" for the program year, and includes the deficit of \$7,080.00 in the column of training costs (RX-1 at 48). Thus, the proposed budget indicates that the print shop's costs would be charged to Phoenix's JTPA grant on a net cost basis. Considering its date of approval, there appears to be no reason why the proposed budget should not be viewed as demonstrating an agreement entered into between Phoenix and the Department prior to Program Year 1987-1988. The undersigned finds the indication in the proposed budget that the print shop's net costs would be charged to Phoenix's JTPA grant to be one of the terms of an agreement reached prior to the commencement of Program Year 1987-1988.

Thus, by way of the proposed budget Phoenix and the Department agreed that the print shop's income would be allocated according to the second option of 41 C.F.R. § 29-70.205-3(c) (1984). In other words, Phoenix and the Department agreed that Phoenix would "(2) Deduct the funds from the total project costs for the purpose of determining the net costs on which the DOL share of costs will be based." Further, because the proposed budget shows all of the print shop's costs being subtracted from all of the print shop's sales, Phoenix and the Department agreed that 100% of the print shop's net costs would be charged to Phoenix's JTPA grant. Because this agreed method of income allocation matches one of the options of 41 C.F.R. § 29-70.205-3(c) (1984), the undersigned will adopt this method of allocation unless it is contradicted by the statute or by the regulations promulgated specifically for Native American recipients of JTPA grants at 20 C.F.R. pt. 632.

The undersigned finds no contradiction to the above method of income allocation in the JTPA or the JTPA regulations. The JTPA provides that grant recipients can spend JTPA funds only as allowed by the Act. 29 U.S.C.A. § 1574(d) (1985). As quoted above, the Secretary's regulations for Native American grantees provide that "[t]o be allowable, a cost must be necessary and reasonable for proper and efficient administration of the grantee's program, be allocable thereto under these principles, and, except as provided herein, not be a general expense required to carry out the overall responsibilities of the grantee." 20 C.F.R. § 632.37(a) (1994). Karen A. Thorne's testimony that the print shop was used to train program participants (Tr. at 27) is an adequate basis for finding that the print shop was reasonable and necessary for carrying out Phoenix's JTPA program. The evidence shows that the print shop performed work for the general public as well as the various

denartments within the Phoenix Indian Center (RX-2 at 14). One might suppose that because the print shop did work for non-JTPA departments within the Phoenix Indian Center the print shop was "a general expense required to carry out the overall responsibilities of the grantee." However, the evidence indicates that when the JTPA department or any other department within the Phoenix Indian Center had work done at the print shop the department paid for the work "in accordance with rates established by the Print Shop" (RX-2 at 14). Thus, the payments by the various departments to the print shop would be part of the gross income received by the print shop. If one subtracts the print shop's gross income from its gross costs in determining the net cost allocable to Phoenix's JTPA grant, and then charges only these net costs to the JTPA grant, JTPA funds are not used to pay for the general reproduction expenses of Phoenix's non-JTPA departments. While the print shop can be viewed as a general expense of Phoenix, under the net cost allocation procedure this general expense is not charged to Phoenix's JTPA grant.

Further, the regulations at 20 C.F.R. pt. 632 (1994) provide affirmative support for the net cost allocation method. These regulations provide, "Income generated under any program may be retained by the recipient to continue to carry out the program." 20 C.F.R. § 632.34(b) (1994). "Program Income" is defined as "net income earned from grant or agreement supported activities." 20 C.F.R. § 632.4 (1994). The fact that net calculations are used to determine if a grantee's activity generated "program income" strongly suggests that when a Native American grantee allocates the costs of an activity to a JTPA grant the grantee should allocate net costs rather than gross costs.

For the above reasons, the undersigned finds that 100% of the net costs of the print shop can properly be charged to Phoenix's JTPA grant for Program Year 1987-1988.

The Department's brief on the issue of the print shop disallowance cites Office of Management and Budget (OMB) Circular No. A-110, Attachment D, for the proposition that "program income" represents gross income, and in support of the Department's method of income allocation (RB at 2-3). The provisions in the OMB Circular No. A-110, Attachment D, are quite similar to the provisions at 41 C.F.R. § 29-70.205-3 (1984).⁴ Both groups of provisions provide that income for the sale of services, such as that generated by the Phoenix print shop, should be allocated as stated in the grant or agreement. One of the options provided for in both groups of provisions is offsetting gross costs with gross income, in order to determine the allocable net costs. In that regard, OMB Circular No. A-110, Attachment D, supports the finding of the undersigned that the print shop allocation should be done on

⁴In fact, the latter were meant to implement the former. 20 C.F.R. § 632.31(b)(2) (1994).

a net cost basis. Unlike the provisions of OMB Circular No. A-110, Attachment D, the provisions at 41 C.F.R. § 29-70.205-3 (1984), do not define "program income" as gross income. However, the undersigned does not find this difference to be relevant in the case at hand. First of all, the regulations at 20 C.F.R. pt. 632 incorporate the provisions of 41 C.F.R. pt. 29-70, not the provisions of OMB Circular No. A-110. 20 C.F.R. § 632.31(b)(2) (1994). Further, while the definition of "program income" in OMB Circular No. A-110, Attachment D, differs from the definition at 20 C.F.R. § 632.4 (1994), both definitions must be considered in their contexts. When the two sets of regulations are considered as wholes, the undersigned finds no relevant contradiction between OMB Circular No. A-110, Attachment D, and 20 C.F.R. § pt. 632 (1994).

4. Calculations of the Proper Charge and the Appropriate Disallowance for the Print Shop

The undersigned has found that considering earnings and costs Phoenix's print shop had a net deficit of \$8,482.00 for Program Year 1987-1988. The undersigned has also found that Phoenix could have properly charged 100% of its net print shop costs to its JTPA grant. Therefore, Phoenix could have properly charged the amount of \$8,482.00 in net print shop costs for Program Year 1987-1988.

The undersigned found above that for Program Year 1987-1988 Phoenix charged \$13,545.00 to its JTPA grant for print shop costs. Because the total chargeable net costs were only \$8,482.00, the amount of \$5,063.00 (\$13,545.00 - \$8,482.00) should be disallowed.

B. John A. Chapman's Four Directions Program

1. The Amount of the Charge

There is uncontradicted evidence that Phoenix charged the amount of \$8,075.00 to its JTPA grant for Program Year 1987-1988 as the costs, mostly for the work of a consultant, of an activity called the "Four Directions" program (RX-1 at 33). Because this evidence is uncontradicted, the undersigned finds that Phoenix did in fact make such a charge.

2. The Cost Incurred by Phoenix

There is somewhat conflicting evidence as to whether Phoenix actually incurred expenses in the amount of \$8,075.00 for the Four Directions program for Program Year 1987-1988. As discussed above, the audit report prepared by Ed Contreras shows no costs for the Four Directions program for Program Year 1987-1988 (CX-1). The undersigned determined above that this aspect of Ed Contreras' report is inaccurate, based on hearing testimony which established that John Chapman worked as a consultant in support of the Four Directions program during Program Year 1987-1988 (Tr. at 20-54). The Department's auditors did not base their disallowance on the

ground that Phoenix did not incur the \$8,075.00 cost. Therefore, the undersigned finds that the Ed Contreras report is inaccurate and that Phoenix incurred the cost of \$8,075.00 in Program Year 1987-1988 for the Four Directions program.

3. Whether the Charge was Proper

The evidence on the record indicates that the Department questioned the charge for the Four Directions program largely because the documentation for the program was inadequate. As explained below, Phoenix has now overcome this initial lack of documentation and established that its charge for the Four Directions program was proper.

The Conrad & Associates audit report states that Phoenix entered into a contract with a consultant for the sale of services to other Native American programs, and that the sale of services was called the Four Directions program (RX-1 at 32). According to the audit report the Four Directions program operated from August 1987 through November 1987 at which time it was terminated without having generated income (RX-1 at 33). The report states that after termination of the program its costs were reclassified as JTPA training costs, in the amount of \$8,075.00 (RX-1 at 33). Phoenix informed Conrad & Associates that the Four Directions program had been expanded to include JTPA training, but the auditors determined that this change was not put in writing as required by the original consultant contract and that the expanded tasks could not be verified through the audit process (RX-1 at 33). Conrad & Associates recommended disallowance of the costs of the Four Directions program, finding the allocation of costs to the JTPA grant to be inconsistent with 41C.F.R. § 29-70.207-2(c), 20 C.F.R. § 632.37(a), and 20 C.F.R. § 632.38(e) (RX-1 at 33).

At the hearing, John A. Chapman testified that during a time period from 1987 through 1988 he worked as director of the Four Directions program on a consultant basis for Phoenix (Tr. at 37-38). Mr. Chapman testified that his work as director of the Four Directions program involved assisting JTPA participants in their job searches (Tr. at 38). Mr. Chapman also helped train inexperienced staff at Phoenix in job development (Tr. at 40). Mr. Chapman testified that when he was originally asked to come to work at Phoenix the director of economic development thought that Mr. Chapman would be able to generate funds for Phoenix (Tr. at 53-54). However, Mr. Chapman told her upon starting that it would not be possible to obtain fees for the Phoenix participants who found employment, as these participants did not have the necessary work history or technical qualifications (Tr. at 54).

Karen A. Thorne testified at the hearing that she was director of the JTPA program during the fiscal year 1987 to 1988 (Tr. at 20). Ms. Thorne described the Four Directions program as "a program established to provide assistance to JTPA clients in areas

of job search, job readiness, resume preparation, assisting with our world of work, classroom activities, going out making company contacts, doing a lot of job development, employment generation" (Tr. at 20). The program further involved talking about the Phoenix Indian Center to potential employers and updating the staff on methods of job development (Tr. at 21). Ms. Thorne identified documents in evidence as Complainant's Exhibit 2 as a series of (1) intake forms used to determine JTPA eligibility and (2) employability development plans, each pertaining to the time period of August of 1987 through November of 1987 (Tr. at 22-23). These documents show various JTPA participants receiving assistance from the Four Directions program (Tr. at 23-25; CX-2).

The regulations provide that "[c]ontracts may be entered into between the Native American grantee and any party, public or private, for purposes set forth in the JTPA." 20 C.F.R. § 632.35 (1994). 41 C.F.R. § 29-70.207(c) (1984) provides that grant recipients shall ensure grant funds are spent only for authorized purposes. 20 C.F.R. § 632.37(a) (1994) provides that "[to] be allowable, a cost must be necessary and reasonable for proper and efficient administration of the grantee's program." 20 C.F.R. § 632.38(e) (1994) provides in part that "[t]raining costs include . . . employability assessment; job related counseling for participants; job search assistance and labor market orientation." There is no evidence in the record to the effect that Mr. Chapman and Ms. Thorne are not credible. Based on the reasonable nature of their testimonies, the undersigned finds Mr. Chapman and Ms. Thorne to have been credible witnesses and accepts their descriptions of the Four Directions program. Based on these descriptions, the undersigned finds that the Four Directions program qualified as a JTPA cost during the Program Year 1987-1988 and that Phoenix did not violate the above regulations in charging the Four Directions costs to its JTPA grant.

The fact that Phoenix initially failed to classify the Four Directions program as a JTPA program does not change the nature of the program. While the documentation of the program may have been inadequate prior to the time of the hearing, Phoenix retained the right to show at the hearing that the Four Directions program was an appropriate JTPA cost during the relevant period. Colorado Department of Labor and Employment v. United States Department of Labor, 875 F.2d 791, 794 (10th Cir. 1989) (In a case arising under the Comprehensive Employment and Training Act (CETA) of 1973, the predecessor act to the JTPA, the Tenth Circuit reasoned that inadequate documentation of costs merely shifted the burden to the grantee to show that the questioned costs were allowable.).

Phoenix has shown that the costs charged to its JTPA grant for the Four Directions program for the Program Year 1987-1988 were reasonable and necessary for Phoenix's overall JTPA program. The undersigned finds that the \$8,075.00 which Phoenix charged to its JTPA grant for consultant work performed by John A. Chapman during

Program Year 1987-1988 should be allowed.

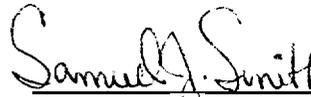
ORDER

IT IS HEREBY ORDERED:

1. Of the \$13,545.00 which Phoenix charged to its JTPA grant as print shop costs for the Program Year 1987-1988, \$8,482.00 shall be allowed and \$5,063.00 shall be disallowed.

2. Of the \$8,075.00 which Phoenix charged to its JTPA grant as costs for its Four Directions program for the Program Year 1987-1988, the entire \$8,075.00 shall be allowed.

Entered this 15th day of December, 1994, at Long Beach, California.



SAMUEL J. SMITH
Administrative Law Judge

SERVICE SHEET

Case Name: PHOENIX INDIAN CENTER, INC.

Case No: 93-JTP-17

Title of Document: DECISION AND ORDER

A copy of the above document was sent to the following:

BILL THORNE, JR.
EXECUTIVE DIRECTOR
PHOENIX INDIAN CENTER, INC.
2601 N. THIRD ST., STE. 100
PHOENIX, AZ 85004

DAVID O. WILLIAMS
OFFICE OF THE SPECIAL COUNSEL
EMPLOYMENT & TRAINING ADMIN
ROOM N4671
200 CONSTITUTION AVE., N.W.
WASHINGTON, D C 20210

KAREN THORNE
JTPA COORDINATOR
PHOENIX INDIAN CENTER, INC.
2601 N. THIRD ST., STE. 100
PHOENIX, AZ 85004

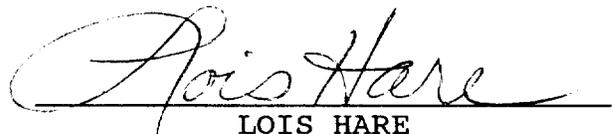
HARRY SHEINFELD, ESQ.
ASST. COUNSEL FOR LITIGATION
USDOL/OFFICE OF THE SOLICITOR
ROOM N-2101
2.00 CONSTITUTION AVE., N.W.
WASHINGTON, D C 20210

ROBERT W. HANULA, ESQ.
DIAL VOLUNTEER LAWYER'S GROUP
DIAL TOWER STATION 2212
PHOENIX, AZ 85077

CHARLES WOOD, JR.
CONTRACT/GRANT OFFICER
DIV. OF AUDIT, CLOSEOUT &
APPEALS RESOLUTION
USDOL/ETA, ROOM N-4716
200 CONSTITUTION AVE., N.W.
WASHINGTON, D C 20210

DANIEL W. TEEHAN, ESQ.
REGIONAL SOLICITOR
U.S. DEPARTMENT OF LABOR
71 STEVENSON ST., SUITE 1110
SAN FRANCISCO, CA 94105

~~BAYLEY REPORTING, INC.
619 LEVERING AVE.
LOS ANGELES, CA 90024~~


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