

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



In the Matter of :

**STATE OF TEXAS DEPARTMENT
OF COMMERCE,**

Complainant,

and

**MIDDLE RIO GRANDE DEVELOPMENT
COUNCIL,**

**Intervenor and
Party-in-Interest,**

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ARB CASE NO. 96-128

ALJ CASE NO. 94-JTP-20

DATE: DEC 11 1996

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

FINAL DECISION AND ORDER

This case arises under the Job Training Partnership Act of 1982, as amended (JTPA or the Act), 29 U.S.C. §§ 1501-1791 (1988),^{2/} and the regulations issued thereunder at 20

^{1/} On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under. *inter alia*, **the** Job Training Partnership Act of 1982, as amended, 29 U.S.C. §§ 1501-1791 (1988 and Supp. IV 1992), and the implementing regulations at 20 C.F.R. Part 627, to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order and regulations under which the Board now issues final agency decisions.

^{2/} This case involves an audit for grant expenditures during the period July 1, 1989 through (continued...)

C.F.R. Parts 626-638 (1992). Following an-audit and related procedures, the Department of Labor (DOL) Grant Officer issued a Final Determination, concluding that \$822,257 of JTPA grant funds expended by the Texas Department of Commerce (TDOC or the State) during the program years 1989 through 1991 must be disallowed. TDOC requested a hearing before an Administrative Law Judge (ALJ) to contest the determination of the Grant Officer. See 29 U.S.C. § 1576(a) (1988 and Supp. IV 1992); 20 C.F.R. § 636.10 (1994). On April 30, 1996, the ALJ issued the Recommended Decision and Order (R. D. and O.) in this case, which concluded that the disallowance determinations rendered by the Grant Officer should be reversed. Based on the Grant Officer's Statement of Exceptions, this Board asserted jurisdiction on June 14, 1996. See 29 U.S.C. § 1576(b) (1988). On the basis provided herein, we disagree with the recommended disposition of the ALJ regarding the disallowances delineated in Finding 3 of the Final Determination and disagree in part with the ALJ's recommended disposition of the disallowances delineated in Finding 2 of the Final Determination.

BACKGROUND

The Act and implementing regulations provide detailed guidelines for the expenditure of JTPA funds by grantees and subgrantees. 29 U.S.C. § 1518 (1988); 20 C.F.R. §§ 629.37-629.39; see *generally Mississippi Dep't of Economic and Community Development v. United States Dep't of Labor*, 90F.3d 110 (5th Cir.1996)(affirming Secy's determination regarding misspent JTPA funds)./ In the interest of ensuring compliance with such guidelines, the Act and regulations also provide for oversight of JTPA expenditures by the

^{2/}(... continued)

June 30, 1992. Administrative file at 14, 42. Statutory guidelines for allowable expenditures under the Act that are applicable to this case are therefore those in effect prior to the amendments to *the* Act of September 7, 1992, Pub. L. No. 102-367, Title I, Subtitle B, § 117, 106 Stat. 1035. References to the regulations are for those in effect during the period covered by the audit except for regulations concerning procedures pertinent to the hearing before the Administrative Law Judge, which are accordingly noted.

^{3/} We note the following provisions concerning limitations on expenditures of JTPA grant funds that are pertinent to the discussion to follow. Section 629.38(a) provides these three categories of expenditures that are allowable under Section 108 of the Act: training, administration and participant support. 20 C.F.R. § 629.38(a); see 29 U.S.C. § 1518. Expenditures under the JTPA must not only be allowable under the Act but must also be properly allocated under one of the foregoing categories. 20 C.F.R. § 629.38(a); see OMB Circular No. A-87, 60 Fed. Reg. 26484, 26491 (May 17, 1995). Section 629.39 of the regulations implements the Section 108(a), (b) limits on the percentage of funds that may be expended under the administration category. 20 C.F.R. § 629.39; see 29 U.S.C. § 1518(a), (b). Employment generating activities are allowable under the Act, 29 U.S.C. §1604(19), but employment generating activities *per se*, see discussion *infra* at II., may be charged only to the administration costs category, see Order at 7-9 and authorities cited therein.

Labor **Secretary**. 29 U.S.C. § 1573; 20 C.F.R. § 629.43. The fiscal controls provided **under the Act** include an audit and appeals process. 29 U.S.C. §§ 1574 - 1576; see 20 C.F.R. §§ 629.42, 629.44. **Audits, which are** provided for under Sections 164 and 165 of the Act, 29 U.S.C. §§ 1574, 1575, are conducted by the Office of the **Inspector** General for the DOL (OIG). See 20 C.F.R. § 629.42. Following receipt of audit reports from the OIG, the **Grant Officer, who serves within the** DOL Employment and Training Administration (**ETA**), **provides a copy of the auditor's report** to the grantee for comments; subsequently, the **Grant Officer evaluates the** audit report and the grantee's responses and issues an Initial Determination to the grantee. 20 C.F.R. § 629.54(d). An informal resolution process follows, during which the grantee is provided the opportunity to provide additional information pertinent to the issues in dispute. *Id.* The Final Determination is then issued by the Grant Officer, and, if the grantee wishes to challenge that determination, the **grantee** may request a hearing before an **ALJ**. 29 U.S.C. § 1576; 20 C.F.R. § 636.10.

Following an audit of **JTPA** expenditures for the grant years 1989-1991 by the grantee **TDOC, a final report was issued by the OIG on March 23, 1993**. GX 1 at 12, 31, **151-77^{4/}**; see **R. D. and 0. at 2**. **On March 31, 1993, the audit report was forwarded to TDOC with instructions to resolve questions arising within the audit with the Middle Rio Grande Development Council (MRGDC), an agency that** administered JTPA grants received by the State. GX 1 at 12, 31, **147-48**; see **R. D. and 0. at 2**. On September 30, 1993, the State's resolution report was submitted to ETA. GX 1 at 12, 31, 42-146; see **R. D. and 0. at 2**. The Grant Officer concluded that **TDOC's** resolution of the matter was not satisfactory and, on December 15, 1993, **the** Grant Officer issued an Initial Determination which concluded that \$885,525 in **JTPA** funds must be disallowed. GX 1 at 31-39; see **R. D. and 0. at 2-3**. Following submission of further documentation by TDOC, the Grant Officer issued a Final Determination on March 14, 1994, which allowed \$63,268 of the previously questioned funds and disallowed \$822,257 in funds. GX 1 at 14-28; see **R. D. and 0. at 3**. Consistent with Section 164(d) of the Act, 29 U.S.C. § 1574(d), the Grant Officer directed TDOC to repay DOL, from non-federal funds. GX 1 at 14; see **R. D. and 0. at 3**.

TDOC requested a hearing before an administrative law judge, and MRGDC, as a subgrantee, was allowed to intervene. GX 1 at 1-11; **R. D. and 0. at 3**; see 29 C.F.R. § 18.10 (1994); *cf. County of Los Angeles v. United States Dep't of Labor*, 891 F.2d 1390 (9th Cir. 1989)(**reversing** ALJ's conclusion that subrecipient under JTPA could not intervene pursuant to 29 C.F.R. § 18.10(b) in hearing requested by state). In response to a motion for partial summary decision filed by the Grant Officer and motions for summary decision and protective order filed by MRGDC, the ALJ issued an Order Granting in Part the Motion for Partial Summary Decision, Denying Motion for Summary Decision, and Granting in Part the

^{4/} For references to the exhibits of record, we will follow the ALJ's example. **R. D. and 0. at 2 n.2.** and abbreviate as follows: U.S. government exhibit, GX; **Complainant/TDOC** exhibit, CX; Intervenor/MRGDC exhibit. IX. For references to the hearing transcript, we will use "HT."

Motion for Protective Order (Order) on **November 3, 1995**. Following a formal hearing on **November 27-28, 1995**, the recommended decision was issued, on April 30, 1996.

DISCUSSION

I. Costs disallowed by the Grant Officer under **Finding 2 of the Final Determination**

At issue before the ALJ under Finding 2 were costs that the Grant Officer had disallowed as expenditures for economic development activities (**EDA**) rather than employment generating activities (EGA), as contended by **TDOC and MRGDC**. R. D. and O. at 6; see GX 1 at 19-21.⁵⁷ **EDA** are broad-based efforts that are not chargeable to grant funds under the Act, whereas EGA costs are allowed under Section 204(19) of the Act, 29 U.S.C. § 1604(19), if the grantee demonstrates that the activity “directly resulted in the placement of JTPA eligible individuals and participants into jobs created by these contracts.”⁵⁸ GX 1 at 20; see R. D. and O. at 6-7 (citing JTPA Conf. Rep. No. 97-889, Sept. 28, 1982 and 20 C.F.R. § 629.37(a)). In challenging the ALJ’s reversal of the disallowances under Finding 2, the Grant Officer urges that the ALJ erred in rendering factual findings that are unsupported by the record. Gr. Ofcr. Initial Brief at 19-22.

First, the Grant Officer contends that the ALJ erroneously reversed the Grant Officer’s disallowance of \$6,925 for three consultant contracts (the **Bates/Balderas/Urbina** contracts), which the Grant Officer had determined to be directed toward assisting business ventures and employers rather than intended “to generate jobs for JTPA-eligible individuals.” **HT** at 220-23; see GX 1 at 19-21, 161-62. In reversing this conclusion and finding that the costs were for EGA, the ALJ found that the consultants who were paid under the three contracts had been utilized to help establish businesses that had originated in the MRGDC “business incubator” center, and that these businesses, in turn, provided jobs for JTPA participants and JTPA eligible individuals. R. D. and O. at 8-9. The Grant Officer challenges this conclusion as unsupported by the record because the evidence does not establish that MRGDC was actually operating an “incubator” center. Gr. Ofcr. Initial Brief at 19-21. Although the ALJ may have misinterpreted the evidence of record regarding the existence of such a center, any such error is not material to his analysis regarding the EGA

⁵⁷ Of the \$42,296 in costs that were at issue before the ALJ under Finding 2, the Grant Officer has challenged the ALJ’s findings regarding only \$17,869. See Gr. Ofcr. Initial Brief at 19-23; R. D. and O. at 6-13. These costs are at issue under both Finding 2 and Finding 3. See Gr. Ofcr. Initial Brief at 5 n.2; R. D. and O. at 15 n. 12; GX 1 at 21.

⁵⁸ As discussed *infra*, EGA costs are allocable under the category of administrative costs and are therefore subject to the fifteen percent cap on administrative costs imposed under Section 108(a), (b) of the Act, 29 U.S.C. § 1518(a),(b). Order at 19 (citing Williams’ deposition at 42-46); see 29 C.F.R. § 629.39(a)(1).

nature of the **Bates/Balderas/Urbina contracts** and is therefore harmless. The testimony of the MRGDC Deputy Executive Director does not indicate that an incubator center, within the meaning provided by the Grant Officer, had been established. T. 506-07, **554-56**. Nonetheless, the rationale relied on by the ALJ, *i.e.*, that the three **consultants'** contracts had directly **benefitted** JTPA participants by providing placement in jobs at specific businesses whose development was aided by these consultants, is in accord with the mandates of the Act regarding the allowability of EGA costs. See R. D. and O. at 6-9; 29 U.S.C. **§ 1604(19)**; see *also* **IX 7, 8, 9**. As the costs of operating the physical **plant** for an incubator **site** are not at issue here, the question of whether such a **center** was **formally** established is largely irrelevant.²¹ We therefore reject the Grant Officer's challenge to the ALJ's reversal of the disallowance of \$6,925 for the **Bates/Balderas/Urbina** contracts under Finding 2 of the Final Determination.⁸¹

The Grant Officer also challenges the ALJ's reversal of the disallowance of \$2,500 for a consultant contract with the University of Texas (**UT**).²² Gr. Ofcr. Initial Brief at 21-22. The Grant Officer had disallowed the costs as **EDA** expenditures, as he determined that the focus of the contract was on a statistical analysis of transportation in the Middle Rio Grande area, "the flow of goods in and out." HT at 169-173. The ALJ determined that "the contract results helped to establish a truck driving training program that provided training and created jobs for JTPA eligible individuals and participants." R. D. and O. at 13. **In support** of that conclusion, the **ALJ** stated that the Grant Officer was unaware of the truck driving training program that was an offshoot of the research done under the UT

²¹ The Grant Officer testified that an incubator center provides assistance through shared resources to developing businesses and that certain costs associated with the space and staff needed for such a center could qualify as allowable EGA under the Act. HT at 238-42. Paul Edwards, the Deputy Executive Director for MRGDC, testified that his agency had worked on job creation and job development in a manner that "could, at some level, be defined as an incubator without walls," T. **506-07**, 554-56, but he did not testify that an incubator center had been established. Edwards' description of an incubator center, *i.e.*, "a place where people come in with ideas for business," differs from the definition provided by the Grant Officer, "a center ... set up wherein a number of businesses could be started, *i.e.* a start-up project for businesses and working in the center, they may share various types of services, such as receptionist, secretarial types of services, accounting services, ... equipment, copy machines and so forth." HT at 238.

²² In view of the foregoing disposition regarding the costs for the **Bates/Balderas/Urbina** contracts, we need not address MRGDC's contention, MRGDC Brief at 19, that the Grant Officer failed to properly raise an exception to the **ALJ's** finding in this regard in the Statement of Exceptions.

²³ The total cost of the University of Texas contract was \$5,000; the Grant Officer determined, after issuance of the Final Determination, that only one-half of that cost was expended from JTPA funds. Gr. Ofcr. Initial Brief at 22 n.9; see R. D. and O. at 13; HT at 169-73.

contract when **he drafted** the Final Determination. *Id.* In challenging the ALJ's conclusion, the Grant Officer argues that the ALJ erred in finding that the Grant Officer was unaware of the truck driving training program and in relying on that factor in concluding that the Grant Officer had improperly disallowed the \$2,500 as an **EDA** cost. *Gr. Ofcr.* Initial Brief at 21.

We agree with the Grant Officer that the **ALJ's** analysis regarding the UT **contract is flawed. The purpose** of the UT contract is much more broad-based and industry oriented than, for example, the three consultants' contracts discussed *supra*, which aided in the development of specific businesses that provided employment positions for **JTPA** participants. As stated by the ALJ, the purpose of the UT contract was to "explore" job opportunities. See IX 12. Like all economic development activity, the UT **research** encompassed, to some degree, the exploration of job opportunities. As the Grant Officer concluded, however, the focus was on the identification of products and industries rather than on the creation of jobs for JTPA participants or eligible individuals. **HT** at 23 1-33, 345-46. We also agree with the Grant Officer that the **ALJ** improperly relied on the development of a truck driving program resulting from the UT contract research to conclude that the contract lead to the creation of jobs for JTPA participants or JTPA eligible individuals. Providing training with the intent of preparing participants to perform jobs is distinguishable from the actual creation of such jobs and, as indicated by the Grant Officer, training funds constitute a separate category of costs under the Act, which are not at issue under Finding 2 of the Final Determination. See 20 C.F.R. § 629.38(a); GX 1 at 19-21. We therefore agree with the Grant Officer that TDOC and MRGDC did not demonstrate that the UT contract costs qualified as EGA under the Act and affirm the disallowance by the Grant Officer.

The Grant Officer also **challenges** the **ALJ's** reversal of the Grant Officer's disallowance of costs associated with a contract between MRGDC and Japan Consultants, Ltd. (JCL), because, the Grant Officer urges, the ALJ relied on an inaccurate reading of the Grant Officer's testimony regarding that contract. *Gr. Ofcr.* Initial Brief at 22. In response, MRGDC asserts that the ALJ correctly interpreted the Grant Officer's testimony on this issue. MRGDC Brief at 22-24.

The **Grant** Officer testified that he had concluded that the \$8,444 for the JCL contract must be disallowed as **EDA** expenditures based on his review of the contract, which provided that JCL would assist MRGDC in preparing for a trip to Japan to meet with government and industry representatives there and would act as liaison between the MRGDC and Japanese representatives, but did not make any reference to job creation for JTPA participants. **HT** at 233-35; see IX 11. **In determining** that the JCL contract represented EGA, the ALJ relied on the acknowledgments by the Grant Officer that certain of **MRGDC's** "Asian Initiative" costs could qualify as EGA if jobs for JTPA participants or eligible individuals were actually created as a result of such expenditures. *R. D. and O.* at 14; see **HT** at 330-32 (Donahue). The ALJ then relied on the testimony of **Paul Edwards**, Deputy Executive Director for

MRGDC, to conclude that the “**Asian Initiative**” had resulted **in** the requisite **creation** of jobs. R. D. **and** 0. at 14. Edwards’ **testimony** provides inadequate evidence that such was the case, however. Edwards testified that a Japanese company had purchased a Middle Rio **Grande** area company that had hired **JTPA** eligible individuals; **Edwards** testified that he was unable to provide documentation on the hiring of the JTPA eligible individuals **by the** company because the company “didn’t want to do any business with the government to sign **an OJT** contract and have to **file** reports and all of that **sort of stuff.**” **HT** at 528, 546. Edwards also stated that the company “**was** one of the Japanese **firms** that we had **talked to** for a long time about various things.” **HT** at 546. Contrary to the **conclusion** reached by the **ALJ**, this testimony suggests only the most attenuated connection between the **November 1990 trip to Japan that was the subject of the JCL** contract and the creation of jobs for JTPA participants or eligible individuals. Indeed, Edwards’ testimony indicates that the jobs were in existence prior to the purchase of the local company by the Japanese firm and does not indicate that the entry of the Japanese **firm** had any impact on the hiring of such individuals. We thus agree with the Grant Officer that the disallowance of \$8,444 in costs for the JCL contract was proper.

II. **Costs disallowed by the Grant Officer under Finding 3 of the Final Determination**

At issue before the ALJ were \$7 19,567 in costs for EGA that the Grant Officer determined TDOC and MRGDC had improperly charged to the participant support costs (PSC) category?^{10/} Of that amount, \$628,115 remain at issue!^{11/} To qualify under the PSC category, expenditures must be for “services which are necessary to enable an individual eligible for training under [the JTPA], but who cannot afford to pay for such **services, to** participate in a training program funded under” the Act. 29 U.S.C. §1503(24). The Act provides that such services “may include transportation, health care, . . . child care and dependent care, meals, temporary shelter, financial counseling, and other reasonable expenses required for participation in the training program” *Id.*; see 20 C.F.R. § 629.38(e)(4). As concluded by the ALJ, PSC costs are further defined by the four categories provided by Section 108(b)(2)(A) of the Act, 29 U.S.C. § 1518(b)(2)(A). See Order at 9-10 and authorities cited therein.

^{10/} The total amount of costs for EGA charged to the PSC category that was disallowed in Finding 3 of the Final Determination was \$822,257; this amount was reduced prior to hearing by the allowance of costs chargeable to the training category in the amount of \$102,690. Gr. **Ofcr.** Initial Brief at 8 n.4; HT at 8: *see* R. D. and 0. at 15 n.12.

^{11/} Also under Finding 3 of the Final Determination, the ALJ reversed the Grant Officer’s disallowance of EGA costs charged to the training costs category of Section 629.38(e)(1). R. D. and 0. at 19-25. The Grant Officer does not challenge this aspect of the ALJ’s decision. Gr. **Ofcr.** Initial Brief at 9 n.5.

The Grant Officer challenges the ALJ's reversal of the disallowance of those costs on the following grounds. The Grant Officer urges that the ALJ erred in allocating the parties' burdens. Gr. Ofcr. Initial Brief at 9-18; Reply Brief at 6-10. The Grant Officer also urges that, in the R. D. and O., the ALJ inexplicably reversed the interpretation that he had stated in the November 3, 1995 Order regarding the Section 108(b)(2)(A) limitation on the charging of EGA costs to the PSC category as well as his ruling regarding the respective burdens of the parties in demonstrating compliance with that provision *vel non*. Gr. Ofcr. Initial Brief at 9-12; Reply Brief at 6-7. In response, TDOC and MRGDC urge that the ALJ's analysis of the parties' burdens was proper and that the interpretation of Section 108(b)(2)(A) set forth by the ALJ in the November 3, 1995 Order is not inconsistent with the ALJ's allocation of the burdens on the parties in the R. D. and O. TDOC Brief at 4-5; MRGDC Brief at 12-16. The respective parties also take opposing positions regarding whether the ALJ erred in finding that the Grant Officer failed to correct a faulty premise underlying the audit report in drafting the Final Determination. Gr. Ofcr. Initial Brief at 18-19; Reply Brief at 6-7; TDOC Brief at 5-8; MRGDC Brief at 8-11.

Section 636.10(g) allocates the burdens of the parties in JTPA hearings before the Office of Administrative Law Judges, as follows:

Burden of production. The Department shall have the burden of production to support the Grant Officer's decision. To this end, the Grant Officer shall prepare and file an administrative file in support of the decision. Thereafter, the party or parties seeking to overturn the Grant Officer's decision shall have the burden of persuasion.

20 C.F.R. § 636.10(g) (1994).^{12/} The ALJ summarized the Grant Officer's burden as the establishment of a *prima facie* case^{13/} "that TDOC violated JTPA regulations based on substantial evidence." R. D. and O. at 5; *accord State of Florida v. United States Dep't of Labor*, Case No. 92-JTP-17, Sec. Dec., Dec. 5, 1994, *aff'd* 83 F.3d 435(table)(11th Cir.

^{12/} The hearing in this case was requested on April 12, 1994. GX 1 at 4. Section 636.10(g), as quoted *supra*, has been in effect since 1993. The ALJ cited its predecessor provision, which was found at 20 C.F.R. § 629.57(i). R. D. and O. at 5. The two provisions are identical, except that "Secretary" was referred to throughout Section 629.57(i) instead of "Grant Officer."

^{13/} The ALJ defined *prima facie* case as "relevant evidence 'sufficient to enable a reasonable person to draw from it the inference sought to be established,'" quoting from McCormick, Evidence 789-790 (2d ed. 1972). R. D. and O. at 5. Although not noted by the ALJ, that definition was also relied on by the court in *State of Maine v. United States Dep't of Labor*, 669 F.2d 827, 830 (1st Cir. 1982), which involved a grant officer's final determination under the predecessor statute, the Comprehensive Employment and Training Act of 1973. Pub. L. No. 93-203, 87 Stat. 839 (1973)(repealed 1978).

1996). In construing the Grant Officer's burden, the ALJ relied in part on the decision of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251 (1984). R. D. and O. at 5, 18. Specifically, the ALJ cited legislative history from the Administrative Procedure Act (APA) that was quoted in *Greenwich Collieries* in support of the ALJ's concern that the DOL could not permissibly "presume" that certain costs were expended in violation of the JTPA. R. D. and O. at 5, 18-19. The ALJ then concluded that the Grant Officer had failed to establish a *prima facie* case of JTPA violations in support of the disallowance of EGA costs charged by the recipients to the PSC category based, in part, on the failure of the Grant Officer to rule out the possibility that such costs could, at least in part, be allocated to the category of PSC. *Id.* at 18.

We agree with the Grant Officer's contention, Gr. Ofcr. Initial Brief at 11-14; Reply Brief at 9-10, that the ALJ's reliance on *Greenwich Collieries*, which addresses a narrow range of administrative law cases, was misplaced. The question before the Court in *Greenwich Collieries* was whether an employee/claimant could prevail over an employer/respondent in a disability claim based on less than a preponderance of the evidence, *i.e.*, when the conflicting evidence was in equipoise.^{14'} *Greenwich Collieries*, 114 S.Ct. at 2252. Within that context, the Court emphasized the APA legislative history indicating that a defending party should not be presumed by the government to have violated the law. *Id.* at 2258 (quoting S. Rep. No. 752, 79th Cong., 1st Session, 22 (1945)). The Court also construed the "burden of proof" which is placed by Section 7(c) of the APA, 5 U.S.C. § 556(d), on the proponent of a rule or order, "unless otherwise provided by statute," as the burden of persuasion. 114 S.Ct. at 2258. In contrast, the conflicting evidence on any particular issue involved in this case is clearly not in equipoise and the Grant Officer did not presume that TDOC and MRGDC misspent JTPA funds; rather, the findings presented in the Grant Officer's Final Determination are based on an extensive and detailed examination of relevant documents. See GX 1.

Moreover, the general rule regarding the burden of persuasion under Section 7(c) that was construed in *Greenwich Collieries* is inapplicable to this case, where the parties' respective burdens are "otherwise provided by statute." Section 165(a)(1) of the Act requires grantees to "keep records that are sufficient to permit the preparation of reports required by this Act and to permit the tracing of funds to a level of expenditure adequate to

^{14'} *Greenwich Collieries* involved claims for benefits under the Black Lung Benefits Act, as amended, 30 U.S.C. § 901 *et seq.*, and the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, and the application by DOL of the "true doubt rule" to these claims. Under this rule, a finding by the ALJ that the conflicting evidence was equally probative was considered to give rise to "true doubt" which was to be resolved in favor of the claimant. The Court determined that this practice, which allowed the claimant to win when the parties' evidence was evenly balanced, was in conflict with Section 7(c) of the APA, which requires the successful claimant's evidence to preponderate. 114 S.Ct. at 2259.

insure that the funds have not been spent ‘unlawfully,’ and Section 165(b) requires the Secretary to conduct investigations into compliance with JTPA requirements by grant recipients. 29 U.S.C. § 1575(a)(1), (b); see 20 C.F.R. § 639.35; see **also *Montgomery County, Maryland v. Dep’t of Labor*, 757 F.2d 1510, 1512 (4th Cir.1985)**(holding that grantee “misspent” funds within the meaning of the Comprehensive Employment and Training Act of 1973 (CETA, cited *supra* at n.13), by failing to maintain required records of expenditures). These statutory provisions, read together, clearly indicate that Section 636.10(g) provides the most rational allocation of burdens that would be consistent with the JTPA statutory scheme, viz., the burden of producing the basis for disallowed costs falling on the Secretary’s designee and the burden of persuasively challenging such disallowances falling on the grant recipient who seeks to have the Grant Officer’s decision overturned. See ***Quechan Indian Tribe v. United States Dep’t of Labor*, 723 F.2d 733 (9th Cir. 1984)** (construing similar regulatory provision at 20 C.F.R. § 676.89(b) (1981), promulgated under the CETA); **but see *State of Maine v. United States Dep’t of Labor*, 669 F.2d 827, 830 (1st Cir. 1982)**(relying on interpretation of Section 7(c) of the APA -- which was later overruled by ***Greenwich Collieries -- in rejecting grantee’s*** argument that DOL bore burden of proof as well as burden of production).

The problem posed by the ALJ’s **evidentiary** analysis concerns the specific question of whether certain facts relevant to the disallowance of costs by the Grant Officer constitute an element of the **prima facie case** or an element of the defense that must be established by the grantees. In reversing the Grant Officer’s finding that EGA costs were improperly charged by TDOC and MRGDC to the PSC category, the ALJ concluded that the Grant Officer had failed to review **all** documentation submitted by the grant recipients which, the ALJ stated, could demonstrate the propriety of the EGA charges under the PSC category. R. D. and O. at 15- 19. The ALJ further concluded, based on his finding that the Grant Officer had failed to examine such documentation, that the Grant Officer had improperly presumed that the EGA costs were not properly allocated to the PSC category. R. D. and O. at 18-19. The Grant Officer urges that the record indicates that TDOC and MRGDC did not submit documentation that could demonstrate the propriety of charging the EGA costs to the PSC category, and that the ALJ thus effectively held the Grant Officer accountable for the production of evidence beyond the scope of his **prima facie** case, while failing to properly place the burden of providing documentation to demonstrate compliance with the Act on TDOC and MRGDC. Gr. Ofcr. Initial Brief at 9-10, 23; Reply Brief at 5-9. The Grant Officer also contends that, in the R. D. and O., the ALJ reversed the position that he had stated in the Order of November 3, 1995, regarding which party bore the burden of submitting such documentation under Section 108(b)(2)(A) of the Act, 29 U.S.C. § 1518(b)(2)(A). Gr. Ofcr. Initial Brief at 16-18; Reply Brief at 6-7. Similarly, the Grant Officer contends that the ALJ, in his recommended decision, reversed a **factual** finding concerning the issue of whether the Grant Officer had perpetuated rather than corrected a flaw in the auditor’s analysis pertinent to Finding 3. Gr. Ofcr. Initial Brief at 18-19; Reply

Brief at 5-6. In -response, MRGDC asserts that the ALJ properly concluded that the Grant Officer's analysis and methodology were flawed. MRGDC Brief at 12-19.

We agree with the Grant Officer that the ALJ misallocated **the** parties' burdens by **requiring the Grant Officer to rule out the possibility that the EGA costs at issue could qualify as expenditures for participant support services.** Although we agree with the ALJ's detailed **analysis** of the restrictions imposed on the charging of EGA expenditures to the **participant support costs category** by the Act, see Order at 7-10, we disagree with his conclusion regarding the evidence necessary to prove a **failure** to comply with those restrictions. As noted by the **ALJ**, Order at 8, the Act **indicates that** participant support costs are **those that directly benefit eligible individuals** by assisting in their participation in the JTPA training program. See 29 U.S.C. §§ **1503(24)**, 1518(b)(2)(A); see also 20 C.F.R. § 629.38(e)(5). For the purpose of establishing a **prima facie** violation of the Act under **Section 108(b)(2)(A)**, it was **sufficient for the Grant Officer to explicate the four types of participant support delineated in that statutory provision** and to explain why he had concluded that the costs charged by TDOC and MRGDC to **the** PSC category did not fall within one of the four types of participant support. *Cf. State of Florida*, slip op. at 4-12. **The Grant Officer** accomplished this task by testifying that TDOC and MRGDC had not provided the documentation necessary to demonstrate that the costs at issue directly benefitted specific JTPA participants or eligible individuals by assisting them in participating in training under the Act. **HT** at 25 1-53, 275, 365; see GX 1 at 17. The issue of whether the EGA costs at issue could possibly qualify as an exception to the general **rule** that EGA costs do not constitute expenditures for participant support services was raised by TDOC and MRGDC as a defense against the case presented by the Grant Officer. Consequently, TDOC and MRGDC bore the burden of establishing, if possible, that such costs were chargeable to the PSC category because the expenditures directly benefitted specific JTPA participants or eligible individuals. *Cf. Quechan Indian Tribe*, 723 F.2d at 736; *First Nat'l Bank of Bellaire v. Comptroller of the Currency*, 697 F.2d 674, 683 (5th Cir. 1983).^{15/} The placement of this burden on the grant recipients is consistent with the well-established **evidentiary** principle that the burden of establishing a fact should be placed on the party having knowledge of the fact and that the opposing party should not be required to establish

^{15/} In *Quechan Indian Tribe*, **the court** concluded that the Secretary had established a violation of statutory restrictions on expenditures by a CETA grantee; the court concluded that the grantee spent grant funds on "programs for which they were intended" but "failed to meet its burden of proving that certain specified administrative expenditures were made in furtherance of the grants' purposes. and also that program participants met the condition' of eligibility." 733 F.2d at 736. In *First Nat'l Bank of Bellaire*, **the court** relied on the provision at Section 7(c) of the **APA** that the proponent of a rule or order has the burden of proof to conclude that, although the Comptroller bore the burden to establish a violation of the lending limitations provided in 12 U.S.C. § 84, the bank bore the burden of establishing that the exception to lending limitations provided by Section **84(13)** was applicable. 697 F.2d at 683.

a negative. See McCormick, *Evidence* § 336 (4th ed. 1992); 9 Wigmore, *Evidence* §2486 (3d ed. 1940).

The **ALJ** had indicated in the Order that TDOC and MRGDC would be provided an opportunity at hearing to prove that the EGA costs at issue qualified as **PSC**.^{16/} Order at 12. TDOC and MRGDC thus were provided an adequate opportunity to provide documentation in support of this defense. Nonetheless, as stated by *the ALJ* at hearing, the record does not contain documentation adequate to establish that the EGA **costs** at issue qualify as PSC under Section **108(b)(2)(A)**. **HT** at 577; *see HT* at 251-53, **275**, 365 (Donahue), **462-63 (Martinez)**; **GX** 1 at 17; *see also* R. D. and O. at 18; Gr. **Ofcr.** Initial Brief at 14, 23-24; MRGDC Brief at 24.

Lastly, we also agree that the ALJ erred in finding, in the R. D. and O. at 17-18, that the Grant Officer had failed to correct the faulty premise relied on by the auditor regarding the potential for EGA costs to qualify as PSC. As initially concluded by the ALJ, in the Order at 18-19, the Grant Officer's testimony indicates that in drafting the Final Determination he was mindful of the possibility that EGA expenditures, in very unusual circumstances, may be allocated as expenditures for participant support. HT at 311-15. Furthermore, inasmuch as *specific, identifiable* JTPA participants or eligible individuals must be directly benefitted by such EGA costs in order for the costs to qualify under the PSC category, it is clear that none of the employment generating activities that were testified about at hearing and which are referenced in the evidence of record could qualify under the **PSC category**.^{17/} *See* R. D. and O. at 15-18. Thus, any error in **the** Grant Officer's failure to **specifically** analyze each of the EGA at issue under the PSC requirement is **harmless**. *See*

^{16/} We reject the Grant Officer's contention that the **ALJ** ruled, in the November 3, 1995 Order, that the Grant Officer had established a *prima facie* case. Gr. **Ofcr.** Initial Brief at 17. As urged by TDOC and MRGDC, TDOC Brief at 4-5; MRGDC Brief at 12, the ALJ ruled only on the question of law before him regarding the interpretation of Section 108(b)(2)(A) of the Act as it pertained to evidence that would support a *prima facie case* of noncompliance with the JTPA. Order at 12.

^{17/} The Grant Officer points out. Reply Brief at 2-3, that MRGDC attempts to confuse the issues at hand regarding the disallowance of EGA costs charged to the participant support category. by the grant recipients with the question of whether the EGA would otherwise qualify as an allowable cost under the administrative costs category. MRGDC Brief at 3-1 1. As indicated *supra*, expenditures for activities that directly result in the placement of JTPA eligible individuals and participants into jobs. *see* R. D. and O. at 6-7 (citing JTPA Conf. Rep. No. 97-889, Sept. 28, 1982 and 20 C.F.R. § 629.37(a)) qualify as allowable EGA costs under the administrative costs category, subject to the fifteen percent cap. To be chargeable to the participant support costs category, on which there is no percentage cap, however, expenditures that would otherwise be considered EGA costs must be shown to have directly benefitted specific. identifiable JTPA participants or eligible individuals. Order at 7-10 and authorities cited therein.

HT at 96-98 (Williams, addressing MRGDC responses to audit-report, GX 1 at 172). We therefore reject the ALJ's conclusion in this regard and **affirm** the Grant Officer's disallowance of EGA costs charged to the participant support services category under Finding 3 of the Final Determination.

ORDER

Accordingly, the ALJ's decision to reverse the disallowance of costs under Finding 2 of the Grant Officer's Final Determination is reversed in part and affirmed in part and the ALJ's decision to reverse the disallowance of costs under Finding 3 is reversed in its entirety. The Texas Department of Commerce^{18/} is ORDERED to pay to the United States Department of Labor \$628,115.^{19/} The Grant Officer shall be guided as to the appropriate method of repayment by the State pursuant to Section 164(d) of the Act and 20 C.F.R. § 629.44.

SO ORDERED.



DAVID A. O'BRIEN
Chair



KARL J. SANDSTROM
Member



JOYCE D. MILLER
Alternate Member

^{18/} The TDOC has been renamed the Texas Workforce Commission since the initiation of this adjudication. See TDOC Brief: Gr. Ofcr. Reply Brief at 4 n.3.

^{19/} As indicated *supra* at n. 5, the costs at issue under Finding 2 of the Final Determination were also at issue under Finding 3. We have agreed with the Grant Officer that the \$628,115 in EGA costs that were at issue in Finding 3 should be disallowed; of those costs, we have also agreed that the \$2,500 UT contract and the \$8,444 JCL contract should also be disallowed on the additional basis that those costs do not qualify as EGA, as concluded by the Grant Officer under Finding 2.

~~CERTIFICATE OF SERVICE~~

Case Name : **State of Texas Department of Commerce and Middle Rio Grande
Development Council v. United States Department of Labor**

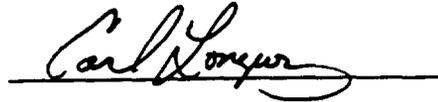
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ALJ Case No. : 94-JTP-20

Document : Final Decision and Order

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