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B-163922, Feb 10, 1978

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B-163922, FEB 10, 1978

1. DEPARTMENT OF LABOR HAS NO AUTHORITY TO ALLOW PAYMENTS IN VIOLATION OF DEPARTMENT REGULATIONS ESTABLISHING 7-DAY UNEMPLOYMENT RULE, 29 C.F.R. SEC. 55.1(Q)(1) AND 30-DAY RELATED EMPLOYMENT RULE, C.F.R. SEC. 55.7(E). CLAIM IS RETURNED TO DEPARTMENT OF LABOR FOR RECALCULATION OF AMOUNT DUE TO THE GOVERNMENT. 2. ALTHOUGH A PORTION OF DISALLOWED GRANT COSTS WAS WITHHELD FROM SUBSEQUENT GRANT FUNDS UNDER SECTION 12(E) OF EEA, PUB. L. NO. 92-54, 85 STAT. 154, CLAIM IS RETURNED TO THE DEPARTMENT OF LABOR UNDER 4 C.F.R. SEC. 104.4 FOR COMPLETION OF CLAIMS COLLECTION EFFORTS, INCLUDING POSSIBLE SETOFF FROM OTHER GOVERNMENT SOURCES, AS REQUIRED BY 4 C.F.R. SEC. 102.3 UNDER CLAIMS COLLECTION ACT, 31 U.S.C. SEC. 951, ET SEQ. (1970).

EMERGENCY EMPLOYMENT ACT OF 1971 - RECOVERY OF GRANT FUNDS:

THIS DECISION RESPONDS TO A REQUEST BY THE ASSISTANT SECRETARY OF LABOR FOR ADMINISTRATION AND MANAGEMENT FOR THIS OFFICE TO REVIEW AND DETERMINE ANY LIABILITY AS WELL AS TO TAKE APPROPRIATE ACTION TO RECOVER, $131,783.71 EXPENDED BY THE STATE OF RHODE ISLAND DURING FISCAL YEAR 1973 AND 1974 IN VIOLATION OF PROGRAM REQUIREMENTS OF A DEPARTMENT OF LABOR GRANT ISSUED UNDER THE EMERGENCY EMPLOYMENT ACT OF 1971 (EEA), PUB. L. NO. 92-54, 85 STAT. 146, SUPERSEDED BY THE COMPREHENSIVE EMPLOYMENT AND TRAINING ACT OF 1973 (CEA), PUB. L. NO. 93 203, 87 STAT. 850, 29 U.S.C. SEC. 841 ET SEQ. THE ASSISTANT SECRETARY HAS PROVIDED US WITH THE FOLLOWING STATEMENT OF FACTS IN THIS MATTER:

"THE STATE OF RHODE ISLAND WAS FUNDED AS PROGRAM AGENT UNDER THE EMERGENCY EMPLOYMENT ACT (PEP, P.L. 92-54, JULY 12, 1971, 42 U.S.C. 4871 ET SEQ.) IN THE AMOUNT OF APPROXIMATELY $7,080,696 BY THREE GRANTS RUNNING FROM SEPTEMBER 1, 1971, THROUGH NOVEMBER 30, 1972. BY LETTER OF DECEMBER 19, 1973, TO GOVERNOR PHILLIP W. NOEL OF RHODE ISLAND, ACTING ASSISTANT REGIONAL DIRECTOR FOR MANPOWER (ARDM) FOR REGION I, ADVISED THAT DUE TO VIOLATIONS OF THE PUBLIC EMPLOYMENT PROGRAM (PEP) BY 36 SUBAGENTS, $428,345.40 OF PROGRAM COSTS WERE DISALLOWED AND RESTITUTION WAS TO BE MADE BY THE STATE.

"THE DISALLOWED COSTS AND DEMAND UPON THE STATE WERE BASED UPON A DOL AUDIT DATED MAY 4, 1973, AND A JOINT CIVIL SERVICE/MANPOWER REVIEW OF RHODE ISLAND PEP DURING 1973.

"GOVERNOR NOEL RESPONDED WITH A LETTER DATED DECEMBER 26, 1973, TO SECRETARY PETER J. BRENNAN. THE GOVERNOR ASKED THAT RESTITUTION BE WAIVED, ALLEGING AMONG OTHER THINGS, THAT PEP REQUIREMENTS WERE NOT ISSUED BEFORE HIRING BEGAN UNDER THE PROGRAM. THIS STATEMENT WAS INACCURATE (SEE ENCLOSED COPY OF FEDERAL REGISTER DATED AUGUST 14, 1971), BUT THE DEPARTMENT NEVERTHELESS, DECIDED TO

REEVALUATE ALL DISALLOWED COSTS WHICH COULD BE DIRECTLY ATTRIBUTED TO ADMINISTRATIVE UNCERTAINTIES IN THE EARLY STAGES OF THE PROGRAM.

"THE GOVERNOR WAS NOTIFIED BY LETTER OF MARCH 29, 1974, FROM LAWRENCE W. ROGERS, REGION 1 ARDM, OF THIS REEVALUATION AND THE CHANGE IN DISALLOWED COSTS AS A RESULT THEREOF. THE LETTER STATED THAT ALL DISALLOWED COSTS WHICH OCCURRED PRIOR TO MAY 31, 1972, THE 'DATE BY WHICH SUBAGENTS SHOULD HAVE RECEIVED THE PEP HANDBOOK,' WERE REEXAMINED. THESE COSTS CONSISTED MAINLY OF VIOLATIONS OF THE ADMINISTRATIVELY ESTABLISHED 30-DAY RULE AND THE 7-DAY RULE, BOTH OF WHICH WERE CLARIFIED BY THE PEP HANDBOOK.

"THE RESULT OF THE REEXAMINATION WAS THAT $177,336.12 IN PREVIOUSLY DISALLOWED COSTS WERE 'NO LONGER CONSIDERED TO BE DISALLOWED.' THIS LEFT A BALANCE OF DISALLOWED COSTS IN THE AMOUNT OF $251,009.28.

"THE LETTER ALSO STATED THAT WITHHOLDING OF FUNDS FOR DISALLOWED COSTS WAS ONLY AVAILABLE AS A REMEDY DURING THE FISCAL YEAR THAT THE IMPROPER EXPENDITURES WERE MADE, OR THE NEXT FISCAL YEAR, AND THAT PROGRAM FUNDS, THEREFORE, COULD NOT BE WITHHELD FOR VIOLATIONS WHICH OCCURRED IN FY 1972. THIS OPINION WAS BASED ON THE CLEAR LANGUAGE OF SECTION 12(E) OF P.L. 92-54 (EEA ACT OF 1971). OF THE DISALLOWED COSTS, $31,648.42 CLEARLY PERTAINED TO POST-FY 72 VIOLATIONS AND THE STATE'S LETTER OF CREDIT WAS APPROPRIATELY REDUCED. THIS LEFT A BALANCE OF DISALLOWED COSTS IN THE AMOUNT OF $219,360.86.

"MR. ROGERS REQUESTED A MEETING WITH THE GOVERNOR'S STAFF TO OBTAIN COMPLETE EXPENDITURE TOTALS FOR PERSONS HIRED IN VIOLATION OF THE LAW AND/OR REGULATIONS IN FY 1972 AND CONTINUED IN THE PROGRAM AS A VIOLATION IN THE FY 73-74 PERIOD. THE MEETING WAS HELD ON APRIL 10, 1974, AND T.C. KOMAREK, ACTING ARDM FOR REGION I, ADVISED GOVERNOR NOEL IN A LETTER DATED APRIL 18 THAT ADDITIONAL AMOUNTS COULD AND WOULD BE WITHHELD FROM THE STATE'S LETTER OF CREDIT.

"TO DATE, THE DEPARTMENT HAS WITHHELD A TOTAL OF $157,341.20 FOR VIOLATIONS OCCURRING IN FY 1973 AND 1974 (THIS FIGURE INCLUDES THE $31,728.42 MENTIONED IN THE MARCH 29 LETTER TO GOVERNOR NOEL). THIS LEFT $93,634.08 IN DISALLOWED COSTS, ALL OF WHICH PERTAINED TO PORTIONS OF HIRING VIOLATIONS OCCURRING IN FY 1972.

"KOMAREK AGAIN REMINDED THE GOVERNOR THAT ALTHOUGH THE DEPARTMENT WAS UNABLE TO WITHHOLD PRESENT PROGRAM FUNDS FOR THIS AMOUNT, THE GOVERNOR, AS PROGRAM AGENT, HAD AN OBLIGATION TO RESTORE THEM. IN A LETTER TO NOEL DATED SEPTEMBER 16, 1975, LUIS SEPULVADA, ACTING ARDM FOR REGION I, NOTED THAT THE GOVERNOR HAD NOT RESPONDED TO THE MATTER OF RESTITUTION OF DISALLOWED COSTS SINCE ROGER'S LETTER OF MARCH 29, 1974. MR. SEPULVADA URGED THE GOVERNOR TO ACT PROMPTLY ON THE MATTER SO THAT RESTORED FUNDS COULD BE USED TO PROVIDE FURTHER ASSISTANCE TO THE UNEMPLOYED OF RHODE ISLAND INSTEAD OF REVERTING TO TREASURY. THE DEADLINE FOR THIS WAS JUNE 30, 1976, AND IT WAS NOT MET.

"AS OF THIS DATE, $131,783.71 ARE COSTS THAT HAVE NOT BEEN REIMBURSED (OCTOBER 5, 1976, LETTER SEPULVADA TO ANGEBRANNDT).

"THIS LETTER USES THE CORRECT TERM OF DISALLOWED COSTS. IN SOME OF THE SUPPORTING CORRRESPONDENCE THE TERM QUESTIONED COSTS WAS INACCURATELY USED TO DESCRIBE COSTS WHICH HAD BEEN ACTUALLY DISALLOWED."

THE ASSISTANT SECRETARY FOR ADMINISTRATION AND MANAGEMENT, CONCLUDES HIS LETTER BY RECOMMENDING THAT WE TAKE APPROPRIATE ACTION TO RECOVER THE $131,783.71 IN

FUNDS EXPENDED BY THE STATE OF RHODE ISLAND DURING FISCAL YEARS 1973 AND 1974 IN VIOLATION OF THE HIRING REGULATIONS OF THE EMERGENCY EMPLOYMENT ACT OF 1971.

IMPROPER ALLOWANCE OF GRANT COSTS

THIS MATTER WAS SUBMITTED TO US FOR COLLECTION ACTION UNDER THE FEDERAL CLAIMS COLLECTION ACT OF 1966, AND IT WOULD BE, OF COURSE, IMPOSSIBLE FOR US TO AUDIT ALL THE EXPENDITURES MADE UNDER THE PEP PROGRAM IN RHODE ISLAND. HOWEVER, IN REVIEWING THE RECORD, WE NOTICE THAT THE DEPARTMENT OF LABOR ORIGINALLY DISALLOWED OVER $98,000 BECAUSE OF VIOLATIONS OF THE 7 -DAY AND 30-DAY REGULATIONS. SUBSEQUENTLY, THE DEPARTMENT ALLOWED THOSE EXPENDITURES. FOR THE REASONS DISCUSSED BELOW, WE BELIEVE THAT THE DEPARTMENT OF LABOR'S ORIGINAL DETERMINATION WAS CORRECT AND THAT THE AMOUNT DUE THE UNITED STATES FROM RHODE ISLAND SHOULD BE INCREASED BY THE SUBJECT AMOUNT.

THE 7-DAY AND 30-DAY RULES, WHICH ARE PART OF THE EEA REGULATIONS, PROVIDE AS FOLLOWS:

(1) "'UNEMPLOYED PERSONS' MEANS *** AN INDIVIDUAL SHALL BE DEEMED TO MEET THIS QUALIFICATION IF HE HAS BEEN WITHOUT WORK FOR 1 WEEK OR LONGER ***" 29 C.F.R. SEC. 55.1(Q)(1) (AUGUST 14, 1971, SUPERSEDED MARCH 3, 1972). THE SUBSTITUTE PROVISION DID NOT CHANGE THE SUBSTANCE OF THE RULE; ONE WEEK WAS CHANGED TO SEVEN DAYS.

(2) "PARTICIPANTS WHOSE MOST RECENT EMPLOYMENT WAS WITH THE PROGRAM AGENT OR ANY EMPLOYING AGENCY RECEIVING FINANCIAL ASSISTANCE THROUGH THE PROGRAM AGENT MUST HAVE BEEN UNEMPLOYED FOR 30 DAYS OR LONGER PRIOR TO BEING EMPLOYED PURSUANT TO THE ACT." 29 C.F.R. SEC. 55.7 (E) (AUGUST 14, 1971).

ONE WEEK VIOLATIONS - IN HIS LETTER OF MARCH 29, 1974 (ENCLOSURE 2 OF THE ASSISTANT SECRETARY'S LETTER), TO THE GOVERNOR OF RHODE ISLAND EXPLAINING THAT HE WAS ALLOWING PREVIOUSLY DISALLOWED EXPENDITURES, THE ASSISTANT REGIONAL DIRECTOR FOR MANPOWER SAID SOME CONFUSION HAD EXISTED IN THE EARLY STAGES OF THE PROGRAM WITH RESPECT TO THE ONE WEEK OR 7-DAY RULE BECAUSE OF THE SEPARATION IN THE REGULATIONS OF THE DEFINITION OF "UNEMPLOYMENT" FROM ANOTHER PROVISION THAT GIVES PRIORTY IN THE SELECTION PROCESS TO THE UNEMPLOYED OVER THE UNDEREMPLOYED (29 C.F.R. SEC. 55.7(B) OF THE AUGUST 14, 1971 REGULATIONS). BUT, HE ADDED, "*** THE NET EFFECT OF PAIRING THESE TWO SEPARATE ITEMS IS AN IMPLICIT STATEMENT OF THE 7-DAY RULE ***." THE CONFUSION, HE SAID, WAS CLEARED UP BY THE ISSUANCE OF A HANDBOOK COVERING THE QUESTION.

THERE ARE AT LEAST NINE CASES THAT WERE ALLOWED UNDER THIS ACTION INVOLVING PERSONS WHO HAD BEEN WITHOUT EMPLOYMENT BETWEEN ONE AND SIX DAYS. IN ONE CASE A RECIPIENT WHO HAD BEEN WORKING ON SATURDAY WAS HIRED UNDER THE PROGRAM ON MONDAY. THE QUESTIONED COSTS VARIED FROM $177 TO $14,635 PER CASE; THE CASES TOTALLED $83,281.85.

THE 30-DAY RULE VIOLATIONS - IN TWO CASES INVOLVING VIOLATIONS OF 29 C.F.R. SEC. 55.7(E), THE ASSISTANT REGIONAL DIRECTOR JUSTIFIED HIS ACTION BY NOTING THAT WHILE THE REGULATIONS IN EXISTENCE WHEN THEY OCCURRED WERE CLEAR, "IN ACTING (WITH GOOD INTENTION) ON *** ADVICE FROM THE GRANTEE PROGRAM AGENT, THE SUBAGENT SHOULD NOT BE PENALIZED." THE AMOUNTS ALLOWED BY THIS WERE $2,677.79 IN ONE CASE AND $12,608 IN THE OTHER; TOTAL AMOUNT, ALLOWED WAS $15,285.79.

IN NONE OF THESE PARTICULAR CASES DOES THE ASSISTANT REGIONAL DIRECTOR, IN

ALLOWING THE QUESTIONED COSTS, ASSERT THAT THE INDIVIDUALS SOMEHOW FALL WITHIN THE ELIGIBILITY STANDARDS OF THE REGULATIONS. IN THE CASE OF THE 7 -DAY RULE VIOLATIONS, HE ASSERTS THAT SUBAGENTS CAN BE EXCUSED FROM APPLYING A DEFINITION IN A REGULATION BECAUSE ITS LOCATION IS NOT PROXIMATE TO A PARTICULAR USE OF THE DEFINED TERM. THIS JUSTICICATION IS NOT BASED ON ANY AMBIGUITY IN LANGUAGE, BUT ON THE COMPLEXITY OF THE REGULATION. (WE NOTE THAT THERE IS NO EVIDENCE THAT THE PARTICIPANTS IN QUESTION WERE ELIGIBLE AS UNDEREMPLOYED INDIVIDUALS.) IN THE CASE OF THE 30-DAY RULE VIOLATIONS, HE EXCUSES THE VIOLATIONS BECAUSE THEY OCCURRED IN GOOD FAITH AND UNDER BAD ADVICE. YET, AS THE DEPARTMENT EXPLAINED IN AN EARLIER LETTER OF DECEMBER 19, 1973, TO GOVERNOR NOEL (ENCLOSURE 2):

"FORGIVING OF UNAUTHORIZED PAYMENTS, AS HAS BEEN SUGGESTED BY AT LEAST ONE CITED SUBAGENT, IS NOT LEGALLY FEASIBLE, BASED UPON THE RULING OF THE SOLICITOR OF THE DEPARTMENT OF LABOR TRANSMITTED OCTOBER 10, 1973, WHICH SAYS IN PART 'FORGIVING OF UNAUTHORIZED PAYMENTS: THE FEDERAL GOVERNMENT LACKS THE AUTHORITY TO FORGIVE PAYMENTS MADE BY A GRANTEE IN VIOLATION OF PEP REGULATIONS, NO MATTER HOW WELL INTENTIONED THE GRANTEE MAY HAVE BEEN IN MAKING SUCH PAYMENTS. WHEN THE CONGRESS ENACTS A STATUTE AUTHORIZING THE EXPENDITURE OF APPROPRIATED FUNDS FOR SPECIFIC PURPOSES, THE CONDITIONS IN THAT STATUTE BECOME BINDING ON THE GOVERNMENT EMPLOYEES WHOSE JOB IT IS TO ADMINISTER THE LAW.'"

THIS STATEMENT IS SOUND AND WE ARE UNABLE TO FIND ANY BASIS IN THE LETTER OF MARCH 29 ALLOWING THESE COSTS (ENCLOSURE 5) TO JUSTIFY THE DEPARTMENT OF LABOR ABANDONING THIS POSITION.

THE PUBLISHED REGULATIONS OF THE DEPARTMENT OF LABOR UNDER SECTION 12 (A) OF EEA, PUB. L. NO. 92-54, 85 STAT. 153 HAD THE FORCE AND EFFECT OF LAW UNTIL MODIFIED BY FURTHER REGULATIONS. 40 COMP.GEN. 473 (1961), 31 COMP. GEN. 193 (1951) AND THE DECISIONS CITED THEREIN. IN THE ABSENCE OF EXPLICIT AUTHORITY TO DO SO, REGULATIONS CANNOT BE WAIVED BY THE DEPARTMENT OF LABOR, 37 COMP.GEN. 820 (1958). WHEN FACED WITH THE NEED TO INTERPRET REGULATIONS, WE GIVE GREAT WEIGHT TO AN AGENCY'S INTERPRETATION OF ITS OWN REGULATIONS (SEE 55 COMP.GEN. 427 (1975) AND CASE CITED AT 429), BUT HERE WE ARE NOT FACED WITH CONFLICT OVER INTERPRETATION. AS PREVIOUSLY NOTED, THE OFFICER WHO ALLOWED THE EXPENDITURES ACKNOWLEDGED THAT THE EXPENDITURES DID NOT MEET THE REQUIREMENTS OF THE REGULATIONS.

EVEN THOUGH, IN THE COURSE OF ITS CLAIMS COLLECTION ACTIVITES, THIS OFFICE DOES NOT, FOR PRACTICAL REASONS, MAKE COMPLETE INDEPENDENT AUDITS OF DEBTS REFERRED TO US FOR COLLECTION, WHEN AN OBVIOUS LEGAL ERROR, WHETHER IN FAVOR OF THE GOVERNMENT OR NOT, COMES TO OUR ATTENTION, IT IS OUR DUTY TO HAVE THE AGENCY INVOLVED MAKE AN APPROPRIATE ADJUSTMENT IN THE AMOUNT DUE. ACCORDINGLY, WE BEIEVE THE DEBT OWED BY RHODE ISLAND SHOULD BE INCREASED BY THE OVER $98,000 INVOLVED IN THE 7-DAY AND THE 30-DAY VIOLATIONS THAT THE DEPARTMENT HAS ALREADY DETERMINED OCCURRED.

DEPARTMENT OF LABOR CLAIMS COLLECTION EFFORTS

ALL AGENCIES ARE REQUIRED TO TAKE "AGGRESSIVE ACTION" TO COLLECT AMOUNTS DUE UNDER CLAIMS RESULTING FROM ACTIVITIES OF THE AGENCY CONCERNED PURSUANT TO THE CLAIMS COLLECTION ACT, 31 U.S.C. SEC. 951 ET SEQ. (1970), AND IMPLEMENTING REGULATIONS, 4 C.F.R. SEC. 102.1 ET SEQ., BEFORE SUBMITTING THE CLAIM TO THE GENERAL ACCOUNTING OFFICE OR TO THE DEPARTMENT OF JUSTICE FOR FURTHER COLLECTION ACTION. WHILE IT APPEARS THAT THE AGENCY HAS SATISFIED THE REQUIREMENT TO MAKE WRITTEN DEMAND FOR PAYMENT, THERE ARE OTHER POSSIBLE ADMINISTRATIVE STEPS, SET

FORTH IN PART 102 OF THE REGULATIONS, SUPRA, WHICH WERE EITHER OMITTED OR WHICH WERE NOT REPORTED TO THIS OFFICE IN ACCORDANCE WITH SECTION 105.4 OF THE REGULATIONS. ONE IMPORTANT OMISSION WAS THE FAILURE TO ATTEMPT COLLECTION ACTION BY OFFSET.

THE DEPARTMENT OF LABOR DID NOT SATISFY ITS CLAIM COLLECTION RESPONSIBILITIES BY THE LIMITED WITHHOLDING ACTION TAKEN UNDER AUTHORITY OF SECTION 12(E) OF THE EEA, WHICH PROVIDES IN PART:

"*** THE SECRETARY MAY ALSO WITHHOLD FUNDS OTHERWISE PAYABLE UNDER THIS ACT IN ORDER TO RECOVER ANY AMOUNTS EXPENDED IN THE CURRENT OR IMMEDIATELY PRIOR FISCAL YEAR IN VIOLATION OF ANY PROVISION OF THIS ACT OR ANY TERM OR CONDITION OF ASSISTANCE UNDER THIS ACT."

WITHHOLDING FURTHER GRANT ASSISTANCE UNDER THE SAME PROGRAM IN WHICH THE VIOLATIONS OCCURRED AND SETTING OFF THE DEBT AGAINST MONEYS OWED TO THE DEBTOR BY ANY AGENCY OF THE FEDERAL GOVERNMENT ARE ENTIRELY DIFFERENT REMEDIES. SINCE THE FORMER IS AVAILABLE ONLY TO RECOVER AMOUNTS EXPENDED IN THE CURRENT OR PRIOR FISCAL YEAR, THE DEPARTMENT OF LABOR HAD A RESPONSIBILITY TO SEEK OFFSET FROM OTHER SOURCES FOR THE REMAINING LIABILITY FOR WHICH WITHHOLDING WAS NOT AVAILABLE. THIS IT DOES NOT APPEAR TO HAVE DONE. INASMUCH AS WE BELIEVE THAT THE AMOUNT DUE THE UNITED STATES BY RHODE ISLAND SHOULD BE RECALCULATED AND SINCE THE DEPARTMENT OF LABOR HAS NOT TAKEN COMPLETE CLAIMS COLLECTIONS ACTION IN ACCORDANCE WITH 4 C.F.R. PART 102, AS REQUIRED UNDER 4 C.F.R. SEC. 105.1, WE ARE RETURNING THIS MATTER TO THE DEPARTMENT OF LABOR FOR PROMPT COMPLETION OF ITS CLAIMS COLLECTION RESPONSIBILITIES. IN ORDER THAT STATUTE OF LIMITATIONS QUESTIONS MAY BE AVOIDED, WE SUGGEST THAT THIS MATTER BE REFERRED DIRECTLY TO THE DEPARTMENT OF JUSTICE FOR POSSIBLE COMPROMISE, TERMINATION, OR JUDICIAL ACTION IF FURTHER COLLECTION EFFORTS ARE UNSUCCESSFUL.