



In the Matter of:

**WESTCHESTER-PUTNAM COUNTIES
CONSORTIUM FOR WORKER
EDUCATION AND TRAINING, INC.,**

ARB CASE NO. 10-081

ALJ CASE NO. 2007-WIA-007

COMPLAINANT,

DATE: October 18, 2010

v.

UNITED STATES DEPARTMENT OF LABOR,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Emily A. Roscia, Esq., *Barnes, Iaccarino & Shepherd, LLP*, White Plains, New York

For the Respondent:

**Frank P. Buckley, Esq.; Harry L. Sheinfeld, Esq.; and Gary M. Buff, Esq.;
*United States Department of Labor, Washington, District of Columbia***

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*.

FINAL DECISION AND ORDER

This case is before the Administrative Review Board (ARB) pursuant to the United States Department of Labor (DOL) Grant Officer's (Grant Officer) final determination under Title I of the Workforce Investment Act of 1998 (WIA), as

amended, and its implementing regulations.¹ The Grant Officer determined that the Westchester-Putnam Counties Consortium for Worker Education and Training, Inc., (Consortium) unlawfully spent WIA grant funds for administrative costs exceeding the limit set forth in the grant and that such funds were subject to repayment. The Consortium requested a hearing before a DOL Administrative Law Judge (ALJ) on the Grant Officer's Final Determination. After holding a hearing, the ALJ issued a Decision and Order (D. & O.) affirming the Grant Officer's disallowance of \$91,839 in excess administrative costs. The Consortium filed a timely petition for review with the ARB, and the Board accepted the case for review. We affirm the ALJ's D. & O. to disallow the Consortium's expenditure of the WIA grant funds spent in excess of the grant's administrative cost limit for the reasons following.

BACKGROUND

The Consortium is a non-profit corporation established as a partnership between the Building and Construction Trade Council of Westchester-Putnam Counties, AFL-CIO, and the Construction Industry Council, an employer's association representing building contractors.² On October 16, 2002, the DOL's Employment and Training Administration (ETA) awarded the Consortium a \$500,000 grant under Title I of the WIA to provide building trades pre-apprenticeship training to individuals residing in Westchester and Putnam Counties, New York, from October 7, 2002, through November 30, 2003.³

The purpose of Title I of the WIA is:

to provide workforce investment activities, through statewide and local workforce investment systems, that increase the employment, retention, and earnings of participants, and increase occupational skill attainment by participants, and, as a result, improve the quality of the workforce, reduce welfare dependency, and enhance the productivity and competitiveness of the Nation.^[4]

¹ 29 U.S.C.A. § 2801 *et seq.* (West 1999 & Supp. 2010); 20 C.F.R. Parts 660, 667 (2010).

² Administrative File Exhibit (AFX) 5 at 55 (Audit Report).

³ *Id.*

⁴ 29 U.S.C.A. § 2811. The WIA superseded the Job Training Partnership Act of 1982, as amended, (JTPA), 29 U.S.C.A. §§ 1501 *et seq.* (West 1998), which provided federal funding to state governments to finance job training and placement programs for economically disadvantaged individuals.

The grant provided that there would be a 10% limit on the amount of the grant funds that could be used for administrative costs.⁵ The Consortium entered into a sub-contract agreement with the National Association On Drug Abuse Problems, Inc. (NADAP), a private non-profit organization, to “manage all aspects” of the training programs it provided under the grant.⁶

Upon the conclusion of the training programs provided under the grant, the DOL’s Office of the Inspector General (OIG) conducted a performance audit of the grant.⁷ The purpose of the performance audit was to, in part, determine whether the Consortium’s reported costs under the grant were reasonable, allowable, and allocable to the grant under the Federal grant requirements as specified in the grant.⁸ Relevant to the issue before the Board, the OIG audit found that the Consortium incurred \$91,939 in administrative costs in excess of the 10% grant limit and recommended that the ETA recover the excess administrative costs.⁹

After giving the Consortium an opportunity to provide additional information in response to the OIG’s audit, the Grant Officer ultimately issued a Final Determination on July 3, 2007.¹⁰ The Grant Officer determined that “ETA is in agreement with the auditor’s finding” and that the Consortium “did not provide sufficient documentation to clarify” or “determine” that it did not incur \$91,939 in administrative costs in excess of the 10% grant limit.¹¹ Thus, the Grant Officer concluded that the \$91,939 in excess administrative costs were disallowed and ordered the Consortium to repay the DOL the excess administrative costs.¹²

⁵ AFX 6 at 72 (Grant Agreement); *see* 20 C.F.R. § 667.210(b).

⁶ AFX 5 at 55 (Audit Report); AFX 6 at 89 (Grant Agreement); AFX 9g at 226, 228 (Sub-Contract).

⁷ AFX 5 at 36 (Audit Report); *see* 20 C.F.R. § 667.400(a)-(b).

⁸ AFX 5 at 36 (Audit Report); *see* AFX 6 at 70 (Grant Agreement) indicating that the Consortium would comply with the uniform administrative grant requirements and cost principles set forth in Office of Management and Budget (OMB) Circular A-122 “Cost Principles For Non-Profit Organizations ” and at 20 C.F.R. Parts 95 and 97, as well as the WIA’s implementing regulations.

⁹ AFX 5 at 36, 39-40, 42-45 (Audit Report).

¹⁰ AFX 3a at 8-10; AFX 3b at 11-21 (Final Determination).

¹¹ AFX 3b at 14-16 (Final Determination).

¹² AFX 3a at 8-9; AFX 3b at 20 (Final Determination).

On July 19, 2007, the Consortium requested a hearing before an ALJ on the Grant Officer's Final Determination.¹³ The ETA informed the Consortium and the ALJ by letter dated June 8, 2009, that the only issue in the case before the ALJ concerned "the \$91,839 in costs disallowed as excess administrative costs."¹⁴ The ALJ held a hearing on the merits of this case on June 11, 2009, and thereafter issued the decision that is before us. In this D. & O. issued on March 10, 2010, the ALJ affirmed the Grant Officer's disallowance of \$91,839 in excess administrative costs. By letter dated March 29, 2010, the Consortium filed a timely petition for review with the ARB, noting its specific exceptions to the ALJ's D. & O.¹⁵ The ARB issued a Notice of Appeal and Order Establishing Briefing Schedule on April 22, 2010, accepting the case for review.¹⁶

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under the WIA.¹⁷ Pursuant to Section 186(b) of the WIA, the Board asserted jurisdiction of the Consortium's appeal.¹⁸ We render our decision in this case pursuant to Section 186(c) of the WIA¹⁹ and, as the Secretary's designee, we review both the ALJ's findings of fact and conclusions of law de novo.²⁰

¹³ Administrative Law Judge Exhibit (ALJX) 1; 20 C.F.R. § 667.800(a).

¹⁴ ALJX 23; *see also* Hearing Transcript (HT) at 12-13.

¹⁵ 20 C.F.R. § 667.830(b).

¹⁶ *Id.*

¹⁷ Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924, 3925 (Jan. 15, 2010).

¹⁸ 29 U.S.C.A. § 2936(b); *see also* 20 C.F.R. § 667.830(b).

¹⁹ *Id.*

²⁰ As the designee of the Secretary of Labor, the Board is not bound by the decision of the ALJ, but rather retains complete freedom of decision.

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision – as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. [Citation omitted.] Similarly, [Section 557(b) of the Administrative Procedure Act] provides that "On appeal from

THE CONSORTIUM'S EXCEPTIONS TO THE ALJ'S DECISION

The exceptions to the ALJ's decision, which the Consortium specifically identified in its petition for review pursuant to 20 C.F.R. § 667.830(b)²¹ are:

1. The ALJ did not consider that the Grant Officer's finding that the Consortium unlawfully spent Federal Title I WIA grant funds for administrative costs exceeding the limit set forth in the grant was based on the OIG audit report's finding that the NADAP was not a subrecipient as defined under section 20 C.F.R. § 660.300.
2. The ALJ did not explain or cite to any legal authority regarding how the Grant Officer sustained its burden of production to establish that the Consortium unlawfully spent Federal Title I WIA grant funds for administrative costs exceeding the limit set forth in the grant.

DISCUSSION

Evidentiary Burdens

The ALJ did not specifically address or apply the relevant framework regarding the parties' evidentiary burdens in this case. In determining whether to sustain the Grant Officer's findings that certain expenditures were not allowable under the WIA, the

or review of the initial decisions of such . . . officers, the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision.

Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII §8, pp. 83-84 (1947); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). *See, e.g., Fla. Dep't of Labor & Emp't Sec. v. U.S. Dep't of Labor*, ARB No. 04-168, ALJ No. 1999-JTP-016, slip op. at 6 (ARB Feb. 28, 2005), *aff'd sub nom. Fla. Agency for Workforce Innovation v. U.S. Dep't of Labor*, 176 Fed.Appx. 85, 2006 WL 1082314 (11th Cir., Apr. 24, 2006)(unpub.); *Mass. v. U.S. Dep't of Labor*, ARB Nos. 02-011, 02-021; ALJ No. 1998-JTP-006, slip op. at 3 (ARB June 13, 2002) (arising under the WIA's predecessor statute, the JTPA).

²¹ 20 C.F.R. § 667.830(b) states that "a party dissatisfied with the ALJ's decision" may file a petition for review with the ARB "specifically identifying the procedure, fact, law or policy to which exception is taken. Any exception not specifically urged is deemed to have been waived."

burden-shifting framework provided at 20 C.F.R. § 667.810(e) applies. Section 667.810(e) states:

The Grant Officer has the burden of production to support her or his decision. To this end, the Grant Officer prepares and files an administrative file in support of the decision which must be made part of the record. Thereafter, the party or parties seeking to overturn the Grant Officer's decision has the burden of persuasion.²²

Under the foregoing, as under the identical implementing regulatory provisions regarding the parties' respective evidentiary burdens in cases arising under the WIA's predecessor statute, the JTPA,²³ courts have held that the initial burden is not on the grant recipient but rests with the Grant Officer who "must produce evidence sufficient to establish a prima facie case."²⁴ This requires evidence sufficient for a reasonable person to conclude that the Federal grant funds were spent unlawfully.²⁵ If the recipient's records are inadequate to show that the Federal grant funds were spent lawfully, the Grant Officer may meet his burden by establishing the inadequacy of the records.²⁶

If the Grant Officer meets his burden of production, the burden then shifts to the recipient challenging the Grant Officer's determination to offer persuasive evidence to the contrary.²⁷ Overcoming a prima facie case of misspent funds requires the grantee to present cogent evidence and argument regarding how it has either met the specific

²² 20 C.F.R. § 667.810(e).

²³ 29 U.S.C.A. §§ 1501 *et seq.* (West 1998).

²⁴ *Tex. Dep't of Commerce v. U.S. Dep't of Labor*, 137 F.3d 329, 332 (5th Cir. 1998); *see also Fla. Dep't of Labor and Emp't Sec.*, ARB No. 04-168, slip op. at 7-8, *aff'd sub nom. Fla. Agency for Workforce Innovation*, 176 Fed.Appx. at 91 n.8, 2006 WL 1082314, slip op. at 4 n.8; 20 C.F.R. §§ 627.802(e), 636.10(g); 20 C.F.R. § 629.57(i) (1991). *See also Mass.*, ARB Nos. 02-011, 02-021, slip op. at 9 n.7 ("In presenting a prima facie case, a Grant Officer should [also] demonstrate an understanding of the statutory and regulatory requirements that are imposed on the recipient and subrecipient.").

²⁵ *Id.*

²⁶ *Tex. Dep't of Commerce*, 137 F.3d at 332; *see also Fla. Dep't of Labor*, ARB No. 04-168, slip op. at 7-8.

²⁷ *See* 20 C.F.R. §§ 627.802(e), 636.10(g) (1998); 20 C.F.R. § 629.57(i) (1988); *see also Fla. Dep't of Labor*, ARB No. 04-168, slip op. at 7-8; *State of Fla. v. U.S. Dept. of Labor*, 1992-JTP-017, slip op. at 4-7 (Sec'y Dec. 5, 1994), *aff'd on recon.* (Sec'y Jan. 20, 1995) (addressing the burdens of production and persuasion under predecessor JTPA regulation, 29 C.F.R. § 629.57(i) (1988)), *aff'd*, 83 F.3d 435 (11th Cir. 1996) (table).

requirements the statute imposes or has compensated for any deficiencies through other means.²⁸

Issue

The ultimate question before the Board is whether the Consortium misspent Title I WIA grant funds. In addressing this issue, as well as the contentions the Consortium raises on appeal, we initially consider whether the Grant Officer met his burden of production necessary to establish a prima facie case of misspent grant funds, both as a matter of law and of fact. If it is determined that the Grant Officer met the required burden of production, we consider whether the Consortium nevertheless has met its burden of persuasion to show that it or its sub-contractor, the NADAP, lawfully spent the Federal Title I WIA grant funds at issue.

Relevant Statutory and Regulatory Provisions

The Secretary is authorized to monitor and investigate all recipients of financial assistance under Title I of the WIA to determine whether the recipients are complying with the WIA's provisions and its implementing regulations, including conducting performance audits to assure that funds are spent in accordance with the WIA.²⁹ A recipient of funds under WIA Title I shall repay to the United States amounts found not to have been expended in accordance with its provisions.³⁰

A "grant" under the WIA's implementing regulations is defined as "an award of WIA financial assistance by the U.S. Department of Labor to an eligible WIA recipient" and a "grantee" is "the direct recipient of grant funds."³¹ A "subgrant" is defined as "an award of financial assistance . . . made under a grant by a grantee to an eligible subrecipient," including "financial assistance when provided by contractual legal agreement."³² A "subrecipient means an entity to which a subgrant is awarded and which is accountable to the recipient . . . for the use of the funds provided."³³

²⁸ *Fla. Dep't of Labor*, ARB No. 04-168, slip op. at 7-8; *Mass.*, ARB Nos. 02-011, 02-021, slip op. at 9 n.7.

²⁹ 29 U.S.C.A. § 2933(a)-(b); 20 C.F.R. § 667.400(a)-(b).

³⁰ 29 U.S.C.A. § 2934(c).

³¹ 20 C.F.R. § 660.300.

³² *Id.*

³³ *Id.*

“Limits on administrative costs” for programs operated under WIA Title I “will be identified in the grant.”³⁴ In this case, the grant awarded to the Consortium advised that there was “a 10% limitation on administrative costs on funds administered under” the \$500,000 grant.³⁵ Administrative costs are those costs, “which are not related to the direct provision of workforce investment services,”³⁶ and are delineated at 20 C.F.R. § 667.220(b). However, pursuant to 20 C.F.R. § 667.220(c)(1), “[a]wards to subrecipients or vendors that are *solely* for the performance of administrative functions are classified as administrative costs” (emphasis added), but section 667.220(c)(4) provides that “[e]xcept as provided at paragraph (c)(1), all costs incurred for functions and activities of subrecipients and vendors are program costs.” The comments accompanying the promulgation of section 667.220 explain:

All costs of vendors and subrecipients . . . are program costs with the single exception of awards to such vendors and subrecipients which are *solely* for the purpose of performing [administrative] functions Thus, incidental administrative costs incurred by a contractor whose contract’s intended purpose is to provide identifiable program services do not have to be identified, broken out from other costs incurred under the contract, and tracked against the administrative cost limitation. Costs incurred under contracts whose intended purpose *is* administrative have to be charged to the administrative cost category.^[37]

Grant Officer’s Determination

The Grant Officer agreed with the OIG audit’s finding that the NADAP “in essence, should have been considered the prime grantee” as it was “not held accountable” by the Consortium “nor was there evidence” that the Consortium “monitored” the NADAP’s grant operations.³⁸ Although the Consortium “claimed to have a recipient-to-subrecipient relationship” with the NADAP, the Grant Officer noted that the OIG audit disagreed but instead concluded that “no such relationship existed according to WIA regulations.”³⁹ The Grant Officer found that although the NADAP and the Consortium “were separate legal entities, there was little operational distinction between them.”⁴⁰

³⁴ 20 C.F.R. § 667.210(b).

³⁵ AFX 6 at 72, 89 (Grant Agreement).

³⁶ 20 C.F.R. § 667.220(a).

³⁷ 65 Fed. Reg. 49421, 49366 (Aug. 11, 2000).

³⁸ AFX 3b at 15-16 (Final Determination).

³⁹ AFX 3b at 15 (Final Determination).

The Grant Officer determined that “since NADAP’s actions were more along the lines of the prime grantee,” additional costs “should have been classified as administrative instead of program related costs.”⁴¹ Thus, the OIG audit found that the Consortium actually incurred \$91,939 in administrative costs above the grant’s 10% administrative cost limit.⁴²

The Grant Officer gave the Consortium the opportunity to provide additional documentation regarding whether costs were properly classified as program costs versus administrative costs in response to the OIG audit’s findings and recommendations. Upon review of the Consortium’s additional documentation, the Grant Officer determined that “there was nothing substantial enough” in the documentation “to recommend any alternative classification of the questioned costs.”⁴³ Although the Consortium submitted a copy of the sub-contract it had with the NADAP, the Grant Officer concluded that without additional documentation “it is difficult to determine whether or not” the Consortium and the NADAP “had an actual recipient-to-subrecipient relationship.”⁴⁴ Ultimately, the Grant Officer found that the Consortium “did not provide sufficient documentation” (such as “documentation of invoices submitted to” the Consortium by the NADAP for payment and “minutes” of meetings between the Consortium and the NADAP) “to clarify the flow of funds from the DOL grant” to show how they were expended and reimbursed to the NADAP. In addition, the Grant Officer found that the Consortium did not provide “any additional material to show the process” the Consortium “used in monitoring” the NADAP.⁴⁵

ALJ’s Decision

Initially, the ALJ addressed the Consortium’s assertion that the NADAP is a “subrecipient” as defined under 20 C.F.R. § 660.300, and therefore not subject to the administrative cost limitation at 20 C.F.R. § 667.210(b) because it is both an “entity to which a subgrant has been awarded” and “is accountable to the recipient [the Consortium] ... for the use of funds provided.” In response, the ALJ held that lacking was evidence that the NADAP “is an entity to which a subgrant has been awarded” as the

⁴⁰ AFX 3b at 15-16 (Final Determination).

⁴¹ *Id.*

⁴² AFX 5 at 43 (Audit Report).

⁴³ AFX 3b at 16 (Final Determination).

⁴⁴ *Id.*

⁴⁵ *Id.*

grant agreement identified only the Consortium as the entity to which the grant was made and did not mention any grant or subgrant to the NADAP.⁴⁶ Although the grant agreement indicated that the Consortium had a “contractual relationship” with the NADAP “to develop, manage and implement its programs” under the grant, the ALJ held that this alone did not establish that the NADAP was a “subrecipient” as defined under 20 C.F.R. § 660.300 “to which a subgrant has been awarded.”⁴⁷

Even if the NADAP met the definition of a “subrecipient” under 20 C.F.R. § 660.300, the ALJ held that would not relieve the Consortium as the named grantee from complying with the 10% administrative cost limitation.⁴⁸ The ALJ rejected the Consortium’s contention that the OIG audit’s finding that the NADAP was not a “subrecipient” was the “basis” for the audit’s finding that the Consortium was responsible for the excess administrative costs, but the fact that the Consortium and the NADAP were “operationally indistinguishable despite being separate legal entities due to NADAP’s performance of very extensive enumerated grantee administrative functions.”⁴⁹

The Consortium also argued before the ALJ that the Grant Officer failed to meet his burden of production. Specifically, the Consortium asserted that the administrative file offered into evidence lacked documentation that the NADAP was permitted to directly draw down grant funds, that the OIG auditors who investigated the grant failed to testify at the hearing, and that it is “unclear” how the amount of excessive administrative costs was determined.

In rejecting the Consortium’s arguments as to the sufficiency of the Grant Officer’s showing, the ALJ noted that whether the record contains documentation regarding the NADAP’s authority to directly draw funds from the grant has “no impact on” whether the Grant Officer sustained his burden to establish that the Consortium exceeded the grant’s administrative cost limitation.⁵⁰ Moreover, the ALJ found that the testimony of the OIG “auditor in charge,” Rebecca Lynn Bowen, who managed the audit and was “responsible for the day-to-day audit function,” was sufficient to meet the Grant Officer’s burden. Finally, the ALJ found that the OIG audit’s determination of the amount of the excessive administrative costs was supported by “relevant numerical facts presented in this record.” Thus, the ALJ affirmed the Grant Officer’s disallowance of administrative costs in the amount of \$91,939.

⁴⁶ D. & O. at 2; *see* AFX 6 at 70 (Grant Agreement).

⁴⁷ D. & O. at 2; *see* AFX 6 at 89 (Grant Agreement).

⁴⁸ D. & O. at 2.

⁴⁹ *Id.*; *see* AFX 5 at 42-43 (Audit Report).

⁵⁰ D. & O. at 3.

Analysis

On appeal before the Board, the Consortium raises anew the arguments it raised before the ALJ. Initially, the Consortium argues that because the grant indicates that the Consortium had a contractual relationship with the NADAP to implement the programs provided for under the grant,⁵¹ the NADAP is a subrecipient of the grant as defined at 20 C.F.R. § 660.300. Thus, the Consortium asserts that the NADAP, as a subrecipient, is not subject to the grant's 10% administrative cost limitation the grant imposed in accordance with 20 C.F.R. § 667.210(b), as the NADAP performed both administrative functions and programmatic functions under the grant and not just solely administrative functions. In such circumstances, all of a subrecipient's costs are considered program costs and not administrative costs under 20 C.F.R. § 667.220(c)(1) and (4).

Under 20 C.F.R. § 660.300, a subrecipient means both "an entity to which a subgrant is awarded" and, which is "accountable to the recipient" for the use of the grant funds. Furthermore, a "subgrant" is defined as "an award of financial assistance . . . made under a grant by a grantee to an eligible subrecipient," including "financial assistance when provided by contractual legal agreement." Because the Consortium had a contract with the NADAP to implement the programs provided for under the grant, the NADAP could be considered "an entity to which a subgrant is awarded." However, to be considered a subrecipient as defined under section 660.300, the NADAP also must be accountable to the Consortium, the recipient of the grant. The Grant Officer agreed with the OIG audit's finding that the NADAP cannot be considered a subrecipient because the Consortium did not provide sufficient documentation that it monitored the NADAP's grant activities as required under the WIA's implementing regulations⁵² or held the

⁵¹ AFX 6 at 89 (Grant Agreement).

⁵² See 20 C.F.R. § 667.400(c)(1), which provides that "Each recipient and subrecipient must continuously *monitor* grant-supported activities in accordance with the uniform administrative requirements at 29 CFR parts 95 and 97, as applicable, including the applicable cost principles indicated at 29 CFR 97.22(b) or 29 CFR 95.27, for all entities receiving WIA title I funds." (emphasis added).

Similarly, 20 C.F.R. § 667.410(a)(1)-(2) provides:

Each recipient and subrecipient must conduct regular *oversight and monitoring* of its WIA activities and those of its subrecipients and contractors in order to:

- (1) Determine that expenditures have been made against the cost categories and *within the cost limitations* specified in the Act and the regulations in this part;

NADAP “accountable” as also required under section 660.300.⁵³ Specifically, the Grant Officer noted that the Consortium did not provide sufficient documentation to show how the grant funds were expended, such as documentation of invoices that the NADAP submitted to the Consortium for payment, minutes from joint Consortium-NADAP meetings, or documentation showing how the Consortium monitored the NADAP.⁵⁴

Instead, the Grant Officer and the ALJ agreed with the OIG audit’s finding that the NADAP acted and performed administrative functions as if it were the prime grantee or recipient.⁵⁵ Thus, they concluded that the NADAP was functionally indistinguishable

(2) Determine whether or not there is *compliance with* other provisions of the *Act and the WIA regulations* and other applicable laws and regulations (emphasis added).

⁵³ AFX 3b at 16 (Final Determination); AFX 5 at 42 (Audit Report); HT at 30, 34, 37, 45-46.

⁵⁴ AFX 3b at 16 (Final Determination).

⁵⁵ D. & O. at 2; AFX 3b at 16 (Final Determination). Examples the OIG noted in its audit report that showed that the Consortium and the NADAP were indistinguishable included:

the NADAP developed the grant proposal and provided the Consortium’s administrative infrastructure;

the NADAP contracted “jointly” for its own and the Consortium’s “single” audit and legal services;

the NADAP directly drew down the grant funds into a NADAP account for the Consortium’s grant programs;

the NADAP certified the Consortium’s financial reports to the DOL’s ETA (which is the responsibility of the grantee, the Consortium in this case, under 20 C.F.R. § 667.300(a)-(c) and 29 C.F.R. § 97.41(a)-(b));

the NADAP filed the Consortium’s tax forms;

the NADAP added the Consortium’s two directors into the NADAP’s personnel system, approving their timesheets as their supervisors and paying them through the NADAP’s payroll;

the NADAP reimbursed itself for costs without approval from the Consortium;

the NADAP maintained custody of all if the Consortium’s financial and tax records.

from the Consortium and, therefore, was not a subrecipient as defined under section 660.300 that was accountable to the Consortium, the recipient of the grant. Consequently, the Consortium's administrative costs were improperly claimed as the NADAP's program costs.⁵⁶

As the agency charged with the implementation and enforcement of the WIA and pertinent regulations, the ETA Grant Officer's construction and interpretation of ETA's own regulations is entitled to substantial deference if it is reasonable.⁵⁷ The Grant Officer's interpretation of what is required to be considered a subrecipient as defined

AFX 5 at 42-43 (Audit Report); *see also* HT at 18, 28-29, 31-33, 35-37, 46, 53, 57.

⁵⁶ See AFX 5 at 43 (Audit Report); HT at 31-32. Although the NADAP, as a contractor for the Consortium, also provided program services like a subrecipient, the comments to 20 C.F.R. § 667.220 clarify that only "incidental" administrative costs incurred by such a contractor do not need to be considered under the administrative cost limitation. 65 Fed. Reg. 49421, 49366 (Aug. 11, 2000). Here, we note that the Grant Officer and the OIG audit determined, in essence, that nearly 30% of the grant funds were utilized for administrative costs, exceeding the 10% administrative cost limitation. It is therefore unlikely that the NADAP's administrative costs could be characterized as "incidental."

⁵⁷ It is a settled principle of administrative law

"that an agency's construction of its own regulations is entitled to substantial deference." . . . In situations in which "the meaning of [regulatory] language is not free from doubt," the reviewing court should give effect to the agency's interpretation so long as it is "reasonable," . . . that is, so long as the interpretation "sensibly conforms to the purpose and wording of the regulations" Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.

Martin v. OSHA Review Comm'n, 499 U.S. 144, 150-151, 111 S.Ct. 1171, 1175-1176 (1991) (citations omitted); *United Urban Indian Council, Inc. v. U.S. Dep't of Labor*, ARB No. 01-025, ALJ No. 2000-WIA-004, slip op. at 7 (ARB May 18, 2001); *U.S. Dep't of Labor v. City of Detroit, Mich.*, 1983-CTA-084, 1983-CTA-158, 1983-CTA-193, 1983-CTA-201, 8194-CTA-080, 1984-CTA-174, 1985-CTA-070, 1985-CTA-110, 1985-CTA-113, 1985-CTA-120, slip op. at 5 (Sec'y July 31, 1995). This standard accords the Grant Officer wide latitude in effectuating the purposes of the WIA's implementing regulations. Thus, we will not substitute our judgment for that of the agency that wrote the regulations at issue and must apply them in sometimes widely different circumstances. *United Urban Indian Council*, ARB No. 01-025, slip op. at 7.

under section 660.300 in the circumstances of this case is reasonable and, therefore, is accorded deference. The Grant Officer determined, based on the OIG's audit contained in the administrative file he prepared, that the Consortium did not provide sufficient documentation to establish that the NADAP was accountable to the Consortium and, therefore, that it did not use WIA grant funds for administrative costs exceeding the limit set forth in the grant. If a grant recipient's records are inadequate to show that the Federal grant funds were spent lawfully, the Grant Officer meets his burden of production.⁵⁸ Thus, the Grant Officer met his burden of production.⁵⁹

Consequently, the burden shifts to the Consortium, which has the "burden of persuasion" to offer persuasive evidence to the contrary.⁶⁰ The Consortium argues that it provided adequate documentation that it held the NADAP accountable by virtue of the sub-contract that it had with the NADAP itself. The Consortium notes that the sub-contract did not prohibit the NADAP from performing the administrative functions that the Grant Officer found indicated that the NADAP was acting as the prime grantee.

⁵⁸ *Tex. Dep't of Commerce*, 137 F.3d at 332; *see also Fla. Dep't of Labor*, ARB No. 04-168, slip op. at 7-8.

⁵⁹ One of the factors that the OIG noted in its audit report that showed that the Consortium and the NADAP were indistinguishable included the fact that the NADAP directly drew down the grant funds into a NADAP account for the Consortium's grant programs. AFX 5 at 42 (Audit Report). The OIG's auditor in charge, Rebecca Lynn Bowen, testified that a subrecipient can directly draw down grant funds if it has a "notice of obligation" in the grant allowing it to do so, but noted that no such "notice of obligation" was in the administrative file in this case. HT at 47. The Consortium argues that the fact that a "notice of obligation" is not in the administrative file indicates that the Grant Officer failed to meet his burden of production.

Contrary to the Consortium's assertion, however, if the record is inadequate to show that the grant funds were spent lawfully, the Grant Officer meets his burden of production. So the fact that the "notice of obligation" is not in the administrative file indicates, as the Grant Officer found, that the NADAP did not have a "notice of obligation" permitting it to directly draw down grant funds as a subrecipient. Moreover, the grant states that grant funds can be drawn down only "by the awardee," the Consortium. AFX 6 at 70 (Grant Agreement).

The Consortium also argues that the testimony of Bowen, the OIG's auditor in charge, who it asserts neither authored the audit report nor conducted the audit, is insufficient to meet the Grant Officer's burden of production. But the OIG audit report itself is contained in the Grant Officer's administrative file and, again, if a grant recipient's records are inadequate to show that the Federal grant funds were spent lawfully, as the OIG audit report determined, the Grant Officer nevertheless meets his burden of production.

⁶⁰ 20 C.F.R. § 667.810(e).

But the sub-contract that authorized the NADAP “to manage all aspects pertaining to” the grant,⁶¹ and whatever it permits does not indicate or establish that the Consortium nevertheless monitored the NADAP, held the NADAP accountable, or that the NADAP did not perform functions that are the responsibility of the grantee as required by the WIA’s implementing regulatory requirements. For instance, 20 C.F.R. § 667.300(a), (b)(1), (c)(1)-(2) requires that direct grant recipients, such as the Consortium, file financial reports and “meet the reporting requirements imposed by DOL.” But the OIG audit report found that the NADAP certified the Consortium’s financial reports to the DOL’s ETA.⁶²

Moreover, non-profit recipients, such as the Consortium and the NADAP, are also required under 20 C.F.R. § 667.200(c)(2) to follow the Federal allowable cost principles identified at 20 C.F.R. § 95.27, which states that the allowability of costs is determined in accordance with the provisions of OMB Circular A-122 (June 9, 2004, codified at 2 C.F.R. Part 230). Attachment A, section A(2)(g), of OMB Circular A-122 requires, in turn, that to be allowable, costs must “[b]e adequately documented.” In addition, 20 C.F.R. §§ 667.400(c)(1) and 667.410(a)(1)-(2) require that recipients monitor grant-supported activities in accordance with applicable cost principles. Similarly, 20 C.F.R. § 667.220(c)(1)-(2) require documentation of administrative and program costs. Finally, 20 C.F.R. § 667.705(a) states that a recipient, such as the Consortium, “is responsible for all funds under its grant.”

But the Consortium did not provide any documentation, other than the sub-contract itself, which showed that it held the NADAP accountable. Indeed, the only Consortium officer to testify on behalf of the Consortium at the hearing, Roy Barnes, admitted that its sub-contract with the NADAP provided that the NADAP would “manage all aspects pertaining to” the grant and that he “didn’t question how the sub-contractor functioned.”⁶³ Similarly, the only NADAP official that testified at the hearing for the Consortium, Lucy Redzeposki, admitted that she was not involved in “technical accounting” or in “classifying costs as administrative or programmatic.”⁶⁴

Alternatively, the Consortium contends that there is no requirement regarding what documentation must be maintained to support that it properly spent the grant funds at issue. Contrary to the Consortium’s contention, however, the grant specified the cost principles and regulatory monitoring requirements it was to comply with, which require that costs be “adequately documented” and that recipients monitor grant-supported

⁶¹ AFX 9g at 226, 228 (Sub-Contract).

⁶² AFX 5 at 42 (Audit Report).

⁶³ HT at 98-99; AFX 9g at 226, 228 (Sub-contract).

⁶⁴ HT at 82.

activities in accordance with the specified cost principles.⁶⁵ It follows that such documentation must be sufficient to meet the Consortium's burden of persuasion to show that the WIA grant funds at issue were lawfully spent for program costs under the grant and not for excess administrative costs.

Finally, the Consortium contends that it is unclear how the Grant Officer determined the amount of excessive administrative costs.⁶⁶ But as the Grant Officer met his burden of production, the Consortium has the burden of persuasion to show that the Grant Officer's determination of the amount of excessive administrative costs was incorrect. Had the Consortium provided persuasive contrary evidence or documentation, it could have met its burden to establish that it lawfully spent the Federal Title I WIA grant funds at issue. But as the Grant Officer determined, the Consortium did not provide documentation that showed that it held the NADAP accountable and did not use WIA

⁶⁵ AFX 6 at 70 (Grant Agreement), which cites to the uniform administrative requirements at 29 C.F.R. Parts 95 and 97, which includes 20 C.F.R. § 95.27, as well as the cost principles for non-profit organizations at OMB Circular A-122 and the WIA's implementing regulations at 20 C.F.R. Part 652 et al., which includes the requirements at 29 C.F.R. §§ 667.200(c)(2), 667.220(c)(2)-(3), 667.400(c)(1), 667.410(a)(1), and 667.705(a).

⁶⁶ The OIG's audit report notes that the OIG audited claimed costs as reported in the Consortium's "financial status report," sampling "reported costs" consisting of Consortium "salaries," "fringe benefits," "participant stipends," and "contractual costs." It further indicates that the OIG "interviewed staff," "examined general ledger journals," "canceled checks, vouchers, invoices," "contracts," and "journal entries" of "personnel costs," "non-personnel costs" and "overhead." AFX 5 at 58 (Audit Report).

In addition, Bowen, the OIG's auditor in charge, testified that the OIG "audited a hundred percent of all the administrative costs" and determined the amount of administrative costs from auditing "general ledger accounts on the costs that were charged to the grant program," "payroll records and timesheets to support that," "invoices, vouchers, the contracts for training programs," "cost reports," "programmatic and financial status" "reports that were filed with the [ETA], and "cancelled checks." HT at 25. Moreover, she testified that the OIG followed the generally accepted auditing standards, also known as the Yellow Book, issued by the Comptroller General of the Government Accountability Office and as required by the Inspector General's Act. HT at 25-26, 38.

The OIG audit report noted that, while the NADAP asserted that the only administrative costs which the Consortium incurred totaled \$27,291, the OIG determined that an additional \$141,343 in grant costs which the NADAP had classified as program costs met the WIA's definition of administrative costs pursuant to 20 C.F.R. § 667.220(b), resulting in \$91,939 in excess administrative costs after subtracting \$26,695 in other questioned costs. AFX 5 at 43 (Audit Report). Contrary to the Consortium assertion, the \$91,939 amount of excess administrative costs cited in the OIG audit report, the Grant Officer's final determination, and Bowen's testimony are all consistent. *See* AFX 5 at 42-43 (Audit Report); AFX 3b at 15 (Final Determination); HT at 39.

grant funds for administrative costs exceeding the limit set forth in the grant. Consequently, we affirm the Grant Officer's determination that the Consortium did not meet its burden of persuasion that its sub-contractor, the NADAP, was a subrecipient and therefore lawfully spent the Federal Title I WIA grant funds at issue for program costs under the grant and not for administrative costs exceeding the limit set forth in the grant.

REPAYMENT

The Consortium has failed to provide any persuasive evidence to overcome the Grant Officer's prima facie showing that, based on the OIG audit's calculations, it misspent \$91,939 in Title I WIA grant funds for administrative costs exceeding the limit set forth in its grant. We therefore affirm the Grant Officer's disallowance of \$91,939 in Title I WIA grant expenditures between October 7, 2002, and November 30, 2003. Thus, the Consortium is liable to repay the misspent Title I WIA grant funds in the amount of \$91,939.⁶⁷

CONCLUSION AND ORDER

Because the Grant Officer has met his burden of production that the Consortium's records are inadequate to show that its Title I WIA grant funds were spent lawfully, and the Consortium has not met its burden of persuasion to show that the Title I WIA grant funds were nevertheless spent for lawful purposes, the ALJ's D. & O. is **AFFIRMED**, and the Grant Officer's determination to disallow the administrative costs exceeding the limit set forth in its grant is **AFFIRMED**. Accordingly, it is **ORDERED** that the Consortium shall repay from funds other than funds received under its grant the sum of \$91,939 to the United States Department of Labor pursuant to 29 U.S.C.A. § 2934(d)(1).

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

⁶⁷ See 29 U.S.C.A. § 2934(c).