



In the Matter of:

COMMONWEALTH OF MASSACHUSETTS,

COMPLAINANT,

v.

UNITED STATES DEPARTMENT OF LABOR,

RESPONDENT.

**ARB CASE NOS. 02-011
02-021**

ALJ CASE NO. 98-JTP-6

DATE: June 13, 2002

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Robert K. Ganong, Esq., *Commonwealth of Massachusetts Department of Labor and Workforce Development, Boston, Massachusetts*

For the Respondent:

Frank P. Buckley, Esq., Harry L. Sheinfeld, Esq., Charles D. Raymond, Esq., *United States Department of Labor, Washington, D.C.*

DECISION AND ORDER OF REMAND

This case arises under the Job Training Partnership Act of 1982, as amended, (hereinafter referred to as JTPA or the Act), 29 U.S.C. §§1501 *et seq.* (1994), and involves action by the United States Department of Labor Grant Officer (the Grant Officer) to establish the misexpenditure of JTPA grant funds by the Commonwealth of Massachusetts (Massachusetts or the recipient) and its subrecipient, the City of Lynn (Lynn), and to recover such funds.^{1/} The Decision and Order (D&O) of the Administrative Law Judge (ALJ) was issued on October 29, 2001.

^{1/} Pursuant to Section 164(e) of the JTPA, the recipient State may be held fully accountable for funds “misspent” by a subrecipient, *i.e.*, spent to cover costs for which JTPA funding requirements have not been met. 29 U.S.C. §1574(e) (1994).

The \$9,107,986 in grant funds that are at issue in this case were disbursed pursuant to Titles II and III of the JTPA, during the years 1994 - 1996.^{2/} D&O at 1-3. The ALJ upheld the Grant Officer's finding that \$4,064,203 must be disallowed as misexpenditures under the Act, but reversed the Grant Officer's conclusion regarding disallowance of the remaining \$5,043,783. D&O at 16-19. The ALJ further found that Massachusetts had failed to establish eligibility for waiver of liability for the disallowed costs pursuant to Section 164(e)(2) of the Act, 29 U.S.C. §1574(e)(2). D&O at 20-21.

In its appeal, Massachusetts urges that the amount of disallowed costs should be reduced from \$4,064,203 to \$1,829,646. Massachusetts also challenges the ALJ's conclusion regarding its eligibility for waiver of liability. The Grant Officer filed a cross-appeal of the ALJ's decision, in which the Grant Officer challenges the ALJ's conclusion that \$4,861,178 in costs are allowable as proper JTPA expenditures. Key to our disposition of this appeal is Massachusetts' argument that the ALJ expressly relied on a JTPA provision that was repealed when the statute was amended in 1992. As we explain, that argument has merit and, along with the need for clarification of the time periods addressed in the ALJ's decision, the Grant Officers'

^{2/} When the JTPA was enacted in 1982, the "program year" was instituted as the time period to be used for grant funding and program planning, and it continued to be an essential component of the JTPA up through the years that are at issue in this case. Pub. L. No. 97-300, §161 (Oct. 13, 1982), 96 Stat. 1347 (codified at 29 U.S.C. §1571(a) (1982-1994)); see 59 Fed. Reg. 45760, 45785 (Final rule, 20 C.F.R. Pts. 626-31, 637) (Sept. 2, 1994) (discussing revision of §627.455 to reflect 1992 amendments' addition of Section 164(f) requirement for quarterly financial reports by program year). The predecessor legislation, the Comprehensive Employment and Training Act, followed the Federal fiscal year for grant awards and program planning, which in 1982 ran October 1 through September 30. Pub. L. No. 93-203, §4 (Dec. 28, 1973), 87 Stat. 839; see also Pub. L. No. 97-300, §181 (Oct. 13, 1982), 96 Stat. 1347, 1354 (codified at 29 U.S.C. §1591 (providing for transition from CETA fiscal year to JTPA program year)); Pub. L. No. 94-272, §§101, 117 (Apr. 21, 1976), 90 Stat. 383, 389 (Fiscal Year Transition Act). The JTPA program year runs from July 1 through June 30, and is identified by reference to the year in which the twelve-month period begins. 20 C.F.R. §626.5, Definitions (1994-97). Typically, a Grant Officer's audit determinations are rendered in terms of costs incurred by the recipient during particular program years, which determines the substantive regulatory and statutory provisions that are applicable. See, e.g., *State of Louisiana v. U.S. Dept. of Labor*, 108 F.3d 615 (5th Cir. 1997), cert. denied, 522 U.S. 823; *Central Valley Opportunity Center v. U.S. Dept. of Labor*, ARB Case No. 98-046, ALJ Case No. 95-JTP-9, Fin. Dec., June 22, 1998. As we discuss in our analysis below, neither the ALJ's decision nor the Grant Officers' Determinations clearly identify the time periods that are at issue in this case, but use the terms program years, fiscal years and calendar years in identifying the periods during which the funds were disbursed. This creates ambiguity that is especially problematic in view of the evidence indicating that, although the Massachusetts fiscal year runs from July through June, like the JTPA program year, the Massachusetts fiscal year is identified by reference to the ending year rather than the year in which the twelve-month period begins. HT 344 (Durkin), 451 (Sweeney). Consequently, Massachusetts FY 1995 is the same period as is covered by the JTPA program year 1994, thus precluding the use of "fiscal year" and "program year" interchangeably in this case. For purposes of this decision of remand and to avoid adding further confusion to the record, we will simply refer to the calendar years identified by the ALJ and/or the Grant Officer, or quote references to particular "fiscal years" directly from the ALJ's decision and the Grant Officers' Determinations.

Determinations and much of the evidence submitted by Massachusetts, requires that the case be remanded to the ALJ for further consideration.

Standard of Review

The Board acts as the designee of the Secretary in rendering final agency decisions under the JTPA and other statutes included in Secretary's Order 2-96, published at 61 Fed. Reg. 19978 (May 3, 1996). On December 19, 2001, pursuant to Section 166(b) of the JTPA, the Board asserted jurisdiction of the appeal filed by Massachusetts. *See* 29 U.S.C. §1576(b)(1994). We render our decision in this case pursuant to Section 166(c) of the Act, 29 U.S.C. §1576(c), and, as the Secretary's designee, we review both the ALJ's findings of fact and conclusions of law *de novo*. *See generally* *Masek v. Cadle Co.*, ARB Case No. 97-069, ALJ Case No. 95-WPC-1, Dec. and Ord., Apr. 28, 2000, slip op. at 7 and authorities there cited (in case arising under whistleblower statute covered by 29 C.F.R. Part 24, discussing Secretary's plenary authority in reviewing ALJ decisions).

Background

On May 13, 1998, the Grant Officer issued a Final Determination disallowing \$9,107,986 in expenditures claimed as JTPA costs under Titles II and III by Massachusetts. GX 1, pp. 8-18;^{3/} *see* 20 C.F.R. §627.606 (1998).^{4/} On May 29, 1998, Massachusetts requested a hearing before an ALJ on the Grant Officer's Determination. *Id.* at pp. 5-6; *see* 20 C.F.R. §§627.800, 627.801(a) (1998). Massachusetts had previously determined that the subrecipient Lynn had engaged in financial mismanagement of JTPA funds spent by its Service Delivery Area (SDA) facility Northshore Employment & Training and levied a debt against Lynn of \$9,160,208. GX 1 at pp. 114-15. Before the instant case could be heard by an ALJ, Massachusetts filed a motion requesting that the ALJ proceeding be stayed pending the outcome of a state action filed by Lynn to contest Massachusetts' debt decision. ALJX 11. On January 12, 1999, the ALJ initially assigned to the case -- Judge David W. DiNardi -- issued an order denying Massachusetts' motion, based on his conclusion that the outcome in state court was not material to the issues

^{3/} The following abbreviations are used in this decision to refer to the evidentiary record and the parties' briefs: Hearing Transcript, HT; Complainant's Exhibit, CX; Grant Officer's Exhibit, GX; ALJ's Exhibit, ALJX; Massachusetts' Exceptions to the Decision and Order of the ALJ, Mass. Pet. for Rev.; Massachusetts' Brief, Mass. Brief; Grant Officer's Request for Review of ALJ's Decision, Gr. Ofcr. Pet. for Rev.; Brief of the Grant Officer, Gr. Ofcr. Brief.

^{4/} We apply the regulatory provisions concerning procedures for JTPA audit resolution hearings -- which are found at Subpart H of Part 627, Title 20 of the Code of Federal Regulations -- that were in effect at the time Massachusetts requested a hearing in this case. As mentioned in footnote 2, the applicable requirements for program operations, like those contained in Subpart D of Part 627, Administrative Standards, are those in effect during the program years at issue. *See State of Louisiana*, 108 F.3d at 615-17; *Central Valley Opportunity Center*, slip op. at 2, n.2. To correspond with the general 1994-97 timeframe that is addressed by the ALJ's decision and the Grant Officers' Determinations, we cite the regulations from Part 627 that were in effect during those years.

before him. ALJX 14. The case was then reassigned to Judge Sutton, who ultimately conducted a formal hearing on the merits of the case and issued the decision that is before the Board. ALJX 17.

First, however, Judge Sutton entertained oral argument and briefing by the parties on the Grant Officer's motion for summary judgment. ALJX 15, 21, 23. On April 14, 1999, he issued an order denying summary judgment; the order also concluded that Massachusetts had not had an opportunity to submit evidence to justify allowance of any of the disallowed costs, *see* 20 C.F.R. §627.606(c)(1998), and that there had been "confusion" regarding Massachusetts' right to request a waiver of liability, *see* 29 U.S.C. §1574(e)(2); 20 C.F.R. §627.704 (1998). The ALJ's order therefore remanded the case to the Grant Officer to provide such opportunities. The ALJ also ordered the Grant Officer to issue a revised Final Determination pursuant to Section 627.606(d), following consideration of any evidence and argument offered by Massachusetts on remand, if the matter was not resolved on remand. ALJX 1A.

On remand, the Grant Officer issued a Revised Final Determination again disallowing \$9,107,986 in costs and concluding that Massachusetts had failed to demonstrate compliance with statutory and regulatory criteria as necessary to support a decision to waive its liability as a JTPA recipient.^{5/} GX 2 at pp. 5-18. The Grant Officer subsequently filed an Updated Administrative File and then a Second Updated Administrative File. GX 2, 3. The case was returned to the ALJ, who held a hearing on September 19-21, 2000, and thereafter issued the decision that is before us.

The Parties' Arguments

Regarding the allowability of costs under the JTPA

In determining whether to sustain the Grant Officers' findings that certain expenditures were not allowable under the JTPA, the ALJ applied the burden-shifting framework provided by Section 627.802(e). D&O at 16-19. Under that regulatory provision, the burden of production is on a Grant Officer to offer *prima facie* evidence that funds have been misspent by a recipient or subrecipient, *i.e.*, that requirements for Federal funding had not been met. 20 C.F.R. §627.802(e) (1998). If the Grant Officer meets that burden, the burden then shifts to the recipient or subrecipient, who is challenging the Grant Officer's determination, to offer persuasive evidence to the contrary. *See id.*; *see also State of Florida v. U.S. Dept. of Labor*, Case No. 92-JTP-17, Sec'y Fin. Dec., Dec. 5, 1994, slip op. at 4-7, *aff'd on recon.*, 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).

^{5/} We use "Grant Officer" to refer to the two officials who were respectively responsible for the three Determinations in this case, which were rendered pursuant to 20 C.F.R. §627.606(b), (d). *See* GX 1, pp.8-18, 22-27; GX 2, pp. 5-18. The Grant Officer who was responsible for the Initial Determination of January 20, 1998, and the Final Determination of May 13, 1998, retired and the Revised Final Determination was issued on November 8, 1999, by a second Grant Officer for the case. HT 212 (Salgado).

The ALJ agreed with the Grant Officer that Massachusetts had failed to ensure that an audit of the Lynn SDA fiscal operation was conducted during the periods at issue as required by the JTPA, and that evidence of such an omission was adequate to carry the Grant Officer's burden of production. D&O at 16-18. Specifically, the ALJ concluded that proof of the lack of an audit provided "evidence sufficient for a reasonable person to conclude that JTPA funds were spent unlawfully." D&O at 16 -18. The ALJ cited Section 164(a) of the JTPA and the regulation at 20 C.F.R. §627.480(a) as authority for the audit requirement. *Id.* at 17. With regard to the documentation and testimony offered by Massachusetts to carry its burden of persuasion -- to establish that disallowed funds had been properly expended under the JTPA -- the ALJ found in favor of Massachusetts regarding \$4,861,178 in Title II costs for "FY 1995" and \$182,605 in Title III costs for "FY 1995 and 1996." D&O at 18-19. The ALJ concluded, however, that Massachusetts had failed to establish that questioned Title II expenditures amounting to \$2,080,188 for "FY 1996" and most of the questioned Title III expenditures for "FY 1995 and 1996" were properly spent. *Id.* In determining that the evidence offered by Massachusetts was not adequate to carry its burden in regard to the Title II and III costs totaling \$4,064,203, the ALJ relied on the testimony of the Grant Officer's accounting expert. D&O at 19. That witness testified that Massachusetts had failed to provide "source documentation" to demonstrate that the expenditures complied with JTPA requirements. HT 122-28 (Lonergan).

Massachusetts urges the Board to reduce the \$4,064,203 in costs disallowed by the ALJ to \$1,829,646. Mass. Brief at 10. Massachusetts begins by challenging the ALJ's conclusion that the lack of financial audits for the Lynn SDA supports an inference that funds were misspent, pursuant to Section 627.802(e). Massachusetts cites the ALJ's reliance on an audits provision of the JTPA that was repealed in 1993, prior to the time periods covered by the grants at issue in this case. In addition, Massachusetts contends that the Grant Officer did not establish that Massachusetts had failed to comply with the JTPA regulation regarding audits, found at 20 C.F.R. §627.480(a). Mass. Brief at 4. Massachusetts also challenges the ALJ's conclusion that the documentation submitted by Massachusetts for "certain costs in FY 96" was inadequate to overcome the Grant Officer's *prima facie* case. Massachusetts urges that there is no authority under the statute or regulations for the source documentation requirement imposed by the ALJ and the Grant Officer. *Id.* at 4-5. Massachusetts contends that the documentation it did submit, along with the testimony of Massachusetts oversight officials who monitored the Lynn SDA funds disbursement and expenditures, provides adequate proof that the funds at issue were not misspent. *Id.* at 5-6.

The Grant Officer challenges the ALJ's reversal of the disallowance of \$4,861,178 in Title II costs for "FY 95." Gr. Ofcr. Brief at 1-2, 4.^{6/} The Grant Officer urges that Massachusetts failed not only to meet the JTPA auditing requirement, but also failed to provide adequate evidence regarding the fiscal accountability of the Lynn SDA to overcome that deficiency. Gr. Ofcr. Brief at 1-7. The Grant Officer specifically contends that Massachusetts failed to demonstrate that the financial management system in place at the Lynn SDA complied

^{6/} The Grant Officer does not challenge the ALJ's finding that \$182,605 in Title III costs should be allowed because supported by adequate documentation. Gr. Ofcr. Pet. for Rev. at 2 n.1.

with two other JTPA requirements. First, the Grant Officer argues that Massachusetts failed to provide source documentation to substantiate expenditures, and second, that Massachusetts failed to demonstrate that the Lynn SDA financial management system complied with generally accepted accounting procedures (GAAP). Gr. Ofcr. Brief at 1-7. The Grant Officer thus contends that the documentation and testimony offered by Massachusetts is inadequate, as a matter of law, to justify the questioned costs. *Id.* at 2-5, 8. In addition, the Grant Officer argues that the ALJ's allowance of \$4,861,178 in Title II costs is undermined by factual errors in the ALJ's characterization of the Reconstructed Trial Balance that Massachusetts submitted, Massachusetts' rejection of the reconstruction and its disallowance of those costs in the decisions it issued to the City of Lynn, and the Grant Officer's evidence offered in opposition. *Id.* at 4-7. Finally, the Grant Officer cites the decision of the United States Court of Appeals for the Fourth Circuit in *Montgomery County, Maryland v. U.S. Dept. of Labor*, 757 F.2d 1510 (4th Cir. 1985), concerning recordkeeping requirements under JTPA's predecessor statute, the Comprehensive Employment and Training Act (CETA), as further support for the conclusion that the ALJ erred in allowing the \$4,861,178 in Title II costs. *Id.* at 8.

Regarding Massachusetts' eligibility for waiver of liability

The ALJ addressed the waiver of liability provisions at Section 164(e)(2), (3) of the JTPA, which allow the Secretary to waive a recipient's liability for funds misspent by a subrecipient if the recipient can establish that it substantially complied with the four requirements delineated at subsection (e)(2)(A) - (D). D&O at 20-21; *see* 15 U.S.C. §1574(e)(2), (3). The ALJ agreed with the Grant Officer that Massachusetts had failed to establish that it met the requirements for compliance with its own monitoring policy under Section 164(e)(2)(A), and was thus ineligible for a repayment waiver. The ALJ based this conclusion on Massachusetts' failure to act promptly to designate the Lynn SDA administrative system as "out of compliance" after it discovered that the Lynn SDA had not taken the necessary corrective action, under the guidelines provided by Massachusetts' Policy Directive 93-12. D&O at 20-21.

In challenging the ALJ's conclusion, Massachusetts advances three basic arguments. First, Massachusetts urges that the ALJ erroneously interpreted Policy Directive 93-12. Mass. Brief at 7-9. Second, Massachusetts contends that the ALJ erred by failing to consider that officials at the regional office of the Department of Labor's Employment and Training Administration concurred in Massachusetts' handling of the financial management system problems evident in the Lynn SDA operation. *Id.* at 9; Mass. Pet. for Rev. at 4. Finally, Massachusetts cites evidence that it contends shows that Massachusetts was "lauded at both the national and regional level for its handling of the Lynn matter." *Id.*

Analysis

Relevant statutory and regulatory provisions

The central issues in this case, the allowability of costs and a recipient's eligibility for waiver of repayment, turn on the requirements for the recipient's and subrecipient's compliance

with administrative and financial requirements for funding under the JTPA. As reflected in the summary of the ALJ's findings above, the question of whether Massachusetts has established a basis for allowing the costs questioned by the Grant Officer is directly linked to the issue of what accounting practices and financial records are required of a JTPA subrecipient. It is only against the standards for fiscal control, accountability and recordkeeping provided by the statute and implementing regulations that a determination can be made regarding whether the Grant Officer has established a *prima facie* case, and whether Massachusetts has carried its burden to establish that the funds were properly spent. *Cf. State of Florida*, slip op. at 4-12, *aff'd on recon.*, Jan. 20, 1995 (applying JTPA regulatory provisions and OMB circular guidelines to issue of whether fixed unit price, performance-based contracts between recipient and subrecipients resulted in excess profits for recipient), *aff'd*, 83 F.3d 435 (11th Cir. 1996) (table). The issue of eligibility for waiver of repayment is also linked to the statutory standards for fiscal control, accountability and monitoring, in addition to the state policy directive addressed by the ALJ. *See* 15 U.S.C. §1574(e)(3)(A) -(D); GX 2 at pp.12-17 (Gr. Ofcr's 11/8/99 Rev. Final Determ.). Determining the standards for fiscal control and accountability contained within the JTPA, as well as the state's obligations in the establishment and monitoring of financial management systems under its own policies, is necessary for a fair evaluation of Massachusetts' actions that are relevant to the four criteria of Section 164(e)(3)(A) - (D).

Analysis of the two primary issues presented in this case must thus begin with examination of the applicable statutory and regulatory provisions. As Massachusetts contends, the ALJ relied on Section 164(a)(2) of the JTPA as it was written prior to the 1992 JTPA amendments in determining that the Grant Officer had made a *prima facie* case. D&O at 17; *see* 15 U.S.C. §1574(a)(2) (1988). Section 142 of the Job Training Reform Amendments of 1992, Pub.L. No. 102-367 (Sept. 7, 1992), 106 Stat. 1021, 1046, superseded the Section 164(a) audits provision relied on by the ALJ with provisions that require, *inter alia*, each State to establish fiscal control procedures to properly disburse and account for JTPA funds under Titles II and III of the Act in accordance with generally accepted accounting principles applicable in the State, the Secretary to promulgate regulations establishing uniform cost principles, and each Governor to establish procurement standards to ensure fiscal accountability and to prevent fraud and abuse under the program. 15 U.S.C. §1574(a) (1994). The 1992 amendments to the JTPA became effective July 1, 1993. §701(a), 106 Stat. at 1049. Interim final regulations implementing the 1992 JTPA amendments were in effect from July 1, 1993, until the final regulations took effect on June 30, 1995. 59 Fed. Reg. 45760, 45815 (Sept. 2, 1994); 58 Fed. Reg. 31471 (June 3, 1993). As a consequence, the applicable statutory requirements are different from those cited by the ALJ.

The ALJ did properly conclude that the recordkeeping requirements imposed by Section 165 of the JTPA must be applied along with Section 164, which addresses fiscal controls, in determining the financial management standards set by the JTPA. D&O at 17-18. Most relevant to the records at issue in this case is the Section 165(a)(1) requirement that recipients "keep records that are sufficient to permit . . . the tracing of funds to a level of expenditure adequate to insure that the funds have not been spent unlawfully." 15 U.S.C. §1575(a)(1) (1994). Section 627.425(b) of the regulations was revised to implement the 1992 amendment of Section 164(a)(1) to require that "fiscal control and fund accounting procedures" established by the

States regarding the disbursement and accounting for JTPA Title II and III funds “ensure that all financial transactions are conducted and records maintained in accordance with generally accepted accounting principles [GAAP] applicable in each State.” 15 U.S.C. §1574(a)(1) (1994); 20 C.F.R. 627.425(b)(1) (1994-97); *see* 57 Fed. Reg. 62004, 62012 (Pts. 626-631, 637, Interim final rule) (Dec. 29, 1992); *see also* 59 Fed. Reg. 54760, 45781 (Pts. 626-31, 637, Final rule) (Sept. 2, 1994). Similarly, Section 627.435(a) was revised to reflect the incorporation of the GAAP requirement in both Section 164(a)(1) and Section 165(f)(1), which concerns quarterly financial reports to be filed by the subrecipient with the State, and then summarized by the Governor for submission to the Secretary. 15 U.S.C. §§1574(a)(1), 1575(f)(1),(2) (1994); 20 C.F.R. 627.435(a) (1994-97); *see* 57 Fed. Reg. at 62012; *see also* 20 C.F.R. §627.455(a), (d)(1) (Reports required.) (1994-97).

The legislative history of the 1992 JTPA amendments indicates Congressional interest in enhancing the fiscal accountability of the program. *See* H.R. Rep. No. 102-240, pt. IV at 50, pt. V at 64 (1991), *reprinted in* 1992 U.S.C.C.A.N. 912, 919, 934. The specific amendments and revised regulatory provisions that we have just discussed are among the various changes to standards for fiscal accountability under the JTPA that resulted from the 1992 amendments. *See* 59 Fed. Reg. 45760 (Final rule, 20 C.F.R. Pts. 626-31, 637) (Sept. 2, 1994); 57 Fed. Reg. 62004 (Interim final rule, 20 C.F.R. Pts. 626-31, 637) (Dec. 29, 1992). In addition to these changes in the JTPA and implementing regulations, the statute that had provided auditing guidelines for JTPA recipients and subrecipients since 1985, the Single Audit Act, was also amended during the years at issue. The Single Audit Act is referenced in 29 C.F.R. Part 96, which is incorporated by reference into the JTPA audits regulation at 20 C.F.R. §627.480 (1994-97). As noted by the ALJ, D&O at 17 n.14, the Single Audit Act Amendments of 1996 resulted in a change from the use of OMB Circular No. A-128 for audits of state and local government recipients to Circular No. A-133. Pub. L. No. 104-156 (July 5, 1996), 110 Stat. 1396; 64 Fed. Reg. 14538 (Interim final rules, 20 C.F.R. Pts. 96, 99) (Mar. 25, 1999). This change became effective for audits of fiscal years beginning after June 30, 1996, and thus would be applicable to program year 1996 operations. Pub. L. No. 104-156, §3, 110 Stat. at 1404; *see* 64 Fed. Reg. at 14538; 62 Fed. Reg. 35278, 35279 (OMB, final revision of Circ. No. A-133) (June 30, 1997). These audit provisions are discussed in greater detail below in the section regarding the question of what time periods are at issue in this case.

This case involves substantial sums and poses several issues of first impression regarding the post-amendments JTPA statutory and regulatory scheme that we have briefly discussed. In reaching his conclusions regarding the allowability of costs in this case, the ALJ repeatedly looked for guidance to decisions of the United States Courts of Appeals applying CETA and the JTPA prior to its 1992 amendment. D&O at 16-19. Although we agree with the ALJ that such opinions may well provide valuable guidance in applying JTPA authorities to this case, the starting point for analysis of the issues here is the statutory and regulatory provisions in effect at the time the funds were disbursed by the Department. *See State of Louisiana*, 108 F.3d at 615-17. The determination regarding whether each party in this case has carried its burden pursuant to Section 627.802(e) must be based on the JTPA statute and the specific fiscal control and

accountability requirements set forth in Subpart D of Part 627.^{2/} On remand, the ALJ should render his findings under the amended JTPA in terms of specific requirements that are imposed by the relevant regulations. The Grant Officer has argued that Massachusetts' own rejection of the Reconstructed Trial Balance and disallowance of those costs in its disallowance decisions issued to the City of Lynn establishes that those costs should be disallowed here. The ALJ should also address this argument. In addition to ruling on the allowability of the costs that are at issue, the ALJ should render findings regarding Massachusetts' eligibility for waiver of liability under Section 164(e)(2),(3) of the Act. In addressing the waiver issue, the ALJ should consider the question of "substantial compliance" as it pertains to all four criteria provided by Section 164(e)(2)(A) - (D). *See* 15 U.S.C. §1574(e)(3) (1994); *Commissioner, Employment Security of the State of Wash. v. U.S. Dept. of Labor*, Case Nos. 90-JTP-29, 91-JTP-11, 92-JTP-34, Sec'y Fin. Dec., Sept. 13, 1995, slip op. at 4-6.

The time periods covered by the Grant Officers' Determinations and the ALJ's decision and ambiguities resulting from the shifting use of "fiscal year" in the record

As we noted at the beginning of this decision, the "program year" is an essential component of the JTPA program for funding and program planning, as well as determining the applicable law, and Grant Officers' determinations are typically rendered according to program years. *See* n.2, *supra*. In this case, the Grant Officers' Determinations and the ALJ's decision refer to program years, fiscal years, and calendar years as though those terms were interchangeable. *See, e.g.*, D&O at 1-4; GX 1 at pp. 8-18, 22-27, GX 2 at pp. 5-18; *see also* Gr. Ofcr. Pet. for Rev. at 1; Gr. Ofcr. Brief at 1 (both, initially referring to "Program Years . . ." but thereafter also referring to fiscal years between 1994 and 1996). The determinations rendered by the Grant Officer do not identify the periods during which the grant funds in this case were disbursed, although those determinations do refer to an audit conducted for the twelve-month period July 1, 1995 - June 30, 1996, and contain references to "fiscal year" periods. *See* GX 1 at pp. 8-18 and 22-27; GX 2 at pp. 5-18; *see also* GX 1 at pp. 7, 55-111 (regarding the three grants involved in this case). Use of the term "fiscal year" instead of "program year" by the ALJ, or the Grant Officer, would ordinarily be insignificant. In this case, however, the two terms are not interchangeable: it is necessary to distinguish between the use of "fiscal year" to refer to a program year under the JTPA and the use of "fiscal year" to refer to the Massachusetts state fiscal year, which spans a different timeframe. As also previously noted, the Massachusetts fiscal year runs from July - June, like the JTPA program year, but the Massachusetts fiscal year

^{2/} As we have already mentioned, the Grant Officer bears the burden of production and the recipient the burden of persuasion under 20 C.F.R. §627.802(e). In presenting a *prima facie* case, a Grant Officer should demonstrate an understanding of the statutory and regulatory requirements that are imposed on the recipient and subrecipient. 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 requirements imposed by the JTPA or has compensated for any deficiencies through other means. *Cf. State of Louisiana*, 108 F.3d at 617-18 (rejecting state's argument that it should be exempted from JTPA accounting requirement as a "creative interpretation" of statute not supported by plain language of the Act). We note that on remand the ALJ may exercise his authority to order briefing by the parties on any issue before him. *See* 29 C.F.R. §18.29(a) (Authority of ALJ) (2001).

is identified by reference to the year in which the period ends, as opposed to the year in which the period begins. HT 344 (Durkin), 451 (Sweeney). Consequently, the time period referred to as "FY 95" for Massachusetts' state purposes would be the same as the period referred to as "program year 94" under the JTPA. In other words, if the Grant Officers' Determinations in this case cover JTPA program years 1994, 1995 and 1996, the three-year period at issue is July 1994 through June 1997. If the three-year period addressed by the Grant Officers covers Massachusetts fiscal years for 1994, 1995 and 1996, the period runs from July 1993 through June 1996.

We have already discussed the ALJ's reliance on the documentation and testimony offered by Massachusetts as justification for \$4,861,178 in questioned costs under Title II for "FY 1995." *See* D&O at 18-19. Many of those documents, particularly those that provide summaries of costs for a particular period of time, contain references to financial transactions that occurred during certain "fiscal years," without the clarification that additional references to specific dates would provide. *See, e.g.,* GX 3 at pp. 1-6. The meaning attached to the term "fiscal year" in the documentation submitted by Massachusetts is unclear.

In addition, review of the ALJ's decision indicates that he uses the term "fiscal year" to refer in some instances to the period covered by the Massachusetts fiscal year and in other instances to the JTPA program year. For example, comparison of the ALJ's discussion of Massachusetts' evidence on pages 9 - 11 of the decision with the specific dates carried by some of the documents that are discussed on those pages indicates that the ALJ uses "fiscal year" in that discussion as defined by Massachusetts, and not to refer to a JTPA program year. *See* D&O at 9 - 11.^{8/} In contrast, the ALJ apparently uses "FY 1996" to refer to the JTPA program year in his discussion of evidence related to Massachusetts' costs for closing the Lynn SDA office.

^{8/} On page 9, under the section entitled "The Commonwealth's Reconstructed Trial Balance for FY 1995," the ALJ discusses Massachusetts accounting documents at pages 7-28 of Grant Officer's Exhibit 3. A review of the documents cited by the ALJ reveals that, in addition to references to "FY 94" and "FY 95," those documents carry specific dates of events or accounting transactions occurring during the Massachusetts 1995 fiscal year, July 1994 - June 1995. *See, e.g.,* GX 3 at pp. 10,11. The ALJ's discussion of these documents under the heading "Reconstructed Trial Balance for FY 1995" indicates that he is using "FY 1995" to refer to the Massachusetts fiscal year rather than the 1995 JTPA program year, which covered July 1995 - June 1996. Similarly, under the next section of the decision, which is entitled "Weekly Invoice Documentation for FY 1996 JTPA Title II Costs," the ALJ discusses the testimony of Massachusetts official Manning, in relation to documents in evidence at GX 3 at pages 29-723. D&O at 10. Review of documents cited by the ALJ in that discussion also reveals that, in addition to references to "FY 95" and "FY 96," those documents contain specific dates of events or accounting transactions occurring during the Massachusetts 1996 fiscal year, July 1995 - June 1996. *See, e.g.,* GX 3 at pp. 84, 98, 216, 283, 536, 671. The ALJ's discussion of these documents under the heading "Weekly Invoice Documentation for FY 1996 . . ." indicates that the ALJ is using "FY 1996" to refer to the Massachusetts fiscal year, July 1995 - June 1996, rather than the 1996 JTPA program year, which covered July 1996 - June 1997. We note that the ALJ appears to have followed the Grant Officer's lead in categorizing the evidence under the "fiscal years" as he did in these discussions. *See* D&O at 9-11 and references therein to Grant Officers' Determinations.

D&O at 15. Review of the record indicates that some of those documents carry specific dates of events and accounting transactions occurring in July - December 1996. GX 2 at pp. 368-70. Those dates do not fall within the Massachusetts "FY 1996," which ran from July 1995 - June 1996; rather, those dates fall within the 1996 JTPA program year, which covered July 1996 - June 1997. Similarly, in analyzing the effective dates of OMB Circulars No. A-128 and No. A-133, in footnote 14 on page 17, the ALJ apparently uses "FY 1995" to refer to the 1995 JTPA program year, covering July 1995 - June 1996, rather than the Massachusetts 1995 fiscal year, which covers July 1994 - June 1995.^{2/} In addition, the ALJ's first reference in the decision is to "costs under the JTPA for 1994, 1995 and 1996." D&O at 1. Had the ALJ intended to refer to the periods covered by the Massachusetts fiscal years designated 1994, 1995 and 1996, the years covered should have begun in 1993, since Massachusetts FY 1994 ran from July 1993 - June 1994.

In sum, the term "fiscal year" is used inconsistently in the ALJ's decision, and the decision does not provide us a basis upon which to reconcile the inconsistency. In addition, the ALJ has not indicated how he interpreted references to particular fiscal years in the documents generated by Massachusetts that do not otherwise specify the dates of events or accounting transactions recorded on those documents.

Finally, there is the question of the audit requirements applicable to the recipient and subrecipient pursuant to the Single Audit Act, which was amended for audits of fiscal years beginning after June 30, 1996. Pub. L. No. 104-156, §3, 110 Stat. at 1404; *see* 64 Fed. Reg. 14538 (Interim final rules, 20 C.F.R. Pts. 96, 99) (Mar. 25, 1999); 64 Fed. Reg. at 14538; 62 Fed. Reg. 35278, 35279 (OMB, final revision of Circ. No. A-133) (June 30, 1997) . The ALJ concluded that it was unnecessary to resolve the parties' arguments regarding whether the requirements of OMB Circular No. A-128 or the revised No. A-133 apply, since no audit was conducted for the Lynn SDA under the Single Audit Act for the years at issue. D&O at 17 n.14. We disagree. In determining what documentation or other evidence a JTPA recipient must provide to overcome the lack of a required audit -- as the ALJ has attempted to do in this case -- the decision maker should consider all of the relevant requirements, including what documentation an auditor is required to examine under the applicable OMB circular. The Single Audit Act Amendments of 1996 emphasize the need for "effective internal controls" to enhance "sound financial management" among recipients of Federal funds. Pub. L. No. 104-156, §1(b)(1), 110 Stat. at 1396 (codified at 31 U.S.C. §7501 (2000)). These and other changes to the SAA are reflected in the revised OMB Circular No. A-133. *See* 62 Fed. Reg. 35278 (OMB, final revision of Circ. No. A-133) (June 30, 1997); 61 Fed. Reg. 57232 (OMB, proposed revision

^{2/} In his analysis of the respective dates during which OMB Circular No. A-128 and revised Circular No. A-133 were in effect, the ALJ properly states that the Single Audit Act "was amended in 1996 for fiscal years beginning after June 30, 1996." D&O at 17 n.14. He goes on to state that "the requisite audit for FY 1995 should have been conducted pursuant to OMB Circular A-128, while the audits for subsequent fiscal years would be subject to OMB Circular A-133." *Id.* The ALJ obviously is using "FY 1995" in this instance to apply to a period ending on June 30, 1996, immediately before the effective date of revised OMB Circular A-133. That period would correspond to the JTPA program year running July 1995 - June 1996, rather than Massachusetts FY 1995, which ran July 1994 - June 1995.

of OMB Circ. No. A-133 and proposed rescission of OMB Circ. No. A-128) (Nov. 5, 1996). Particularly relevant to an evaluation of the adequacy of the documentation and argument offered by Massachusetts are the changes in the definitions of “internal control” and “internal control pertaining to the compliance requirements for Federal programs” that are contained in OMB’s revision of A-133. *See* 29 C.F.R. §99.105 (Definitions) (1999); 61 Fed. Reg. at 57235; *see also* 62 Fed. Reg. at 35283 (discussing Federal agencies’ concerns that auditors were not conducting adequate testing of internal controls). It is also necessary to determine the applicability of an A-133 audit to any of the time periods involved in order to evaluate the merits of the Grant Officer’s argument that either an A-133 audit or a “special procedures” audit is required to justify the questioned costs in this case. *See* D&O at 10, 11 (noting Grant Officer’s November 1999 finding that an A-133 or special procedures audit was necessary to support allowability of costs for 1995 and 1996, GX 2 at pp. 9-12); HT at 82-85, 117-18 (Lonergan, testifying that A-133 or special procedures audit was required); *cf. State of Louisiana*, 108 F.3d at 617 n.12 (noting ALJ’s reversal of Grant Officer’s application of JTPA provisions that were not enacted until after the program years involved in the case).

In rendering his decision on remand, the ALJ should clarify the time periods that are covered by the Grant Officers’ Determinations.^{10/} He should also explain his use of terms to identify particular periods of time in the decision, such as “program year” and “fiscal year.”^{11/} If necessary to resolve questions of fact regarding the time periods addressed by specific items of evidence, the ALJ may exercise his option to invite the parties to enter stipulations regarding such evidence. *See* 29 C.F.R. §18.51 (2001). He should also consider the particular requirements of the A-128 and A-133 Circulars, as pertinent to the relevant years.

CONCLUSION and ORDER

On remand, the ALJ should identify the time periods during which the JTPA operations giving rise to the questioned costs occurred, and apply the relevant statutory and regulatory provisions in effect during the respective time periods. The ALJ should also render findings concerning the question of waiver of liability, taking into account his findings concerning the JTPA requirements for recipients and subrecipients for the pertinent time periods, and the statutory language concerning substantial compliance. In analyzing the evidence on remand, the ALJ should resolve any ambiguities in the hearing testimony or documentary evidence arising from the use of “fiscal year” in that evidence. In rendering his findings on remand, the ALJ should also explain his use of “fiscal year” or related terms. Finally, the ALJ should specifically

^{10/} We also note that the D&O before us contains several clerical errors in critical numerical references -- to Titles II or III of the JTPA, in citations to statutory and regulatory sections and their year of enactment or publication, and Grant Officer’s exhibits -- that give rise to questions concerning the intended meaning of various passages. In a case such as this, which addresses the accounting for of sums that are categorized according to year and program title, accuracy in those details is of utmost importance to the reviewability of the decision.

^{11/} Audits of governmental units conducted under the Single Audit Act cover the state or local government’s fiscal year. *See, e.g.,* 29 C.F.R. §96.500 (Scope of audit) (1999).

address the issue raised by the Grant Officer concerning Massachusetts' adoption of a position in this proceeding that is contrary to that taken in its own decisions disallowing costs claimed by Lynn.

The decision and order of the ALJ is accordingly **VACATED** and the case is **REMANDED** for further consideration in accordance with this opinion.

SO ORDERED.

JUDITH S. BOGGS

Administrative Appeals Judge

WAYNE C. BEYER

Administrative Appeals Judge

OLIVER M. TRANSUE

Administrative Appeals Judge