

STATE OF FLORIDA
AGENCY FOR WORKFORCE INNOVATION

WORKFORCE ESCAROSA, INC.,)
)
Petitioner,)
)
v.)
)
STATE OF FLORIDA AGENCY FOR)
WORKFORCE INNOVATION,)
)
Respondent.)
/

DOAH NO. 08-5951
OGC CASE NO. 1467

FILED
2009 JAN 25 A 11:05
DIVISION OF
ADMINISTRATIVE
HEARINGS

FINAL ORDER

On October 30, 2009, an Administrative Law Judge (“ALJ”) of the Division of Administrative Hearings (“DOAH”) submitted his Recommended Order to the Agency for Workforce Innovation (“Agency”). A copy of the Order is attached hereto as Exhibit A. This matter is now before me for final agency action.

BACKGROUND

On September 19, 2008, the Agency issued a Management Decision to Workforce Escarosa, Inc. (“Escarosa”) in which it disallowed \$348,355 in expenditures for gas cards charged by Escarosa to an HHS Temporary Assistance to Needy Families (“TANF”) Welfare Transition Program (“WTP”) grant. It advised Escarosa that the disallowed charges must be repaid by December 31, 2008. The Management Decision followed an audit of federal funds which had been awarded to Escarosa for the year ending June 30, 2007.

Escarosa filed a petition for formal hearing (“Petition”) on October 6, 2008, and the Agency referred the matter to the Division of Administrative Hearings to conduct an administrative hearing. The assigned ALJ conducted the hearing on June 17-18, 2009 and submitted his Recommended Order on October 30, 2009.

THE RECOMMENDED ORDER

In the Recommended Order, the ALJ stated that the issues to be resolved in the proceeding concern whether the Agency properly disallowed \$348,355 in federal grant funding to Petitioner for having insufficient documentation to justify that the funds were used for allowable U.S. Department of Health and Human Services (HHS) grant purposes, and whether the funds, related to gas card purchases, were properly documented and whether Escarosa must repay the disallowed amount.

The ALJ found that Escarosa, as a recipient of federal grant funds, is required to properly account for expenditures of those funds and to document grant expenditures. That documentation must establish that an expenditure is one which is allowable under the laws or regulations pertaining to the grant program and that the expenditure is actually used for the intended purpose of the grant. (RO ¶ 6).

The ALJ found that Escarosa provided transportation assistance to WTP participants in the form of gas cards. The gas cards were purchased with HHS/Temporary Assistance for Needy Families grant funds. The value of gas card purchases between June 2004 and December 2006 totaled \$991,000. (RO ¶ 13).

The ALJ found that Pensacola Junior College (College) was a service provider for Escarosa during this period, and until June 30, 2008. (RO ¶ 15).

The ALJ found that on December 14, 2006, Escarosa notified the College of problems in its audit and reconciliation of gas card disbursements. These issues included gas card signature logs not being available for audit, inconsistencies in the dates on signature logs, such that distribution dates were entered as prior to the date the cards had actually been purchased. There were distribution dates on Saturdays, when the program was closed for the weekend. There were cards not issued in consecutive order and cards issued without being receipted to the staff

member responsible for distributing the cards, so that there was no record of who had custody of the cards. Some clients received excessive amounts of cards, and on one signature log, the client signed a line with no gas card number indicated. (RO ¶ 17).

The ALJ found that Escarosa notified the Agency in December 2006 that there were cards that could not be accounted for, and that theft by an employee was suspected. All of the cards that could not be accounted for were issued from Escarosa to the College between the dates of June 1, 2004 and December 31, 2006. (RO ¶ 18).

The ALJ found that Escarosa had the College calculate the number of cards, and their value, for which there was insufficient documentation, using gas card numbers provided by Escarosa. The list of card numbers was prepared by Escarosa using its financial and purchasing records. The list provided only contained cards issued to the College. (RO ¶ 24).

The ALJ found that the College matched the card numbers with information in its “support services files” as to eligibility and card disbursement to participants. It then determined, in late 2007, that it believed the final amount of undocumented gas cards to be \$348,355. (RO ¶ 25).

The ALJ found that the Agency returned to Escarosa in late 2007 and accepted that calculation, as indicated by the Inspector General’s report dated January 10, 2008, Respondent’s Exhibit A, in evidence. (RO ¶ 26).

The ALJ found that the disbursement logs have been shown by the evidence and testimony, in some instances, to have been inaccurately executed or forged. Further, the ALJ found that it had not been persuasively shown whether all of the undocumented gas cards were actually issued and used, or who may have used them. Therefore, the ALJ found that the

evidence does not show that \$348,555 is the proven amount which should be disallowed and ultimately repaid. (RO ¶ 27).

The ALJ also found that the Inspector General's January 10, 2008 report concluded that documentation had not been produced to support proper use of grant funds concerning the undocumented cards. The Agency's Inspector General could not know with confidence that the gas cards in question went to eligible participants in the program or that the funds were actually used for the purpose for which they were granted to Escarosa. (RO ¶ 28).

The ALJ found that Escarosa chose not to have an audit performed, as requested by the Agency, to determine the exact amount attributable to undocumented cards or the amount used for non-approved purposes. It did not have a forensic examination of the gas card logs performed because Escarosa did not want to spend further money in investigation. (RO ¶ 29).

Additionally, the ALJ found that the Agency asked Escarosa to attempt to determine whether the oil companies from whom the cards had been purchased could, from their records, confirm and document the unused gas cards, which would show that those funds had not actually been expended. That would reduce the number of undocumented cards. Escarosa did not make this attempt. (RO ¶ 30).

The ALJ found that Escarosa obtained an audit, which included a finding that Escarosa had not complied with requirements concerning allowable costs and subrecipient monitoring applicable to its TANF-WTP program. Finding 2006-1 states that "a final amount of possible theft has been determined which is \$348,355, from July 2004 through December 2006." (RO ¶ 31).

By letter dated January 30, 2009, Escarosa took the position that all gas cards had been properly documented, except for an amount valued at \$5,580, which Escarosa postulated had

been stolen. The Agency did not accept that new position without an amended audit finding or certification by an auditor, which would validate the documentation as being appropriate as to the remaining \$342,775 amount of disputed gas cards. (RO ¶ 32).

Escarosa asserted that the only way to arrive at an audited number of the cards that were stolen, improperly used or unaccounted-for would be to have a forensic handwriting specialist analyze the signatures in the card disbursement logs. Ms. Nelms admitted that it would be better to have had a forensic audit performed so that an exact amount of loss would have been known. However, the ALJ found that Escarosa did not obtain a forensic audit or handwriting analysis. (RO ¶ 33).

The ALJ found the College's calculation was based on the College's support services files, which were maintained and updated accurately, and that the \$348,355 figure was arrived at from data in the support services files. Ms. Bagwell prepared the College's calculation, and she testified that she believed the data was reliable, but she questioned the final amount because she had a doubt concerning the list of cards that Escarosa provided to the College, as well as the time period for which she was directed to conduct the calculation. In its calculation, the College compared the total number of gas cards purchased by Escarosa with HHS funds to the number of gas cards distributed by the College. The College only distributed gas cards pursuant to the WTP program. It is not involved in card distribution for Escarosa's Non-Custodial Parent Program ("NCCP"). The ALJ found that the College's calculation is flawed because NCCP gas cards may have been included in the undocumented amount of \$348,355. (RO ¶ 35).

The ALJ found that the analysis employed to determine the disallowed amount is unreliable, and that the evidence does not prove with any precision what the figure for disallowed costs should be. (RO ¶ 41).

The ALJ recommended that the Agency enter a final order requiring Escarosa to conduct an appropriate independent audit and/or forensic audit, which accords with generally accepted accounting principles and the applicable federal grant management and administration authority in order to show any extant undocumented amount of grant-related funds from within the gas card program for the relevant audit period.

STANDARDS OF REVIEW

Section 120.57(1)(l), Florida Statutes, provides that an agency final order “may reject or modify an administrative law judge’s conclusions of law and interpretations of administrative rules over which it has substantive jurisdiction.” Subsection 120.57(1)(l), Florida Statutes, also prescribes that an agency reviewing a DOAH recommended order may not reject or modify the findings of fact of an administrative law judge “unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.” §120.57(1)(l), Fla. Stat. (2009); Wills v. Florida Elections Commission, 955 So. 2d 61 (Fla. 1st DCA 2007); Heifetz v. Dept. of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985) (holding that an agency may not reject an ALJ’s findings of fact, which are supported by competent, substantial evidence, nor is it authorized to reweigh the evidence, resolve conflicts in testimony, draw inferences, judge credibility of witnesses, or otherwise interpret evidence). However, if a finding of fact in a recommended order is improperly labeled by an administrative law judge, the label should be disregarded and the item treated as though it were properly a conclusion of law. Battaglia Properties v. Fla. Land and Water Adjudicatory Commission, 629 So. 2d 161, 168 (Fla. 5th DCA 1994).

A reviewing agency has no authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. Brogan v. Carter, 671 So. 2d 822, 823 (Fla. 1st DCA 1996). Therefore, if the DOAH record in this case disclosed any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such finding in this Final Order. Florida Dept. of Corrections v. Bradley, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). In addition, a reviewing agency has no authority to make independent or supplemental findings of fact in construing the recommended order on review. See, e.g., North Port, Fla. v. Con. Minerals, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

RULINGS ON EXCEPTIONS

No exceptions were filed in this case.

FINDINGS OF FACT

The Findings of Fact set out in the Recommended Order are hereby adopted, and incorporated herein by reference.

CONCLUSIONS OF LAW

1. Conclusions of Law 44 through 62, and 65 through 69 set out in the Recommended Order are hereby adopted, and incorporated herein by reference.
2. The Agency rejects Conclusion of Law 63 of the Recommended Order wherein the Administrative Law Judge concludes that \$348,355 has not been established by reliable, substantial evidence. Requiring the Agency to prove the amount of disallowed costs improperly shifts the burden from the Petitioner to the Respondent. See The Human Dev. Corp. of Metro. St. Louis, DAB No. 1759 (2001) (“[I]t is a fundamental principle of grants management that a grantee is required to document its costs, and that the burden of demonstrating the allowability

and allocability of costs for which funding was received under a grant rests with the grantee.)

See, e.g., Texas Migrant Council, Inc., DAB No. 1743 (2000), and decisions cited therein. Thus, it was Escarosa's responsibility to establish that it properly charged TANF funds for the gas cards in question. Because Petitioner did not establish that it properly spent any amount of the disallowed costs, Petitioner must return \$348,355 to the Agency.

3. The Agency rejects Conclusions of Law 64 and 70 of the Recommended Order, wherein the Administrative Law Judge concludes that no disallowance amount has been established and that an appropriate independent and/or forensic audit should be conducted to determine the amount of undocumented gas card expenditures, and concomitantly, the magnitude of any departure from the grant requirements. The Petitioner had the burden to provide documentation to demonstrate that the costs are allowable. By failing to properly document the gas cards and failing to establish that the gas cards were issued to eligible participants, Petitioner has failed to establish that the funds were spent for grant purposes and has thereby failed to comply with the terms and conditions of the award. Therefore, the Agency has properly disallowed \$348,355. See 45 C.F.R. §74.62 (2009).

4. A review of the complete record indicates that Petitioner failed to produce documentation to establish that the disallowed gas cards went to eligible participants in the program and that the funds were actually used for grant purposes. See RO ¶ 28, 41 Exhibits A, Q; Tr. p. 140, line 16 through p. 148, line 15. Therefore, the Agency's disallowance must be sustained, and Petitioner must return the full disallowed amount to the Agency. See Lac Courte Oreilles Tribe, DAB No. 1132 at 5 n.4 (1990); Delta Found. Inc. v. Dep't of Health & Human Serv. et al. 303 F.3d 551 (5th Cir. 2002); 2 C.F.R. 230, App. A, § A.2.g.

5. The Agency cannot order Petitioner to conduct a forensic audit for the purpose of

determining if any of the costs are allowable. Rather, Petitioner bears the burden of documenting its costs. Petitioner may elect to conduct a forensic audit if it determines that doing so would allow it to demonstrate that its gas card expenditures are allowable.

6. The Agency adopts the Administrative Law Judge's Recommendation to require Escarosa to conduct an audit in part, as modified above.

ORDER

Within 180 days of the date of this Final Order, Workforce Escarosa, Inc. shall conduct a forensic audit if it wishes to demonstrate that any portion of the \$348,355 was properly used for grant purposes and is an allowable cost. Within 90 days following its receipt of the completed forensic audit, Workforce Escarosa, Inc. shall pay the Agency the amount determined to be disallowed by that audit using a non-federal funding source.


If Workforce Escarosa, Inc. elects not to conduct a forensic audit, Workforce Escarosa, Inc. shall pay the Agency the disallowed amount of \$348,355 using a non-federal funding source within 90 days of the date of this Final Order.

NOTICE OF RIGHTS

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Agency in the Office of General Counsel, Caldwell Building MSC 110, 107 E. Madison Street, Tallahassee, Florida 32399-4120; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Agency.

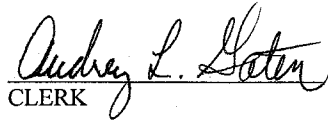
DONE AND ORDERED this 22 day of January, 2010, in Tallahassee, Florida.

STATE OF FLORIDA AGENCY FOR
WORKFORCE INNOVATION


CYNTHIA R. LORENZO
Director

Caldwell Building
107 E. Madison Street
Tallahassee, Florida 32399

FILED, ON THIS DATE, PURSUANT TO SECTION
120.52, F.S., WITH THE DESIGNATED AGENCY
CLERK, RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.


CLERK

1/22/2010
DATE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Final Order has been sent by

United States Postal Service to:

Susan Nelms, Executive Director
Workforce Escarosa, Inc.
9111 A Sturdevant Street
Pensacola, Florida 32514

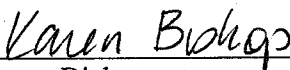
Joseph Passeretti, Esquire
Emmanuel Sheppard & Condon
30 South Spring Street
Pensacola, Florida 32502

Claudia Llado, Clerk and
P. Michael Ruff, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

James E. Landsberg, Esquire
Agency for Workforce Innovation
The Caldwell Building, MSC 110
107 E. Madison Street
Tallahassee, Florida 32399

this 22nd day of January, 2010.



Karen Bishop
Assistant General Counsel