STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WORKFORCE ESCAROSA, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-5951
	)	
AGENCY FOR WORKFORCE INNOVATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Upon proper notice, this matter came on for formal proceeding and hearing before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings in Pensacola, Florida, on June 17 and 18, 2009. The appearances were as follows:

APPEARANCES

For Petitioner: Susan Nelms, Executive Director,
Workforce Escarosa, Inc.
(Qualified Representative)
9111 A Sturdevant Street
Pensacola, Florida 32514

Joseph Passeretti, Esquire
30 South Spring Street
Pensacola, Florida 32502

For Respondent: James E. Landsberg, Esquire
Peter James Caldwell, Esquire
Agency for Workforce Innovation
107 East Madison Street, MSC 110
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STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Agency for Workforce Innovation (the Agency), (Respondent), has properly disallowed some $348,355 in federal grant funding to the Petitioner, Workforce Escarosa, Inc. (Escarosa) or Petitioner, for purportedly having insufficient documentation to justify that such funds were used for allowable U.S. Department of Health and Human Services (HHS) grant purposes. Included within that issue is the question of whether the funds, related to "gas card" purchases, were properly documented and whether Escarosa must re-pay the disallowed amount.

PRELIMINARY STATEMENT

This cause arose on September 19, 2008, when the Respondent Agency issued a "Management Decision" (Initial Agency Action), 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 re-paid 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. Thereafter, pursuant to an Amended Hearing Request, the cause was referred to the Division of Administrative Hearings on December 1, 2008.

The cause was assigned to the undersigned Administrative Law Judge for formal proceeding. By agreement of the parties, the matter was initially set for hearing on March 24 and 25, 2009. Thereafter, by an agreed-upon Motion for Continuance, the matter was continued and was re-scheduled for agreed upon dates of June 17 and 18, 2009. The cause came on for hearing on those dates. The Petitioner, Escarosa, presented the testimony of two witnesses, Susan Nelms, the Escarosa Executive Director, and Margeret Thomas, the former Escarosa Assistant Executive Director. Escarosa offered Petitioner's Exhibits 1 through 8 into evidence and those eight exhibits were admitted. Additionally, upon examination and discussion between Susan Nelms and the undersigned, Susan Nelms, without objection, was granted leave to represent Escarosa as a Qualified Representative at the hearing.

The Agency presented the testimony of nine witnesses; Susan Nelms, Diane Bagwell, Director of Social Service Grants and Projects for Pensacola Junior College (PJC); James Mathews, Agency Inspector General; Janet Summers, Escarosa Finance Director; Carol Bono, Escarosa Accounting Specialist; Laura McKinley, the Agency's Financial Management Systems Assurance Section Manager; Fay Malone, Agency Compensation and Benefits Manager; Phillip Wilcox, Agency Investigations Manager; and Ed LeBrun, former Escarosa Executive Director. The Respondent

Agency also offered Respondent's Exhibits A through TT. All exhibits were admitted into evidence upon motion and stipulation of the parties.

On June 16, 2009, the Agency served on Escarosa a request that the undersigned take official recognition of several federal regulations and administrative decisions. That request was filed with the Division of Administrative Hearings, no objection was made to the request and official recognition has been so taken.

Upon conclusion of the hearing, the parties requested that the testimony be transcribed and availed themselves of the right to submit proposed recommended orders. The three-volume transcript was filed with the Division on July 13, 2009. After the hearing, upon a showing of good cause by the Agency, the Agency's Motion for Extension was granted, for submission of proposed recommended orders, until August 21, 2009. The Proposed Recommended Orders were thereafter timely submitted and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner, Escarosa, is a state Regional Workforce Board (RWB) constituted according to Section 445.007, Florida Statutes (2008).[1/] Escarosa is in the business of promoting workforce development in the Northwest Florida region and as part of this effort provides support services to assist WTP

participants. It does so, as pertinent to this case, through the use of TANF funds to provide transportation assistance, in the form of gas cards, which assist participants in engaging in work activities.

2. In the Workforce Development System, federal government funds are transmitted to the Agency. The Agency then passes the funds through to regional workforce boards such as Escarosa, and the regional workforce boards then pass those funds, by related agreements, to local providers such as PJC, to provide workforce development programs or support services.

3. The Agency and Escarosa operated pursuant to a "Master Cooperative Agreement," at times pertinent to this case. The agreement required Escarosa to comply with applicable cost principles and administrative requirements for grants included in various "Circulars" of the Federal Office of Management and Budget" (OMB).

4. The TANF program is a state-administered program that assists unemployed persons returning to the workforce. It provides support services, such as transportation assistance (here in the form of gas cards) which assist participants in traveling to engage in work activities.

5. In accepting TANF funds, Escarosa has agreed to the

terms and conditions of the Grant Award. The Grant Award states, in pertinent part,

> expenditures utilizing these funds must be consistent with all federal and state rules, regulations and policies established for TANF funds. Funds must be used to facilitate meeting the goals and outcome measures of the welfare transition program.

6. By being a recipient of federal grant funds, Escarosa is required to properly account for expenditures of those funds and to document grant expenditures. The 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. Therefore, for the gas card situation, the documentation must show a link between a card issued by Escarosa and a participant in the WTP program and show that the card went to an eligible participant.

7. Escarosa, as a recipient of federal funds, is required to maintain a financial management system that includes effective internal controls and provides for safeguarding of federal funds. The system should include controls to prevent errors or problems in transactions and to detect when there are breakdowns in the system. A monitoring plan should be part of the testing or detection process.

8. The state agency is also required to monitor sub-recipients such as Escarosa. They must be monitored on a regular basis to ensure that there is compliance with grant rules, regulations, the provisions of specific agreements, and with the performance of goals and objectives, pursuant to OMB Circular A-133.

9. The Agency monitored Escarosa during the period of time relevant to this case but did not discover the problems with documentation in the gas card program. The monitoring by the Agency is a sampling process, not an entire audit of every aspect of Escarosa's operations and programs.

10. The Agency does not have authority to monitor or investigate below the level of its sub-recipient such as Escarosa. It does not audit sub-recipients' service providers, such as PJC. It did check Escarosa's records to see that it had been monitoring, and had audit reports, as to its service provider PJC (the College). The Agency checked for the Audit reports regarding the College and, for the 2004 period, determined that the College had not submitted an external audit report or Federal Single Audit Report, as required. It recommended to Escarosa's regional workforce board that it require such sub-recipients to comply with contractual terms, including submission of a Federal Single Audit Report. Escarosa took that suggested corrective action by the time of the 2005

audit and had a current External Audit Report for the College in its file for 2005.

11. Escarosa is required to have annual financial audits performed in compliance with OMB Circular A-133. The audit reports are required to be filed with the Agency and Escarosa complied with that requirement and filed its reports.

12. The Agency has a policy concerning audit resolution which provides that regional workforce boards, such as Escarosa, must re-pay debts, established as a result of inappropriate use of federal funds, from non-federal funds. In its Administrative Plan, Escarosa acknowledged the requirement to re-pay such obligations, which are accrued as a result of mis-expenditure of funds due to willful disregard of federal law, gross negligence or failure to observe accepted standards of administration. The Escarosa Administrative Plan includes debt collection from contracted providers such as PJC, in appropriate circumstances.

THE GAS CARD PROGRAM

13. Escarosa provided transportation assistance to WTP participants in the form of issuance of gas cards to such participants. The gas cards were purchased with HHS/TANF grant funds received from the Petitioner Agency and were charged to Escarosa's grant award. The value of gas card purchases between June 2004 and December 2006 as reflected on invoices for gas cards, totaled $991,000. Escarosa purchased approximately

58,800 gas cards during this period in increments of $5.00, $10.00, $15.00 and $20.00. As reflected on the Respondent's Exhibit A, in evidence, at page 4, witness Diane Bagwell reported that some 57,652 cards (including 1,544 purportedly un-used cards) were issued to the College between July 1, 2004, and December 15, 2006.

14. The un-refuted evidence reflects that Escarosa had written procedures which specified the process for ordering gas cards, transferring custody of them to the service provider, (the College); determining participant eligibility and the process for issuing cards to participants. This included documentation requirements and monitoring requirements. Escarosa's written procedures required that it monitor, with periodic reviews, the gas card disbursement system to determine compliance with all written procedures. The procedure requires the documentation of participant eligibility and issuance of cards. This documentation was required to be filed in the participant's "support services file" maintained by the College. Additionally, a gas card log was maintained by the College and was required to reflect the participant's signature, upon receipt of a gas card. The log and the gas cards were required to be monitored to ensure strict, procedural accountability.

15. The College was a service provider for Escarosa during the period in question, June 2004 to December 2006, and until

June 30, 2008. This was pursuant to a contract between the College and Escarosa by which the College operated the gas card program. The contract between Escarosa and the College required the College to defend, indemnify, and hold Escarosa harmless from all claims, including attorneys' fees and costs, caused by the College's acts or omissions in the course of operation of the contract. Escarosa's contract with the College also required the College to maintain general liability insurance to cover the College, and any services or activities provided by the College, under its contract with Escarosa.

16. The College did not petition to intervene in these proceedings. The Respondent Agency is not a party to Escarosa's contract with the College to operate the gas card program.

17. On December 14, 2006, Escarosa notified the College of certain problems in the audit and reconciliation of gas card disbursements. Some of the issues included gas card signature logs not being available to be audited by Escarosa; inconsistencies in the dates on signature logs, such that distribution dates to participants were entered as prior to the date that their relevant cards had actually been purchased. There were distribution dates on Saturdays when the program was closed for the weekend. There were logs showing the distribution date to the participant in October 2006, which were submitted after the referenced gas cards had been physically

counted (before distribution) on November 3, 2006. 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.

18. Escarosa notified the Respondent Agency in December 2006, that there were cards which could not be accounted for and that theft by an employee of the College was suspected. All 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.

19. The Respondent's staff went to Escarosa in January 2007 to provide technical assistance in resolving the discovered problems with the gas card program. The Respondent found that Escarosa had not been following its own procedures as to monitoring and managing the program. Escarosa was not monitoring the gas card distribution process or the process for determining whether participants were eligible for receiving cards. It was not monitoring the dollar amount of cards being distributed to participants on a monthly basis. It was not correctly following its Administrative Plan concerning monitoring or the Master Cooperative Agreement with the Agency,

because it was not properly monitoring its service provider, the College.

20. Escarosa has agreed, through its representative, Ms. Nelms, that with proper monitoring of the program the theft of gas cards could have been detected within a few months. The Agency's Office of Inspector General conducted an inquiry into Escarosa's report concerning problems with the program and issued a report on March 16, 2007. At that time, there had not been a determination of the final amount of undocumented cards, so it was recommended that Escarosa determine the amount of loss and develop a plan for recovery of the loss from the College.

21. The Florida Department of Law Enforcement (FDLE) investigated the gas card theft. It interviewed program participants and asked them to authenticate signatures on the client signature logs, in order to identify forged signatures. It did this for about 50 participants and then suspended its investigation because the total charges then established through its investigation exceeded the amount necessary to charge the College employee involved with grand theft. Therefore, because FDLE ceased its investigation, it never established the total extent of any theft or other undocumented status of additional gas cards. The College employee involved was prosecuted in a criminal proceeding and was ordered to pay $2,360 restitution.

VALUE OF UNDOCUMENTED CARDS

22. The Escarosa staff worked with the Agency's personnel in attempting to determine the number of undocumented cards. It later hired temporary staff to assist in that effort.

23. In September 2007, Ms. Nelms, of Escarosa, advised the Agency's Inspector General of her belief that the amount of undocumented cards at that time was $284,685. The process of reconciliation was continuing and incomplete at that point, however. The College had not agreed to that amount and was trying to match disbursement logs for issuing the cards, the documentation in its "one-stop service tracking system" (OSST) and its "hard copy files," to locate additional documentation which could reduce the amount of undocumented gas cards below the above figure. The OSST is a data system used to store information on program participants, such as their eligibility for transportation services.

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

25. The College then 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.

26. In late 2007, the Agency Investigations Manager and an auditor returned to Escarosa and accepted the College's calculation that 20,899 gas cards valued at $348,355 were unaccounted for and not traceable to corresponding disbursement logs. A report of that confirmation was issued on January 10, 2008 (See Respondent's Exhibit 8 in evidence).

27. However, disbursement logs have been shown by the evidence and testimony in this proceeding, in some instances, to have been inaccurately executed or forged. Even if some issued cards were not reflected in disbursement logs, that still does not mean that those which were reflected in disbursement logs were accurately entered and documented, given the fact that there was some forgery and inaccurate recording in disbursement logs, concerning card disbursement. This fact calls into question the valuation of $348,355. That number also is rendered doubtful by the fact that, of the purported number of undocumented gas cards, it has not been persuasively shown whether all were actually issued and used, nor who may have used all of them. Thus, while the evidence may show that 20,899 gas

cards were undocumented, it does not correspondingly persuasively show that $348,355 is the proven amount which should be disallowed and ultimately re-paid.

28. Thus, the report issued January 10, 2008, found that documentation had not been produced to support proper use of grant funds concerning the undocumented cards. The Agency 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.

29. 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, as Ms. Nelms had once advocated, because Ms. Nelms did not want to spend further money in investigation. Escarosa does not have any non-federal money to spend on such costs.

30. Further, in January 2008, the Agency requested that Escarosa 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. The unused cards would show that funds represented by them had not actually been expended. That would reduce the number of undocumented cards

and result in obtaining refunds for the unused cards. This would reduce the ultimate re-payment amount. The Agency believed this would help Escarosa reduce the number of undocumented cards that it might be responsible for. Escarosa, however, did not accede to the request that it attempt to make such an audit involving the oil companies.

31. Escarosa had obtained an audit from the firm of O'Sullivan and Creel, LLP, which issued its "Independent Auditor's Report on Compliance with Requirements Applicable to Each Major Program and Internal Control Over Compliance in Accord with OMB Circular A-133." This document is in evidence as Respondents Exhibit 2. This was a report of an audit of Escarosa's compliance with requirements applicable to federal programs and was provided to Escarosa's Board of Directors. It included a finding that Escarosa had not complied with requirements concerning allowable costs and sub-recipient monitoring applicable to its TANF-WTP program. It included, at Finding 2006-1: "Un-allowed costs and sub-recipient monitoring," that there was a final amount of questioned cost of $348,355, representing the period from July 2004 through December 2006. It described that amount in its finding, however, as a "Final Amount of Possible Theft" of $348,355 for undocumented gas cards. It also acknowledged in its findings that it had not

audited any response to the audit report which was made or might be made by Escarosa.

32. Escarosa later took the position, by letter of January 30, 2009, that it believed 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.

33. Ms. Nelms 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. She admitted that it would be better to have had a forensic audit performed so that an exact amount of loss would have been known. She did not obtain, nor did Escarosa obtain, such a forensic audit or handwriting analysis, however.

34. In taking a position that the undocumented amount or value of the gas cards was much lower than the postulated $348,355, Ms. Nelms testified that the client signature logs or gas card logs should be used to reconcile gas card purchases with what had been disbursed to participants. She maintained that this would result in a much lower undocumented figure,

perhaps as low as $5,580. Escarosa presented no persuasive evidence that the gas card logs were sufficiently reliable however. In relying on the gas card logs to show gas card disbursement to program participants, Escarosa concedes that the logs contained forged and missing signatures and that portions of the logs had been falsified. The logs have simply not been demonstrated to be reliable as a basis of documentation for the gas card expenditures at issue.

35. Diane Bagwell was the person responsible for the College's calculation concerning arriving at the figure for undocumented gas cards. Ms. Bagwell testified that the College's support services files, which were maintained under her supervision, were maintained and updated accurately and that the $348,355 figure was arrived at from data in the support services files. She testified that she believed that data was reliable, but she also questioned the final amount of $348,355 because she had a doubt concerning the list of cards provided by Escarosa to the College, as well as the time period (July 2004-December 2006) for which she was directed to conduct the search or calculation. In its calculation, the College compared the total number of gas cards purchased with HHS funds by Escarosa to the number of gas cards distributed by the College. It only distributes gas cards pursuant to the WTP program. It is not involved in card distribution for Escarosa's Non-Custodial

Parent Program (NCPP). The approach used by the College in its calculation, which thus far has been accepted by the Agency, is flawed in that the testimony of Diane Bagwell and Janet Summers indicates that NCPP gas cards may have been included in the purported undocumented amount referenced above. This is because the evidence indicates that the calculation by the College may have compared the total cards purchased for both the WTP and NCPP programs against the cards distributed by the college.

36. It is also apparent the College did not include any data from the time period prior to July 2004 nor after December 2006. The analysis in this manner would remove from consideration cards purchased prior to the beginning of the test period, July 2004, but actually activated or issued after July 2004, as well as cards purchased prior to December 2006, but activated or issued after December 2006. Cards purchased prior to July 2004 and distributed during January 2004 through December 2006, would appear to be undocumented because the data was not reviewed, even though the cards were distributed and used between January 2004 and December 2006. Similarly, the cards purchased prior to December 2006, but not issued and used until 2007, would appear as being undocumented because the attendant data was not reviewed for the period July 2004 through December 2006, even though, in actuality, the cards may have been properly accounted-for, but used after December 2006.

37. It thus appears that the College, in its calculation, may have combined gas card purchases made for both the NCPP and the WTP programs, comparing the combined total of gas card purchases to its own WTP records in its support services files. It apparently did not set off the total of the number of NCPP gas cards from the WTP program cards and thus considered an inflated number of purchased gas cards vis-a-vis its records when it should have only considered the WTP-related cards. The evidence shows that NCPP cards valued in excess of $200,000 were purchased. This is a relatively small percentage of the total HHS funds expended on gas card purchases for the relevant time period (approximately $1,000,000). However, this does account for a significant portion of the so-called undocumented gas cards. The number of undocumented cards might be substantially smaller if the College, in its calculation, had offset or removed the NCPP gas cards from the total cards it was considering.

38. Other flaws in the calculations by the College also cast doubt on the correctness of the disallowment figure of $348,355. Thus, for example, as to Exhibit "L", the Agency contends that in the period July 2004 to December 2004, gas cards issued by both CITGO and BP oil companies are undocumented. Exhibit "S", however, and Exhibit "OO", which document Escarosa's use of HHS funds during this period of time,

show Escarosa did not purchase any BP gas cards. Instead, only CITGO gas cards were purchased prior to June 2005.

39. Exhibit "S" in evidence, specifically Invoices 2322, 2426, 2428, 2490, 2515, and 2516 show that Escarosa purchased a total of 7,250 gas cards valued at $133,500. The Agency contends that the value of $127,558, represented by 8,335 gas cards during that time period are unallowable costs, as depicted by Exhibit "L", in evidence. The Agency is thus contending that nearly 100 percent of the gas cards for the year 2005 are undocumented. Such a finding would not be credible nor supported by preponderant, persuasive evidence.

40. Moreover, Exhibit "L" identifies undocumented cards by serial number. When that exhibit is compared to Exhibit "OO" and Exhibit "S", it would appear that the value of undocumented cards alleged by the Agency ($348,355) includes cards that were never purchased (at least for the WTP program). Exhibit "OO," for example, shows that Escarosa activated a total of 750 $5.00 gas cards for the WTP program in the calendar year January 2005 to December 2005. Exhibit "L" however suggests that 1,438 $5.00 gas cards are undocumented for that same calendar year. Thus it would appear the undocumented cards total contended for by the Agency either includes cards that were never purchased, which is inappropriate, or includes NCPP program gas cards, which are not

part of this dispute and are not related to the program (WTP) and purported undocumented gas cards at issue.

41. In summary, the analysis employed, based primarily on the College's calculations, to justify a disallowance figure of $348,355 is simply unreliable, as demonstrated by the facts found above. Therefore, although persuasive evidence shows that there is, no doubt, a substantial number of undocumented gas cards, at the very least represented by the ones which were stolen or embezzled by the College employee in question (or others), the evidence does not prove with any precision what that figure for such disallowable costs should be.

42. This situation and determination might have been alleviated or avoided, in part, had the Petitioner, Escarosa, taken the advice of the Agency and effected an audit of its gas card operation, procedures and WTP program, related to gas card use, which included a precise audit of the number of cards obtained from oil companies and the oil company records which could show which cards had actually been used. Unfortunately, Escarosa declined to do that. Consequently, an accurate, and perhaps a forensic audit, is clearly needed to establish with precision the amount of costs which should be disallowed, represented by the gas card portion of the Petitioner's WTP program.

43. Based upon the legal authority cited herein, that audit should be performed by the Petitioner Escarosa. It is also observed that, given the facts established by the record in this case, based upon its contract with the College, Escarosa would appear to have a substantial likelihood of recourse against the College and its insurance carrier or servicing agent, for whatever cost disallowance, and related costs and fees, are ultimately proven, if any.

CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

45. This is a proceeding where the Agency, the Respondent, has made an initial decision to disallow and require repayment of certain disallowed grant expenditures made by the Petitioner, Escarosa. The Division of Administrative Hearings has jurisdiction to hear such disallowance cases. See Department of Labor and Employment Security v. Indian River Community College, Case No. 82-032 (DOAH: March 22, 1982; Final Order: November 7, 1982); Department of Labor and Employment Security v Putnam County Board of County Commissioners, Case No. 82-167 (DOAH: April 16, 1982; Final Order: July 2, 1982). The Respondent Agency's predecessor Agency, The Florida Department of Labor and Employment Security, has had its authority to disallow certain

grant-related expenditures, and to require repayment of disallowed costs, upheld. See Department of Labor and Employment Security v Nando-Sumter Community Action Agency, Case No. 84-0719 (DOAH: June 13, 1984; Final Order: August 27, 1984); Department of Labor and Employment Security v Jefferson County Board of County Commissioners, Case No. 82-883 (DOAH: June 14, 1982; Final Order: August 2, 1982).

46. The Nando-Sumter and Jefferson County cases are procedurally and factually similar to the instant case, with the Department therein disbursing federal funds to sub-recipients, pursuant to contracts requiring compliance with federal regulations. In those cases, the Recommended Orders and Final Orders recognize that, as the recipient of federal funds, the Florida Department of Labor was responsible for insuring compliance with federal regulations and that Florida law obligated it to carry out the duties assigned to Florida under federal law. Those duties included "entering into contracts on behalf of the State with program operators to locally administer the program." Nando-Sumter at 6. In Jefferson County, the Recommended Order and the Final Order provided that the sub-recipient involved should re-pay the Department of Labor the costs expended "in violation of the contract and applicable regulations."

47. HHS Department Appeals Board (DAB) decisions have been held to be persuasive in a case such as this where the Agency and Escarosa are required to comply with HHS law and regulations governing HHS grants. AHCA v. Lake Mary Health Care Assocs., Inc., Case No. 04-0335 (DOAH: June 8, 2004; Final Order: Feb. 9, 2005). HHS is the federal agency responsible for promulgating the regulations that are standards by which Escarosa's compliance must be determined. Because these decisions are those of HHS addressing the interpretation and application of its own regulations, the decisions are entitled to substantial deference. S. Valley Health Care Ctr. v. Health Care Fin. Admin., 223 F.3d 1221, 1223 (10th Cir. 2000) (Courts give substantial deference to agency's interpretation of its own regulations.).

48. A question was raised in this proceeding concerning whether the College was an indispensable party. An indispensable party is one necessary for a complete determination of all issues and one without which the case cannot further proceed. See Office of the Attorney General, Dept. of Legal Affairs v. Commerce Commercial Leasing, 946 So. 2d 1253, 1255 (Fla. 1st DCA 2007). Party status for the College is not necessary for a determination of the ultimate issues concerning whether Escarosa has violated the relevant federal regulations and contract, has grant-related expenditures which

are not documented or otherwise justified, and whether it must repay the disallowance thereof. An indispensible party is one who is materially interested in the subject matter of the litigation and would be directly affected by its outcome. Everette v. Florida Dept. of Children and Families, 961 So. 2d 270, 273 (Fla. 2007). The College in this proceeding would not be "directly affected" since the case will not result in an order adjudicating any of the College's interests. The disallowance issue affects Escarosa and not the College. The fact that the College may become liable to Escarosa for recovery of any disallowed amount, pursuant to the College's contract with Escarosa, does not make the College an indispensible party to this proceeding. See Phillips v. Choate, 456 So. 2d 556, 558 (Fla. 4th DCA 1984). Moreover, the College is not an indispensible party where it has no privity of contract between itself and the Agency for Workforce Innovation. See Dept. of HRS v. Southpointe Pharmacy, 636 So. 2d 1377, 1381 (Fla. 1st DCA 1994). The record reflects that the College had notice of these proceedings and elected not to file a motion to intervene.

THE AGENCY'S ROLE AND AUTHORITY TO DISALLOW GRANT EXPENDITURES AND REQUIRE REPAYMENT

49. The Agency is the state administrative entity for receipt of federal workforce development grants and other federal funds, and is the designated agency for each federal

workforce development grant assigned to it for administration. §§ 20.50(2)(a) and 20.50(3), Fla. Stat. The Agency is responsible for administering the TANF funds at issue in this proceeding and for ensuring that welfare transition services funded by TANF are provided in compliance with approved administrative plans. § 445.004(5)(b)6, Fla. Stat. The Agency has the level of authority necessary to be the designated recipient of each federal grant assigned to it. § 20.50(3), Fla. Stat. In sum, the Agency is responsible for ensuring that the state appropriately administers federal workforce funding. § 20.50(1), Fla. Stat.

50. All program and fiscal instruction to the regional workforce boards is statutorily required to emanate from the Agency. § 20.50(1)(a), Fla. Stat.

51. OMB Circular No. A-133, Audits of States, Local Governments, and Non-Profit Organizations, 62 Fed. Reg. 35,278 (June 30, 1997) provides the standards and requirements for audits of states, local governments and non-profit organizations expending federal awards or grant funds.

52. The Agency serves as a "pass-through entity" which is defined as a "non-Federal entity that provides a Federal award to a sub recipient to carry out a Federal program." "Sub recipient means a non-Federal entity that expends Federal awards received from a pass-through entity to carry out a Federal

program . . . ." OMB Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations, 62 Fed. Reg. 35,278 § 105 (June 30, 1997). As an entity that has received an award of TANF funds from the Agency, Escarosa is the Agency's sub recipient.

53. As a pass-through entity, the Agency has the following responsibilities:

> Pass-through entity responsibilities. A pass-through entity shall perform the following for the Federal awards it makes:
>
> (1) Identify Federal awards made by informing each sub recipient of CFDA title and number, award name and number, award year, if the award is R&D, and name of Federal agency. When some of this information is not available, the pass-through entity shall provide the best information available to describe the Federal award.
>
> (2) Advise sub-recipients of requirements imposed on them by Federal laws, regulations, and the provisions of contracts or grant agreements as well as any supplemental requirements imposed by the pass-through entity.
>
> (3) Monitor the activities of sub-recipients as necessary to ensure that Federal awards are used for authorized purposes in compliance with laws, regulations, and the provisions of contracts or grant agreements and that performance goals are achieved.
>
> (4) Ensure that sub-recipients expending $300,000 ($500,000 for fiscal years ending after December 31, 2003) or more in Federal awards during the sub-recipient's fiscal

> year have met the audit requirements of this part for that fiscal year.
>
> (5) Issue a management decision on audit findings within six months after receipt of the sub-recipient's audit report and ensure that the sub-recipient takes appropriate and timely corrective action.
>
> (6) Consider whether sub-recipient audits necessitate adjustment of the pass-through entity's own records.
>
> (7) Require each sub-recipient to permit the pass-through entity and auditors to have access to the records and financial statements as necessary for the pass-through entity to comply with this part.

OMB Circular No. A-133, Audits of States, Local Governments, and Non-Profit Organizations, 62 Fed. Reg. 35,278 § 400(d) (June 30, 1997).

54. A management decision must include the following:

> The management decision shall clearly state whether or not the audit finding is sustained, the reasons for the decision, and the expected auditee action to repay disallowed costs, make financial adjustments, or take other action. If the auditee has not completed corrective action, a timetable for follow-up should be given. Prior to issuing the management decision, the Federal agency or pass-through entity may request additional information or documentation from the auditee, including a request for auditor assurance related to the documentation, as a way of mitigating disallowed costs. The management decision should describe any appeal process available to the auditee.

OMB Circular No. A-133, Audits of States, Local Governments, and Non-Profit Organizations, 62 Fed. Reg. 35,278 § 405(a) (June 30, 1997). The Agency in the grant award, master cooperative agreement, monitoring activities, and management decision has performed its pass-through entity responsibilities.

55. In the present case, the HHS definition of "sub-recipient" shows federal acknowledgment of a recipient's authority to disallow and require repayment.

> *Sub-recipient* means the legal entity to which a sub-award is made and which is accountable to the recipient for the use of the funds provided.

45 C.F.R. 74.2 (emphasis added). The Master Cooperative Agreement between the Agency and Escarosa further establishes the Agency's authority. It states:

> Failure to comply with the terms and conditions outlined herein may result in the loss of federal and state funds and may be considered grounds for the suspension or termination of this Agreement and result in a determination of disallowed costs.
>
> The Board understands that the Agency may take action to recover disallowed costs and interest. Upon exhaustion of applicable administrative and judicial remedies, the Board agrees to refund the amount of finally determined disallowed costs and interest from non-federal and non-state grant funds.

COMPLIANCE REQUIREMENTS FOR EXPENDITURE OF GRANT FUNDS

56. Escarosa is a regional workforce board and, pursuant to Section 445.007(9), Florida statutes, it must ". . . apply

the . . . expenditure procedures required by federal law for the expenditure of federal funds." § 445.007(9), Fla. Stat. This statutory requirement derives from federal requirements for the use of federal funds and is incorporated in the parties' master cooperative agreement and in the grant award of HHS funds to Escarosa. Escarosa is bound by the spending principles of federal law for its HHS/TANF grant.

57. Escarosa as a "sub-recipient" and auditee has the following responsibilities pursuant to the OMB Circular A-133:

> "(a) Identify, in its accounts, all Federal awards received and expended and the Federal programs under which they were received. . .
>
> (b) Maintain internal control over Federal programs that provides reasonable assurance that the auditee is managing Federal awards in compliance with laws, regulations, and the provisions of contracts or grant agreements that could have a material effect on each of its Federal programs.
>
> (c) Comply with laws, regulations, and the provisions of contracts or grant agreements related to each of its Federal programs.
>
> (d) Prepare appropriate financial statements, including the schedule of expenditures of Federal awards. . . .
>
> (e) Ensure that the audits required by this part are properly performed and submitted when due.
>
> (f) Follow up and take corrective action on audit findings, including preparation of a summary schedule of prior audit findings and a corrective action plan . . .".

OMB Circular No. A-133, Audits of States, Local Governments, and Non-Profit Organizations, 62 Fed. Reg. 35,278 § 300 (June 30, 1997).

58. OMB Circular A-122, Cost Principles for Non-Profit Organizations, 2 C.F.R. Part 230, App. A, § A.2.g. provides that costs or expenditures must be adequately documented in order to be allowable. Escarosa was required to meet the standards for financial management systems in accordance with OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, 2 C.F.R § 215.21(b)(2). Such financial management systems must include records that adequately identify the source and application of funds for grant purposes; control over and accountability for all funds, property, and other assets, as well as safeguards to ensure that assets are only used for authorized purposes. Preponderant evidence demonstrates that Escarosa, during the time period at issue, failed to meet the standards for such financial management systems in accordance with OMB Circular A-110, 2 C.F.R § 215.21(b)(2), primarily due to the lack of adequate oversight of gas card program operations conducted at the College locations.

DISALLOWANCE

59. The failure to have documentation to support grant-charged expenses is grounds for the Respondent Agency's disallowance of gas card purchases charged to the TANF grant. See OMB Circular A-122, Cost Principles for Non-Profit Organizations, 2 C.F.R Part 230, APP. A. § A.2.g. "Documented" means that items purchased for grant program participants must actually be received by those individuals. Delta Foundation Inc. v. Dept. of Health and Human Services, 303 F.3d 551, 568-70 (5th Cir. 2002) ("It is not enough for a cost to be allowable, records must establish that the cost is also allocable to the grant project"). An agency's disallowance of a recipient's expenses has been upheld due to inadequate documentation in a case before the Division of Administrative Hearings as well. See Abilities, Inc. v. Dept. of Education, Case No. 04-2053 (DOAH: May 9, 2005; Final Order: July 12, 2005), where the Administrative Law Judge found as follows:

> Abilities' invoices are not sufficient to show that federal funding for VRS services was spent on VRS services and neither are the invoices and profit-loss statements, etc. provided by ACS. Simply, the funds allegedly used for these services could not be verified or audited by VRS.

60. Escarosa's purchase orders and records of the College's request for cards do not constitute adequate documentation showing that gas card expenditures were properly

charged to the TANF grant because they do not show that eligible participants received them. The gas card logs, with client signatures, are not reliable documentation because they admittedly contain some forged signatures and falsified information. Therefore, they do not reliably show that only eligible participants received gas cards.

61. Under its authority referenced above, the Agency requested that Escarosa provide additional documentation or auditor-assurance of documentation. The Agency suggested that Escarosa contact the oil companies to obtain further documentation on cards purchased and, more importantly, cards actually used. Escarosa refused to do this and also refused to obtain independent auditor verification as to adequacy of documentation, when it revised its position to assert that it had documentation for all but $5,080 worth of gas cards. As the auditee, however, Escarosa had a responsibility to assist in clearing the audit finding. Thus, it has not complied with federal expenditure principles.

62. While Escarosa maintained that it had documentation for all but $5,080 worth of gas cards, it did not show that it had adequate supporting information because of the documentation that it purportedly relied on (the logs) referenced above. Thus, in addition to the amount of $5,080, Escarosa did not show that all remaining TANF funds expended for gas cards during the

time period in question actually got to the ultimate recipients, the participants in the program. Thus, it was not shown that all such expenditures were used to accomplish grant purposes and therefore, some disallowance would be in order.

63. The problem with disallowance, and requiring Escarosa to repay the disallowed amounts, is that the postulated disallowed amount of $348,355 has not been established by reliable, substantial evidence. The Agency has accepted the College's calculation that this amount represents the final sum of undocumented cards. The greater weight of the persuasive evidence, however, does not support reliance on that calculation, for the reasons delineated in the above Findings of Fact, including the likelihood that unrelated, irrelevant NCPP funds and gas cards might have been included in the College's calculation. The evidence in support of that amount as being an accurate total, under the circumstances delineated in the above Findings of Fact, is simply not substantial or credible.

64. In the face of that finding and conclusion, it has neither been established that some other amount, or lesser amount, of undocumented cards has been persuasively proven as being appropriate for disallowance and repayment by the Petitioner. An appropriate independent and/or forensic audit should be conducted. Such an audit should include examination of oil company records, both for determining the exact amount of

gas cards purchased during the relevant time period and the precise amount of such gas cards actually used. Until this is accomplished, an appropriate, precise amount of undocumented gas card expenditures, and concomitantly, the magnitude of any departure from the grant requirements cannot be determined.

REPAYMENT REQUIREMENT FOR THEFT

65. The Petitioner, Escarosa, asserts that a grantee is not required to repay federal grant charges that are undocumented by reason of another person's theft. It relies on the absence of reference to a theft repayment requirement in OMB Circular A-122. It is clear, however, that theft does not excuse a requirement that disallowed amounts be repaid. See Sea Mar Community Health Center, Inc., DAB No. 1459 at 10 (1994) (Grantee had an "obligation to repay or properly account for the embezzled funds."). See also Oglala Sioux Tribe, DAB No. 498 at 2 (1984) where the DAB found that money which was stolen could not have "been expended for grant purposes." In Oglala Sioux Early Childhood Component, DAB No. 680 at 1 (1985), the party who stole grant-purchased property was the grantee's third-party business associate rather than its own employee. Even though the theft was due to no fault of the grantee and beyond its control, the DAB upheld the disallowance since stolen grant property constitutes unallowable "bad debts" under OMB Circular A-122. Theft of gas cards does not relieve Escarosa of the

requirement that it repay amounts thus not used for grant purposes because of the theft.

66. The Petitioner also contends that, even if it is required to repay some disallowed amount representing undocumented gas card funds, the Respondent Agency does not have authority to require such repayment from non-federal funds. Moreover, it contends that, as a practical matter, it has no funds which are non-federal with which it could repay any disallowance.

67. However, expenditures disallowed, and therefore not allowed to be paid from federal grant funds, cannot be repaid using federal grant funds. The law governing HHS grants requires the Agency, as a pass-through entity, to request repayment of disallowed HHS funds from non-federal sources. Anderson-Oconee Headstart Project, Inc., DAB No. 090 (1980) (Disallowed grant expenses must be repaid from non-federal funds despite the recipient's insistence that it had no non-federal funds.)

68. The Respondent Agency has the authority to require repayment of any disallowance, ultimately established as to amount, out of non-federal funds. Escarosa, in turn, would seem, pursuant to its contract with the College, to have some opportunity for recourse against the College in pursuing recovery of any disallowed amount.

69. Escarosa also contends that the Agency's failure through its monitoring program, to timely discover the problems attendant to the gas card program should relieve it from having to re-pay grant funds not spent for grant purposes. The case law, however, supports the proposition that even if the Respondent Agency failed to discover the problems with the gas card program, through not adequately monitoring that program, that Escarosa still is not relieved from repayment of any grant funds expended for non-grant purposes, either intentionally or inadvertently. Florida AFL-CIO, Inc. v. Florida Dept. of Labor and Employment Security, Case No. 88-2755 (DOAH: Jan. 20, 1989; Final Order: Mar. 17, 1989). In that case, the Department of Labor disallowed federal grant funds based upon fraudulent misappropriations by the recipient's employee. The grantee argued that the Agency's disallowance should be overturned because it had failed to discover the misappropriation through monitoring of the grantee. In the Recommended Order, the Division of Administrative Hearings determined that the failure to monitor the recipient did not constitute a valid defense:

> A further Petitioner argument is that it should be excused from the repayment sought by the Respondent because the Respondent failed to properly monitor the Petitioner's performance under the contract. In this regard, it is argued that better monitoring would likely have resulted in earlier detection of the fraudulent activities of the Petitioner's employee. The argument

> misses the point. The Petitioner is not being penalized because of the fraudulent activities of its employee; it is being asked to return the fruits of that fraudulent activity. The timing of the discovery of the fraud has no bearing on the Petitioner's obligation to repay fraudulently obtained funds.

Florida AFL-CIO, Inc. v. Florida Dept. of Labor and Employment Security, supra. Even if the Agency herein should have discovered the lack of documentation or theft earlier, through better monitoring, a belated discovery still does not exonerate Escarosa from its liability for any undocumented use of grant funds.

70. In summary, the Agency has authority to proceed against Escarosa and demand repayment of grant funds which were not used for approved grant purposes, in this case by not being adequately documented as to who the recipients were, when they received the gas cards and that they were appropriately approved clients of the program entitled to receive the gas cards. The fact remains, however, that the evidence in this case is not reliable in establishing with any precision what the disallowed amount should be, for the reasons determined in the above Findings of Fact. Therefore, it cannot be recommended that Escarosa repay any amount at this time. The preliminary step of conducting an adequate audit and/or forensic audit, which accords with generally-accepted accounting principles, as well

as the above-referenced federal grant administration legal authority, must be conducted before the magnitude of funds and gas card expenditures which are genuinely undocumented and therefore subject to repayment can be determined. Such an audit should be required to be conducted by the Petitioner, Escarosa. Parenthetically, it is noted that the Petitioner may have the ability to obtain recompense for the attendant expenses from its contracting partner, the College.

RECOMMENDATION

Having considered the foregoing findings of fact, conclusions of law, the evidence of record, the candor and demeanor of the witnesses and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Agency for Workforce Innovation requiring the Petitioner, Workforce Escarosa, Inc., to conduct an appropriate independent audit and/or forensic audit, which accords with generally accepted accounting principles and the above-referenced federal grant management and administration authority, which might show with precision any extant undocumented amount of grant-related funds from within the gas card program, for the relevant audit period referenced in the above Findings of Fact. When that is accomplished, the parties may take such substantive and procedural steps as their interests may indicate.

DONE AND ENTERED this 30th day of October, 2009, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of October, 2009.

ENDNOTE

[1/] All statutory references shall be to 2008 Florida Statutes, unless otherwise noted.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.