

STATE OF NEW YORK DEPARTMENT OF
LABOR

IN THE MATTER OF THE

New York State Department of Labor,
Complainant

-against-

NADAP, INC.,

Respondent

For a determination pursuant to Section 21 of the Labor Law, that certain costs otherwise covered under contract with YONKERS WORKFORCE INVESTMENT BOARD should be disallowed.

**REPORT
&
RECOMMENDATION**

Case No.: GA-09-0086

To: Honorable Peter M. Rivera
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was scheduled for December 22, 2010, in New York, New York. The purpose of the hearing was to provide all parties an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an audit and review by the Department of Labor's ("Department") Division of Financial Oversight and Technical Assistance Unit ("FOTA") of the Division of Employment and Workforce Solutions into whether National Association on Drug Abuse Problems, Inc. ("NADAP") complied with the requirements of State and federal laws and regulations, generally accepted accounting principles, and provisions of its contract with the Yonkers Workforce Investment Board ("YWIB"), in administering and providing services as its fiscal agent at the One-Stop Employment Center, located at 20 South Broadway, Yonkers, New York 10701.

After NADAP was awarded the contract by YWIB for the operation of the One-Stop Employment Site, FOTA conducted an audit covering the period of July 1, 2006 through December 31, 2007. The audit questioned several items of costs reported by NADAP, and, in its final report dated September 24, 2008, that was re-dated November 7, 2008 when it was served on NADAP (HO Ex. 2, Tab A; T. 72), FOTA determined that costs totaling \$108,781.41 must be disallowed. This figure was ultimately increased to \$110,537.81 following receipt of additional information from NADAP. (HO Ex. 2, Tab C; HO Ex. 1, para. 12) In a letter dated December 10, 2008, NADAP disputed the FOTA findings and requested a hearing. (HO Ex. 4, Tab A) The Department thereafter served a Notice of Hearing dated October 20, 2009. (HO Ex. 1) On November 23, 2009, NADAP served its Answer and Attachments (HO Ex. 3) requesting that the matter be dismissed in part based upon the argument that the Department did not follow the proper dispute resolution procedure and that it applied the wrong standards in determining to disallow the challenged costs. In its Answer, NADAP withdrew its request for a hearing and requested that the case be determined on the record submitted.

After reviewing the record and discussing the case with the parties, it was determined that the record was not sufficiently developed to resolve all issues raised in the Notice of Hearing and Answer and a hearing was scheduled. Prior to the hearing, the parties conferred and entered into a written Stipulation of Agreed Facts and Disputed Issues (“Stipulation”) that was received into the record as Hearing Officer Exhibit 7, a copy of which is attached hereto and made a part hereof.

At the conclusion of the hearing, the parties agreed to discuss the case and determine what issues to brief and how best to present the record. Upon information and belief, the parties did discuss the case and the Department investigated whether the applicable regulations should be amended. In the absence of the receipt of post-hearing briefs from either party, this case is being decided on the record created by the pre-hearing submissions, the transcript of the December 22, 2010 hearing, and the Stipulation.

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito , Kenneth L. Golden, Senior Attorney, of Counsel.

The Respondent appeared with John Chamberlain, Esq., as a consultant to NADAP.

HEARING OFFICER DESIGNATION

John W. Scott was designated as Hearing Officer in this matter.

ISSUES

1. Did Respondent fail to comply with provisions of federal regulations, including but not limited to: 20 CFR Parts 660 through 671; 29 CFR Section 95.26; 2 CFR Part 215, and 2 CFR Part 230?
2. Did the Respondent fail to comply with federal policies and guidelines as outlined in Office of Management and Budget Circulars, including but not limited to OMB Circular A-87; OMB Circular A-102; OMB Circular A-110 (2 CFR Part 215); OMB Circular A-122 (2 CFR Part 230); and OMB Circular A-133 ?
3. Whether Respondent failed to comply with Department policies and guidelines as outlined in Workforce Development Systems Technical Advisory #00-22, among other Technical Advisories?
4. Whether the Department properly disallowed the stipulated disputed costs reported by Respondent in the operation and fiscal management of the Yonkers One-Stop Employment Center?

FINDINGS OF FACT

Pursuant to a Notice of hearing dated October 20, 2009 (HO Ex. 1), this matter was brought on for a hearing to determine whether the Respondent, NADAP, complied with federal and State regulations in acting as the fiscal agent for YWIB in the operation of the Yonkers One-Stop Employment Site. In order to ensure proper allocation of funds,

the Department, as the State's lead agency in workforce investment and development, applies Office of Management and Budget ("OMB") circulars when performing its audits of Local Workforce Investment Boards and their local partners ("WIB") such as YWIB and NADAP.

YWIB was designated as a local agency providing employment and training services under the provisions of the Workforce Investment Act of 1998 (HO Ex. 2, Tab A, at pg. 4), including the delivery of comprehensive employment services through the One-Stop system. Under federal regulations, a Local Workforce Investment Board may select an outside entity to provide administrative and management services needed to operate a One-Stop facility. (Stipulation, para. 1)

In 2005, the YWIB contracted with NADAP, a non-profit organization, to operate its One-Stop Employment Center located at 20 South Broadway, Yonkers, NY. The contract was renewed for periods up to and including December 31, 2007. (Stipulation, para. 1; HO Ex. 2, Tab B)

Under the terms of the contract, NADAP acted as the fiscal agent for the Yonkers LWIA, and received payment as a sub-recipient of federal funds allocated to the Yonkers LWIA under the Workforce Investment Act. (HO Ex. 1, para. 4; HO Ex. 2, Tab B, Art. 3) Additionally, NADAP agreed to allocate federal funds in accordance with budgeted amounts and to comply with all applicable cost principals set forth in the OMB circulars. (HO Ex. 2, Tab B, Art.5) NADAP was to remain solely liable for payment of disallowed costs. (HO Ex. 2, Tab B, Art. 5, section 5.05) The parties agree that, as a non-profit organization, the OMB circulars that governed NADAP's activities as fiscal agent for the Yonkers LWIA were A-110 and A-122. (See, HO Ex. 1, at para. 4; HO Ex. 2 at pg. 13; Resp. Ex. A; Stipulation, para. 2)

The Department's Division of FOTA conducted an audit of NADAP's accounting methods and expenditures in accordance with the provisions of OMB circulars A-87 and A-102. The Department admitted that the OMB circulars that should have been used in the audit were A-110 and A-122. (See, Resp Ex. B; T. 139) The plan for FOTA's financial oversight of the One-Stop system, and the procedure for the resolution of issues

that may be disclosed during the conduct of financial oversight reviews is contained in Workforce Development System Technical Advisory 00-22 (“TA 00-22”). (Resp. Ex. A)

FOTA initially issued a Draft Report dated April 17, 2008, and a Final Report following completion of the audit on September 24, 2008. These reports were mailed to the Yonkers WIB. (HO Ex. 2, Tab D) Thereafter, FOTA re-issued the Final Report on November 7, 2008 and mailed this document to the Yonkers WIB and NADAP. (Stipulation, para. 7; T. 27-28) In both of these Final Reports, FOTA concluded that: “the Yonkers LWIA’s financial management systems were not in compliance with requirements prescribed by WIA Rules and Regulations, OMB Circulars A-87 and A-102, and NYSDOL policies.” (HO Ex. 2, Tab D) The LWIA was directed to “make adjustments of \$110,537.81 to reported costs for unallowable expenses.” (Stipulation, paras. 6, 7) The September 24, 2008 Report does not make reference to the right to appeal the disallowed costs. The November 7, 2008 Report does include reference to requesting a hearing before an independent hearing officer. However, neither report references the resolution procedures that are contained in TA 00-22. (T. 66-79)

In support of the position that the disallowance of costs reported by NADAP was proper, the Department produced an Affirmation from Joseph Lowenstein, the Financial Consultant Supervisor in FOTA. (HO Ex. 2, Tab C) Mr. Lowenstein indicated that the Department conducted an audit of NADAP’s accounting methods and expenditures in accordance with OMB circulars and Federal regulations. The specific OMB circulars relied upon by the Department are not listed in Mr. Lowenstein’s Affirmation. The chronology for the audit listed in the Affirmation is as follows:

- a) A Draft Report issued on April 17, 2008 wherein the auditors determined that NADAP Inc.’s financial management was not in compliance with federal and State regulations and policies, resulting in a total of \$314,850.73 in disallowed costs.
- b) Following review of additional documentation submitted by NADAP, the department issued a Final Report dated September 24, 2008 in which it was determined that NADAP’s failure to conform to federal and State regulations and policies and adopt generally accepted accounting principles in their

financial management procedures resulted in a total of \$110,537.81 in costs that must be disallowed.

- c) The Final Report was re-issued on November 7, 2008 with the same conclusions.
- d) Subsequent to the issuance of the Final Report, the Department determined NADAP's failure to limit consultant's fees to amounts allowable under federal guidelines, resulted in an additional disallowance for legal fees in the amount of \$5,438.00 for a total disallowance of \$115,975.81. (HO Ex. 1 at para. 12)
- e) After re-issuance of the final report to Yonkers Local Workforce Investment Area ("LWIA") and NADAP on November 7, 2008, NADAP submitted a detailed response dated December 10, 2008 (Resp. Ex. A) disputing the findings and requesting an independent hearing. Among other issues, NADAP argues that the final report ignored the resolution activities prescribed in TA 00-22. Additionally, NADAP argues that the Department applied the wrong OMB Circulars to the subject audit. (See, HO Ex. 2, Tab A)

FOTA acknowledged that the wrong OMB Circulars were referenced in all audit report documents (HO Ex. 4, Tab B). Joseph Lowenstein does not specifically address this issue in his Affirmation (HO Ex. 2, Tab C). The Department's Trial Brief (HO Ex. 2) summarized the auditing procedures outlined in the Lowenstein Affirmation and did reference the correct OMB Circulars. However, the Department offered no evidence indicating that FOTA actually applied the standards outlined in the correct OMB Circulars (A-110 and A-122) to the audit or any analysis indicating whether FOTA would have arrived at similar conclusions under both sets of OMB Circulars. DOL concluded that, "... the proper accounting standards were utilized, costs properly analyzed and undocumented and unsubstantiated costs disallowed in accordance with the standards outlined above." (HO Ex. 2 at pg. 13)

In pre-trial submissions and during the hearing, NADAP argued that the FOTA ignored the TA 00-22 requirement that the Final Report allow for a comment period after which an appeal and independent determination should be available following the issuance of the Initial Determination and Final Determination. NADAP argues that FOTA's failure to follow TO 00-22 was a failure to follow long established disallowed

cost resolution practices at the State and federal levels and denied it basic due process. (HO Ex. 4, Tab a, pgs. 1-2) Additionally, NADAP disputed the disallowance of several cost findings, since FOTA applied the wrong OMB Cost Circulars. “NADAP is a non-profit corporation falling under Circulars A-110 and A-122 rather than under Circulars A-87 and A-102. There are substantive differences between the circulars, especially with regard to the payment of incentives or bonuses.” (HO Ex. 2, Tab a, pg. 2) Based upon FOTA’s failure to follow the debt collection procedures set forth in TA 00-22, and in failing to cite in its collection letters the proper rule(s) NADAP violated regarding the disallowed costs (Circulars A-110 and A-122 rather than Circulars A-87 and A-102), NADAP made two motions during the hearing for an Order dismissing the proceeding and returning the matter for a de novo evaluation. (T. 85-91; 140-145) These motions were opposed by the Department and preserved on the record for the consideration of the Commissioner. (See, 12 NYCRR 701.7)

Pursuant to the Stipulation (HO Ex. 7), the issues remaining for resolution are: the validity of the resolution process, disallowance of NADAP incentive pay in the amount of \$50,238.00; disallowance of legal costs in the amount of \$13,890.00¹, and the disallowance of \$7,124.56 in salary reclassification and consultant fees.

CONCLUSIONS OF LAW

The Department is an executive agency of the State of New York, designated as the State Agency responsible for monitoring and overseeing implementation of the Workforce Investment Act (Pub. L. 105-220 and New York State Labor Law article 24-A). Authorization to enforce those laws and implementing regulations is granted by Labor Law article 2, as well as Federal Regulations contained in 29 CFR Sections 95.26 and 97.20; and 2 CFR Part 230. This proceeding is subject to New York State Administrative Procedure Act article 3; Labor Law articles 2 and 24-A; and 12 NYCRR part 701. (HO Ex. 1, para.1 at pg. 3; Stipulation, para. 3)

¹ DOL agrees to withdraw the disallowance of an additional amount for legal costs in the amount of \$5,438 as alleged in the Notice of Hearing. (See, Stipulation, HO Ex. 7, at page 6)

It is clear from the record that the wrong OMB Circulars were referenced in all audit reports. (Resp. Ex. B; Final Reports dated September 24, 2008 and November 7, 2008) The Respondent argues that there are substantive differences especially with regard to the payment of incentives and bonuses between the circulars referenced in the Final Reports by FOTA (Circulars A-87 and A-102) and the correct circulars applicable to non-profit corporations (Circulars A-110 and A-122). (See, Resp. Ex. A) The record as developed does not contain any detailed discussion of this issue or any analysis from any FOTA employee demonstrating that the challenged audit was conducted using the correct OMB Circulars. The Department has produced an Affirmation and testimony of Joseph Lowenstein, the individual who supervised the audit that resulted in the challenged Final Reports, but Mr. Lowenstein does not specifically address these issues. Additionally, the counsel for the Department produced a Trial Brief (HO Ex. 2) detailing the audit process but, again, this Trial Brief does not specifically show that the standards contained in the proper OMB Circulars were applied. Department correspondence to NADAP, dated May 8, 2009, indicates that the controlling OMB Circulars were, in fact, not applied to the challenged audit (See, HO Ex. 4, Tab B). In that correspondence, Mr. Lowenstein writes, "...we have reviewed our findings and the Circulars and have determined that the application of the appropriate Circulars would not have any effect upon the conclusions that were previously reached." (HO Ex. Tab B at p. 1) Based upon the state of the record, I am unable to determine that FOTA conducted the audit of the Respondent in accordance with the controlling OMB Circulars or that the application of the appropriate OMB circulars would not have resulted in different findings and conclusions. Neither the conclusory statement in the May 8, 2009 Lowenstein letter, nor Mr. Lowenstein's affirmation and testimony cure the defect in the record.

The record as developed also does not allowing a finding that FOTA followed the Resolution Activities outlined in the Workforce Development System Technical Advisory 00-22. ("TA 00-22")

In correspondence dated December 10, 2008 (HO Ex. 4, Tab A), and the Answer dated November 23, 2009 (HO Ex. B), NADAP argues that the resolution process that culminated in the Final Report ignores TA 00-22. NADAP argues that TA 00-22 requires that Final Reports allow for a comment period after which an Initial Determination is

issued. After issuance of the Initial Determination, informal resolution efforts take place and then a Final Determination is issued. The appeal and independent hearing process outlined in the November 7, 2008 Final Report begin only after the Initial and Final Determinations are issued by the DOL. In the December 10, 2008 correspondence, NADAP requests that DOL 1) follow TA 00-22 and allow for response to the Final Report; 2) conduct an independent evaluation of that response by an individual and Division which is not responsible for the writing of the Final Report; 3) issue an Initial Determination based upon that independent evaluation; 4) allow informal resolution of any remaining differences; 5) issue a Final Determination; and 6) allow for appeal and an independent hearing if necessary. (Resp. Ex. A)

The stated purpose of TA 00-22 is to outline the Department's plan to have FOTA conduct financial oversight of Grant Recipients, WIA One-Stop systems, and Welfare-to-Work Block Grant Recipients, and to "establish NYDOL's policy for the resolution of issues that may be disclosed during the conduct of financial oversight reviews." (Resp. Ex. A at pg 1) Technical Advisory 00-22 specifically states that, "[f]or the purposes of this Technical Advisory, the term Grant Recipient will be used to reference both direct recipients and sub-recipients." (Resp. Ex. A at pg 2) The YWIB is a LWIA authorized to receive a grant of federal funds to provide job training and employment services at the Yonkers One-Stop Employer Center. (HO Ex. 1, para. 3) NADAP is a not-for-profit organization that contracted with the Yonkers Workforce Investment Board to provide administrative and fiscal services at the Yonkers One-Stop Employment Center, and to act as a fiscal agent for the Yonkers Local Workforce Investment Area. (HO Ex. 1, para. 4) In this capacity, NADAP was to receive payment as a sub-recipient of federal funds allocated to the Yonkers Local Workforce Investment Area. (HO Ex. 1, paras.3 and 4) Accordingly, by the express language of TA 00-22, all of the requirements relating to the financial oversight review and resolution activities contained in TA 00-22 apply to NADAP as a "grant recipient." (T. 79, 81-82)

Technical Advisory 00-22 indicates that FOTA is the unit within WDTD that has been assigned to conduct comprehensive financial oversight activities and assisting Grant Recipients in improving their financial operations while ensuring compliance with applicable rules and regulations. The oversight reviews seek to ensure that entities under

review are in compliance with applicable uniform administration requirements and that OMB circulars are being followed with respect to relevant cost principles.

FOTA issues a report summarizing the results of the financial oversight activities. In those instances when FOTA concludes that the Grant Recipient or One-Stop fiscal agent's response to the report and/or its corrective action plan is not adequate, FOTA will provide written notification of this conclusion and it will then be necessary to commence resolution activities.

The resolution activities outlined in TA 00-22 provide that within 30 days after the date of FOTA's notification that the entity's response to the report and/or its corrective action plan is not adequate, the Grant Recipient shall submit a written response, including related supporting documentation to the WDTD's Resolution Unit for review. After review and evaluation of the Grant Recipient's response and within 30 days, the Resolution Unit shall issue an initial determination identifying both allowed and disallowed costs and address the acceptability of the corrective actions taken or planned to resolve the administrative findings. The Grant Recipient shall have 30 days from the date of the initial determination to submit an additional response and provide additional evidence and documents to justify the costs and/or address administrative findings. Within 30 days of receipt of the Grant Recipient's response to the initial determination, a final determination shall be issued by the Resolution Unit identifying the allowed and disallowed costs and the remaining administrative findings. All final determinations issued by the Resolution Unit may be appealed to the Grant Officer and are subject to the process established by the Grant Officer.

The Respondent received the final report dated November 7, 2008 (HO Ex. 2, Tab D) and thereafter disputed the disallowed cost findings and requested an independent hearing in its December 10, 2008 correspondence (HO Ex. 4, Tab A). The Respondent also objected to the Department's failure to follow the resolution activities mandated by TA 00-22. These same issues are raised by the Respondent in its November 23, 2009 Answer (HO Ex.3). The Department argues that these issues are unavailing since the record "clearly demonstrates that NADAP had a full opportunity to justify its costs ... [and] the Final Report dated November 7, 2008 was issued directly to the Director of

NADAP.” (HO Ex. 2 at pg. 12) However, the record as developed does not allow a finding that FOTA followed the Resolution Activities outlined in TA 00-22 (T. 69-73) or that NADAP was afforded the opportunity to participate as a Grant Recipient in the Financial Oversight Review and Resolution Activities provided in TA 00-22. (T. 82-86) What the record does indicate is that a Final Report was issued by the office that conducted the Financial Oversight Review as opposed to WDTD’s Resolution Unit as required in TA 00-22. (T. 68-69) Additionally, the first time NADAP was specifically included as a party to the proceeding was in the reissuance of the Final Report dated November 7, 2008 at which point NADAP’s recourse was to request a hearing if it disagreed with the disallowed cost findings. (T. 82-86) There is no evidence in the record indicating that NADAP was afforded the opportunity to have its written response and documents reviewed and evaluated by the WDTD Resolution Unit as required by TA 00-22.

Based upon the state of the record, I am unable to determine that NADAP was afforded the opportunity to fully participate in the Financial Oversight Review and Resolution Activities as allowed by TA 00-22.

RECOMMENDATIONS

I RECOMMEND that the Commissioner of Labor adopt the within findings of fact and conclusions of law as the Commissioner’s determination of the issues raised in this case, and based on those findings and conclusions, the Commissioner should:

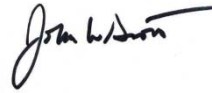
DETERMINE that the record does not allow a determination as to whether the Department properly disallowed the costs that remain in dispute pursuant to the Stipulation that were reported by the Respondent in the operation and fiscal management of the Yonkers One-Stop Employment Center ; and

ORDER that the Respondent’s motions requesting that the Final Report dated November 7, 2008 and all findings disallowing costs reported by the Respondent in the operation and fiscal management of the Yonkers One-Stop Employment Center be rescinded without prejudice are granted, and the case is returned the Department’s Financial Oversight and Technical Assistance Unit for further review and development of

the record in accordance with OMB Circulars A-110 and A-122 and Workforce Development System Technical Advisory 00-22.

Dated: November 8, 2012
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Scott". The signature is written in a cursive style with a long horizontal stroke at the end.

John W. Scott, Hearing Officer