

APPLICATION OF THE OHIO
REHABILITATION SERVICES
COMMISSION,

Docket No. 93-76-R
Recovery of Funds Proceeding
ACN: 05-23444G

Applicant.

INITIAL DECISION

Appearances:

Sallie J. Debolt, Esq., of the Office of the Attorney General, State of Ohio, Columbus, Ohio, for the Applicant

Jeffrey B. Rosen, Esq., of the Office of the General Counsel, United States Department of Education, Washington D.C., for the Rehabilitation Services Administration

Before:

Allan C. Lewis, Chief Administrative Law Judge

This is an appeal initiated by the Ohio Rehabilitative Services Commission (Ohio) in response to a preliminary department decision issued by the Regional Commissioner, Region V, Rehabilitation Services Administration of the United States Department of Education (RSA) which requested, in part, that Ohio repay \$227,400 of Federal funds misspent under Title I of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 357, as amended (to be codified at 29 U.S.C. §701 *et seq.*) for the period July 1, 1989, through June 30, 1990. [See footnote 1](#)¹ The preliminary departmental decision concluded that Ohio's payment during the Federal fiscal year 1990 of a judgment rendered during the Federal fiscal year 1989 for the wrongful dismissal of an employee in 1975 was not properly chargeable against the grant for fiscal year 1990. Based upon findings of fact and the conclusions of law, *infra*, the Department may recover the \$227,400 in Federal funds.

I. OPINION

The facts are not in dispute. On April 22, 1975, Ohio dismissed John Gephart, Director of the Dayton Office of the Bureau of Vocational Rehabilitation. Gephart appealed his dismissal to the State Personnel Board of Review, which affirmed the decision. Gephart subsequently appealed to the Montgomery County Court of Common Pleas, which on March 2, 1987, reversed the dismissal as procedurally defective. Ohio appealed unsuccessfully. After all appeals were exhausted, the Montgomery County Court of Common Pleas entered a judgment which ordered Ohio to reinstate Gephart as of August 25, 1989, and to pay him \$227,400 which represented \$200,000 in back pay and \$27,400 in retirement contributions for the period from April 23, 1975,

to August 25, 1989. The judgment was rendered on September 22, 1989, and was satisfied by Ohio on November 3, 1989. Thereafter, Ohio reported \$227,400 as a payroll expense under its U.S. Department of Education RSA Grant for the Federal fiscal year 1990.

RSA disallowed the payment on the theory that "the employee performed no services during the . . . period [for which he was paid and, therefore,] the employee should have been paid with non federal funds." RSA Br. at 2. Ohio argues that this expenditure was an allowable cost under OMB Circular A-87, paragraph C as it was "necessary and reasonable for the proper and efficient administration of the grant program." According to Ohio, back pay awarded to an employee wrongfully discharged constitutes wages under Social Security Board v. Nierotko, 327 U.S. 358 (1946) and, therefore, this payment represents compensation for personnel services and employee fringe benefits under OMB Circular A-87, Attachment B, Sections B.10.a. and B.13.b.

Initially, the administration of grants to state and local government programs is governed by Title I of the Rehabilitation Act of 1973 which provides funds for "any goods or services necessary to render an individual with a disability employable." Rehabilitation Act of 1973, 29 U.S.C. § 723(a). Thus, the governing statute requires a nexus between the services rendered and the grant program. The record is clear that Mr. Gephart did not perform any services relative to the grant program. He was paid because Ohio dismissed him from his position wrongfully.

Further, OMB Circular A-87, entitled "Cost Principles for State and Local Governments," sets forth the general accounting principles for determining allowable costs of Federal grant programs. Circular A-87, 46 Fed. Reg. § 9548 (Jan. 28, 1981). Under the basic guidelines, allowable costs are those costs which satisfy a two prong test of which the first prong is pertinent herein. Under the first prong of the test, a cost must "be necessary and reasonable for proper and efficient administration of the grant programs." Circular A-87, Attachment A, § C.1.a., 46 Fed. Reg. § 9548, 9549 (Jan. 28, 1981). The term necessary within OMB Circular A-87, according to the court in Massachusetts v. Sullivan, 803 F. Supp. 475, 479 (D. Mass. 1992), must--

be considered "in the connection in which it is used, as it is a word susceptible of various meanings." Black's Law Dictionary 928 (5th ed. 1979). Here, it is used in conjunction with the term "reasonable," which is commonly understood to mean "[f]air, proper, just, suitable under the circumstances" and "[f]it and appropriate to the end in view." Id. at 1138

(emphasis added). In this context, "necessary" imports not "absolute physical necessity or inevitability," but rather "that which is ... appropriate, suitable, proper, or conducive to the end sought." Id. at 928 (emphasis added).

Similarly, the United States Claims Court dealt with the issue of whether costs associated with payment of guardian ad litem fees in paternity suits in child support enforcement cases were "necessary" costs within the meaning of OMB Circular A-87. Kentucky v. United States, 16 Cl. Ct. 755 (1989). There, the court held that the services provided must be directly associated with the objective of the grant program in order to be necessary costs Id. at 763. The payment of guardian ad litem fees was necessary to accomplish the government's objective of enforcing

child support payments and to provide counsel which was essential in order to litigate the child support enforcement cases. Thus, costs which are associated with doing business as a local government may not qualify as “necessary and reasonable” costs under OMB Circular A-87 unless they are also expended in direct furtherance of the grant program in question.

This view is also consistent with Attachment B, Section B.10.a. of Circular A-87 which mandates that allowable costs for compensation for personal services--

include[] all remuneration, paid currently or accrued, for services rendered during the period of performance under the grant agreement, including but not necessarily limited to wages, salaries, and supplementary compensation and benefits. (emphasis added).

In the instant case, the payment of the judgment by Ohio was not in the furtherance of the RSA grant program. Mr. Gephart did not render any services affecting the grant program. The payment was made as a result of the erroneous dismissal of Mr. Gephart, a matter unrelated to the RSA grant. In this context and in light of the authority above, it is clear that the payment of the judgment by Ohio was not necessary and reasonable for the proper administration of the RSA grant.

Ohio maintains that the absence of any grant related work by Mr. Gephart does not disallow this cost. In this regard, it cites Social Security Board v. Nierotko, 327 U.S. 358 (1946) which held that an award of back pay and fringe benefits to an employee who was improperly discharged constituted "wages" for purposes of benefits under the Social Security Act. Ohio argues, by analogy, that the same construction should apply in this case.

Nierotko is distinguishable. Initially, it was decided under a different statute, the Social Security Act, and, therefore, is not precedent in this case. Secondly, while the concept of back pay is designed to make a wrongfully discharged employee "whole" with respect to lost wages, Nierotko, 311 U.S. at 364-65, the underlying considerations of the Social Security Act and the Rehabilitation Act of 1973 warrant different results. The purpose of the Social Security Act is to provide funds "for the decent support of elderly workmen who have ceased to labor" through contributions from the employee's wages and the employer. Nierotko, 327 U.S. at 363. Thus, in Nierotko, the payment of back pay was treated as an effort to make the employee whole with respect to his lost wages and, therefore, it was considered as wages and counted toward his eligibility and benefits under the Social Security Act. The purpose of the Rehabilitation Act of 1973 is to provide funds for goods and services necessary to render an individual with a disability employable. While Ohio's payment may have made Mr. Gephart whole with respect to his lost wages, it would thwart Congressional purpose to treat this payment as wages under the Rehabilitation Act of 1973 because Ohio's payment, if made with Federal funds, would not in any way have furthered the purpose of the Rehabilitation Act of 1973. In this circumstance, Ohio, not the Federal government, must bear the financial consequence of its wrongful discharge of its employee. [See footnote 2](#)²

II. ORDER

In light of the above, the Ohio Rehabilitative Services Administration is HEREBY ORDERED to repay the United States Department of Education the sum of \$227,400.

Allan C. Lewis
Chief Administrative Law Judge

Issued: July 14, 1995
Washington, D.C.

Footnote: 1 ¹ The initial preliminary departmental decision requested repayment of \$883,517 and a second preliminary departmental decision requested repayment of \$10,798. The issues raised were settled by the parties with the exception of Audit finding #19.

Footnote: 2 ² On brief, RSA advances a second, alternative theory for disallowance--that the Federal fiscal year 1990 is not the proper year under which this expenditure, if allowable, may be charged against the grant. Inasmuch as the expenditure is not an allowable cost, it is not necessary to address this timing question.