

STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

TAMPA BAY WORKFORCE ALLIANCE,)
INC.,)
)
Petitioner,)
)
v.)
)
STATE OF FLORIDA, DEPARTMENT OF)
ECONOMIC OPPORTUNITY (successor to)
STATE OF FLORIDA, AGENCY FOR)
WORKFORCE INNOVATION),)

DOAH NO.: 10-8311
DEO CASE NO. 10-00081

Respondent.

FINAL ORDER

On August 12, 2011, the Administrative Law Judge (“ALJ”) assigned by the Division of Administrative Hearings (“DOAH”) issued a Recommended Order (“RO”) to the Agency for Workforce Innovation (the “Agency”) in the above captioned administrative proceeding. Copies of the RO were sent to counsel for the Petitioner, Tampa Bay Workforce Alliance, Inc. (“TBWA”), and to the Respondent, the Agency. The Agency timely filed Exceptions to the RO on August 29, 2011. TBWA did not file Exceptions to the RO, but filed Responses to the Agency’s Exceptions on September 8, 2011. The RO is now before the Executive Director of the Department for Economic Opportunity (“DEO”) (pursuant to Section 1, Chapter 2011-142 of the Laws of Florida, effective October 1, 2011, the Department became the successor to the Agency for Workforce Innovation) for final agency action.

BACKGROUND

On July 14, 2010, Respondent, Agency for Workforce Innovation (“Agency”), issued its Final Determination following an inspector general investigation of expenditures made by TBWA from November 1, 2008 through November 30, 2009. The Agency disallowed \$147,128.18 in expenditures. TBWA contested \$125,834.75 of the \$147,128.18 in disallowed costs, broken down as follows: \$18,905.12 of expenditures related to food purchases; \$58,448.63 of costs related to the business excellence awards; \$13,195.00 for expenditures classified by TBWA as sponsorships; \$7,817.00 for entertainment costs for various functions and corporate meetings; \$22,800.00 for expenditures classified by TBWA as public outreach costs; and \$4,669.00 for expenditures classified by TBWA as promotional materials. TBWA provided additional documentation for charges of \$621.33 incurred on 10/29/09 at Panera Bread, and the Agency agreed that this amount is allowable and can be deducted from the disallowed costs, reducing the amount in dispute to \$125,213.42.

TBWA filed a request for hearing on August 23, 2010 which was referred to DOAH on August 27, 2010. The case was assigned to Administrative Law Judge R. Bruce McKibben for a formal administrative hearing. Pursuant to notice to all parties, a final hearing was conducted in this case on June 7, 2011, in Tampa, Florida, then continuing via video teleconferencing on June 8, 2011, with sites in Tallahassee and Tampa, Florida.

At the final hearing, TWBA called one witness: Edward Peachey, President and chief executive officer (“CEO”) of TBWA.¹ Petitioner's Exhibits 1, 10 through 16, and 19 through 21 were admitted into evidence. Official recognition was taken of Exhibits 17 and 22.

¹ In an endnote to the Recommended Order, the ALJ stated the following: Peachey was not the CEO of TBWA during the period of time at issue in this proceeding. He has no personal knowledge about the expenditures at issue,

Respondent called five witnesses: Lois Scott, Program Manager, Office of One-Stop Program Support; Philip Wilcox, Investigations Manager; James Mathews, Agency Inspector General; Laura McKinley, Early Learning Coalition Programs Specialist; and Kevin Thompson, Director, Agency Support Services. Respondent's Exhibits 1 through 4, 7, 8, and 11 were admitted into evidence. Official recognition was taken of sections 20.055 and 20.50, Florida Statutes; Chapter 445, Florida Statutes; OMB Circular No. A-110, codified at 2 C.F.R. Part 215; and OMB Circular No. A-122, codified at 2 C.F.R. Part 230.

A transcript of the final hearing was ordered by the parties. The transcript was filed at DOAH on July 13, 2011. By rule, the parties were given ten days from the filing of the Transcript to submit proposed recommended orders. Each party timely submitted a proposed recommended order ("PRO"), and the ALJ subsequently issued the RO on August 12, 2011.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ identified the issue in the case as whether certain enumerated expenditures by TBWA were compliant with governing rules, and, if not, whether the expended funds must be repaid to the Agency.

The ALJ found that the Agency is the state administrative entity responsible for the receipt and distribution of federal workforce grant funds. The Agency receives funds from the U.S. Departments of Labor, Health and Human Services, and Agriculture. Those funds are distributed to the 24 regional boards for use in the performance of their services. Grant funds must be expended in compliance with state and federal guidelines. (RO ¶ 2).

but has information based upon his review of documentation and discussions with the prior CEO. The value of his testimony is weighted accordingly.

The ALJ found that TBWA receives grants through the Workforce Investment Act, which serves adult, youth, and dislocated workers, and through the Wagner-Peyser Act, which funds Florida's job exchange that matches employers with job seekers. (RO ¶ 3).

In Conclusion of Law paragraph 46, the ALJ concluded that TBWA is subject to OMB Circular No. A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations. 2 C.F.R. §§ 215.1, 215.5. The ALJ specified, "TBWA's financial management system must provide for '[w]ritten procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award' and '[a]ccounting records including cost accounting records that are supported by source documentation.'" 2 C.F.R. § 215.21(b)(6), (7). Conclusion of Law paragraph 48 provides the general criteria for a cost to be allowable as stated in Attachment A of OMB Circular No. A-122: it must be reasonable for the performance of the award, conform to any limitations or exclusions of Attachment A and the award, and be adequately documented. Conclusion of Law paragraph 49 provides the OMB Circular's definition of reasonable costs. That definition specifically states that specific costs must be "scrutinized with particular care" when organizations receive "the preponderance of their support from awards made by Federal agencies" and consideration must be given to factors including whether the cost is of a type generally recognized as ordinary and necessary for the operation of the organization and whether the individuals concerned acted with prudence in the circumstances, considering their responsibilities to the organization, its members, employees, and clients, the public at large, and the Federal Government.

In Conclusions of Law paragraphs 56 and 57, the ALJ specified certain expenditures as allowable, partially allowable, or unallowable. The ALJ ultimately recommended that the Agency enter a final order, partially upholding its decision to disallow TBWA's challenged expenditures, but

reducing the amount from \$125,213.42 (i.e., the amount in dispute) to \$55,192.04. (RO, section titled “Recommendation,” page 27). The ALJ also recommended that this amount be repaid within 90 days of the date of the entry of the final order. *Id.*

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Pursuant to section 120.57(1)(l), Florida Statutes, an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, “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.” § 120.57(1)(l), Fla. Stat. (2011); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm’n*, 955 So. 2d 61 (Fla. 1st DCA 2007). The term “competent substantial evidence” does not relate to the quality, character, convincing power, probative value or weight of the evidence, rather, “competent substantial evidence” refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See, e.g., Scholastic Book Fairs, Great Am. Div. v. Unemployment Appeals Comm’n*, 671 So. 2d 287, 289, n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep’t of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep’t of Envtl. Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.*, 652 So. 2d 894 (Fla. 2d DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the “fact-finder” in these administrative proceedings. *See, e.g., Tedder v. Fla. Parole Comm’n*, 842 So. 2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep’t of Bus. Regulation*, 475 So. 2d 1277,

1281 (Fla. 1st DCA 1985). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See also, Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001). An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See, e.g. Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So. 2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So. 2d 1086, 1089 (Fla. 1993); *Dep't of Env'tl. Regulation v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Env'tl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties, Ltd. v. Fla. Land & Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). However, neither should the agency label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view

as an unfavorable finding of fact. *See, e.g., Stokes v. Bd. of Prof'l Eng'rs*, 952 So. 2d 1224 (Fla. 1st DCA 2007).

Finally, in reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception" that identifies the disputed portion of the recommended order by page number or paragraph, provides a legal basis for the exception, and includes appropriate and specific citations to the record. §120.57(1)(k), Fla. Stat. (2011).

RULINGS ON EXCEPTIONS

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker*, 677 So. 2d 254, 256 (Fla. 1996); *Fla. Dep't of Corrs. V. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Env'tl. Coalition of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991).

However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject an erroneous conclusion of law over which the agency has substantive jurisdiction. *See*, §120.57(1)(l), Fla. Stat. (2011); *Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001).

DEO's Exceptions

Exception No. 1

DEO takes exception to the ALJ's Finding of Fact in paragraph 1, finding that the Agency is the workforce strategy and policy-setting board for the statewide workforce system, providing oversight to 24 regional workforce boards in designing and implementing programs to

develop a skilled workforce. TBWA had no objection to this Exception. DEO cited section 445.004, Florida Statutes, as its authority that these responsibilities are those of Workforce Florida, Inc., and not DEO. Section 445.004(2), Florida Statutes, states, in pertinent part: Workforce Florida, Inc., is the principal workforce policy organization for the state. The purpose of Workforce Florida, Inc., is to design and implement strategies that help Floridians enter, remain in, and advance in the workplace. . The statement in paragraph 1 is the construction of a statute, and it is therefore a Conclusion of Law rather than a Finding of Fact. As such, the conclusion of Exception 1 is more reasonable than the ALJ's Conclusion of Law. This Exception is granted, and the second and third sentences of Finding of Fact paragraph 1 are deleted and restated in the following additional Conclusion of Law:

Workforce Florida, Inc. is the workforce strategy and policy-setting board for the statewide workforce system. It provides oversight to 24 regional workforce boards in designing and implementing programs to develop a skilled workforce.

The final sentence in paragraph 1 is revised (only for purposes of context within the paragraph) to state: TBWA is one of 24 regional workforce boards.

Exception No. 2

DEO takes exception to the ALJ's Conclusion of Law in paragraph 56, bullet 5, concluding that one-half of the expenses from the May 30, 2009² corporate meeting are disallowed. The ALJ concluded that the meeting was a mixture of business and social, that it was impossible to accurately allocate the division of time between the two, but that part of the expenditures for the meeting was not consistent with the directives set forth for allowable expenditures. TBWA, in paragraph 2 of its Responses to Exceptions ("Responses"), agreed that

² The Recommended Order states that this meeting was held on March 30, 2009. The correct date is May 30, 2009. Plaintiff's Exhibit 11 at 68 and Tr. 133.

the meeting was a mixture of business and social and that one-half of the costs should be disallowed.

The allowability of these expenditures is controlled by OMB Circular No. A-122, which provides that the costs of a meeting are permissible only if the primary purpose of the meeting is the dissemination of technical information. 2 C.F.R. 230, App B ¶ 29. DEO's witness, Laura McKinley, testified that pursuant to this provision, unless a meeting's primary purpose is demonstrated to be the dissemination of technical information, the costs are unallowable. Tr. 279-80. The ALJ found "there is scant evidence to support" TBWA's position that its corporate meetings "were for the primary purpose of dissemination of technical information." (Finding of Fact paragraph 42.) Nevertheless, the ALJ attempted to divide the event's agenda into "business and social," found it impossible to accurately allocate items between the two, and simply divided the costs 50-50 between allowed and disallowed items.

The OMB Circular No. A-122 furthermore expressly disallows entertainment costs. "Costs of entertainment, including amusement, diversion, and social activities and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities) are unallowable." 2 C.F.R. 230, App B ¶14. This provision requires that such costs be disallowed, even if they are associated with a meeting with a primary purpose of dissemination of technical information. However, disallowance of *particular costs* on the basis that they are entertainment costs is irrelevant when the meeting was not for the primary purpose of dissemination of technical information. Under this circumstance, *all costs* must be disallowed.

In Conclusion of Law paragraph 47, the ALJ concluded that TBWA is a non-profit organization subject to OMB Circular No. A-122. Based on the facts found by the ALJ, it is

concluded that this meeting's "primary purpose" was not to disseminate technical information. Therefore, none of the expenditures associated with the meeting are allowable. DEO's Exception to disallow \$5,673.00 is granted. This conclusion is more reasonable than the conclusion of the ALJ. The ALJ's Conclusion of Law in paragraph 56, bullet 5, is changed to state:

May 30, 2009, corporate meeting: This meeting was a mixture of business and social. It is concluded that the meeting was not for the primary purpose of dissemination of technical information and all costs are therefore disallowed in accordance with the requirements of OMB Circular No. A-122, Attachment B, paragraph 29. (\$5,673.00)

Exception No. 3

DEO takes exception to the ALJ's Conclusion of Law in paragraph 56, bullet 6,³ concluding that "one-half of the expenditures for [the Business Excellence Awards] events is disallowed."⁴ In Finding of Fact paragraph 11, the ALJ found that TBWA challenged \$58,448.63 of costs associated with the Business Excellence Awards events.

In Conclusion of Law paragraph 44, the ALJ stated that TBWA "has the burden of proving by a preponderance of the evidence that the disallowed grant funds were spent for grant purposes and that its expenditures are allowable." The OMB Circulars provide no legal authority to treat individual expenditures associated with an event as a lump sum when making a

³ DEO's Exception No. 3 incorrectly referenced bullet 5.

⁴ The ALJ identifies one-half of the amount TBWA spent on the Business Excellence Awards events for 2008 and 2009 as \$20,044.50. Apparently the ALJ mistook the first dollar amount he had listed in Findings of Fact paragraphs 17 and 18 as a total for each year's expenditures (\$17,476.50 + \$22,612.50 = \$40,089.00), however, the first amount listed represented only the costs charged by the Intercontinental Hotel for the venue and food, and all amounts listed in those findings must be added together to arrive at the total amount of expenditures for the BEA events of \$58,448.63.

determination of allowability. Instead, as stated by the ALJ in Finding of Fact paragraph 5, TBWA “is responsible for assuring that all federal funds it receives are used in accordance with the requirements set forth in federal regulations, specifically the guidelines in [OMB] Circular No. A-122, Cost Principles for Non-Profit Organizations.” These guidelines provide specific criteria for evaluating the allowability of selected items of cost. Therefore, each expenditure must be determined to be allowable or unallowable based on the OMB criteria applicable to a business meeting or outreach event as these events were characterized by the testimony of Mr. Peachey. See, Tr. 58, lines 19 and 20 and Findings of Fact paragraphs 20, 33, and 35. That legal analysis follows.

A full review of the record establishes that TBWA’s 2008 BEA expenditures to the Intercontinental Hotel (\$17,476.50) for the event venue and food, Uline (\$81.76) for gift bags, Shorter Childs Printing (\$989.00) for invitations, Levy Awards (\$566.89) for crystal trophies, and Michaels (\$84.33) for gift bags and TBWA’s 2009 BEA expenditures to the Intercontinental Hotel (\$22,112.50) for the event venue and food, the Levy Awards (\$1,910.25) for plaques and crystal trophies, and Staples (\$52.40) for supplies have been shown to have a business purpose and are not prohibited by other provisions of the OMB Circulars. The ALJ concluded that one-half of the expenditures for the BEA events should be disallowed because they were “not entirely consistent with prudent expenditure of government grant funds.” Applying this prudent person/reasonableness criteria to these expenditures results in the conclusion that \$21,636.81 of these expenditures are disallowed. The conclusion, to disallow half of these expenditures, is in accordance with the ALJ’s Finding of Fact in paragraph 35 that there was no credible evidence to support the contention of TBWA’s only witness that the event had to be upscale to attract its

targeted employers and public figures. The other expenditures for the BEA events, however, are prohibited by other provisions of the OMB Circular and must be completely disallowed.

The \$10,000 expenditure to Tricycle Studios for the 2009 BEA Video is not allowable. In Finding of Fact paragraph 19, the ALJ found that TBWA did not “produce the video at the final hearing or provide sufficient evidence” of the contents of the video and “did not specifically demonstrate how a video of award winners benefits one of its grants.” TBWA’s witness was unable to testify to any use of the video by TBWA (Tr. 107). In addition, the ALJ determined in Conclusion of Law paragraph 56, bullet 6, that “there is no evidence that the video produced at the event has any marketing value.” Therefore, in accordance with Conclusion of Law paragraph 44, TBWA did not meet its burden of showing that the expenditure was for grant purposes and the entire \$10,000 expenditure for producing the video is disallowed.

The \$1,700 in expenditures to IBEX for musicians at the BEA events is not allowable. TBWA paid IBEX \$1,200.00 for a solo pianist and string quartet at the 2008 Business Excellence Awards and \$500.00 for a solo pianist at the 2009 Business Excellence Awards. These costs are unallowable entertainment costs. 2 C.F.R. 230, App. B ¶14. In Conclusion of Law paragraph 56, bullet 4, the ALJ disallowed an expenditure for musicians that were specifically hired for a reception (i.e., prior to the portion of the event that was claimed to be a business meeting and an outreach event) after finding in Finding of Fact paragraph 28 that the associated event was neither a business meeting nor an outreach event. Though no agenda was provided for the BEA events (Tr. 151), the invoice (P. Ex. 12, at page 284) for the 2009 event states that the musician is to perform “during reception and after event” and the TBWA email (P. Ex. 12, at bottom of page 248) for the 2008 event outlines the “entertainment needs” for the event to include music for the “pre-reception,” music “while people are eating and mingling,”

and music “immediately following the awards ceremony.” It is significant to the determination of allowability that the selected item of cost for meetings and conferences cautions that other cost items incidental to the meeting cannot include costs of entertainment. *See*, 2 C.F.R. 230, App. B ¶29. Thus, to allow an expenditure for music at a business meeting and outreach event, as the BEA events were characterized (Tr. 109-10), would render meaningless the prohibition against entertainment costs in 2 C.F.R. 230, Appendix B, paragraph 14. *See also, Humanics Associates*, DAB No. 860 (May 1, 1987). DEO’s conclusion that “entertainment” includes any costs associated with performances of live music, as opposed to the ALJ’s seemingly implicit conclusion that it is not entertainment if it occurs within a business meeting or outreach event is more reasonable than the conclusion of the ALJ. An agency’s interpretations of its regulations should not be overturned unless clearly erroneous. In accordance with DEO’s interpretation of the OMB Circular regarding “entertainment” these costs must be disallowed.

TBWA’s witness provided no explanation of benefit to the grant for the expenditure for John Kantor Photography. Mr. Peachey’s testimony that the photographer “took pictures on behalf of the staff” does not indicate a grant purpose. (Tr. 105, line 17). When asked if the pictures were put on the web site, he responded, “I am not sure if they were.” (Tr. 105, line 21). A full review of the record shows no competent substantial evidence to establish a benefit to the grant and this expenditure of \$265.00 must be disallowed.

TBWA’s witness provided no explanation of benefit to the grant for the Business Excellence Awards expenditures to Cheers for table and chair covers. Mr. Peachey’s characterization of the costs as “incidental costs” that were intended to contribute “to the environment that they were trying to create” (Tr. 154), provides no basis to determine a benefit to the grant. Without competent substantial evidence to demonstrate that these costs were

reasonable and necessary for the performance of the award, these costs in the amount of \$3,210.00 must be disallowed.

The ALJ failed to apply the requirements of the OMB Circulars to the specific costs after concluding that “the manner in which the events were conducted by TBWA is not entirely consistent with prudent expenditure of government grant funds.” DEO, however, must review the costs on an individual basis to determine compliance with the OMB Circulars. Failure to do so would place liability on DEO as the State agency that is responsible for ensuring that the state appropriately administers federal workforce funding (Conclusion of Law paragraph 45). This modified Conclusion of Law is more reasonable than that of the ALJ. Exception 3 is granted. Conclusion of Law paragraph 56, bullet 6, is revised to state:

The BEA events have some legitimate business basis. However, the manner in which the events were conducted by TBWA is not entirely consistent with prudent expenditure of government grant funds. Further, there is no evidence that the video produced at the event has any marketing value. The disallowed costs for the Business Excellence Awards total \$36,811.81, consisting of:

- \$21,636.81 (1/2 of business expenditures)
- \$10,000.00 expenditure to Tricycle Studios for the 2009 BEA Video
- \$1,700.00 in expenditures to IBEX for musicians at the BEA events
- \$265.00 expenditure to John Kantor Photography
- \$3,210.00 expenditures to Cheers for table and chair covers

Exception No. 5⁵

DEO takes exception to the ALJ’s Conclusion of Law in paragraph 57, concluding that the remainder of the challenged expenditures was proven to be consistent with the requirements for use of government grant funds as set forth in the OMB Circulars.

⁵ DEO did not include an Exception No. 4.

In Conclusion of Law paragraph 56, bullet 1, addressing the expenditures associated with the “December 2008 End of Year Celebration,” the ALJ concluded that the meeting was “an employee party” and stated, “The expenditures relative to that event are disallowed.” Two “Solid Gold Entertainment” expenditures totaling \$725 (identified on page 2 of Plaintiff’s Exhibit 10, in the “Employee Recognition” expense section) are also associated with the December 2008 End of Year Celebration (Tr. 185). This is clearly part of the “expenditures relative to that event” that the ALJ concluded were disallowed. Therefore, DEO’s Exception No. 5 is granted and the additional \$725 is disallowed. This conclusion is more reasonable than that of the ALJ. Conclusion of Law paragraph 56, bullet 1, is revised to increase the dollar amount stated to include the disallowance of this \$725 expenditure for this event and now states the following:

December 2008 end of year celebration: There was insufficient evidence presented by TBWA to support the contention that the meeting was anything other than an employee party. The expenditures relative to that event are disallowed. (\$8,863.78)

Exception No. 6

DEO takes exception to the ALJ’s Conclusion of Law in paragraph 57, concluding that the remainder of the challenged expenditures was proven to be consistent with the requirements for use of government grant funds as set forth in the OMB Circulars.

Specifically, DEO takes exception to the expenditure to IBEX for \$950.00 for a solo pianist and string quartet at the Scholars Reception on April 17, 2008. These costs are unallowable entertainment costs and must be disallowed. 2 C.F.R. 230, App. B ¶14.

As expressed in the analysis of DEO's Exception 3, in Conclusion of Law paragraph 56, bullet 4, the ALJ disallowed an expenditure for musicians that were specifically hired for a reception (i.e., prior to the portion of the event that was claimed to be a business meeting and an outreach event) after finding in Finding of Fact paragraph 28 that the associated event was neither a business meeting or an outreach event. However, with regard to the Scholars Reception, in Finding of Fact paragraph 27, the ALJ found that the expenditure for live music was associated with a "bona fide business meeting" and that the "musicians were incidental to the purpose of the meeting." It is significant to the determination of allowability that the selected item of cost for meetings and conferences cautions that other cost items incidental to the meeting cannot include costs of entertainment. *See*, 2 C.F.R. 230, App. B ¶29. Thus, to allow an expenditure for live music at a business meeting, would render meaningless the prohibition against entertainment costs in 2 C.F.R. 230, Appendix B, paragraph 14. *See also*, *Humanics Associates*, DAB No. 860 (May 1, 1987). DEO's conclusion that "entertainment" includes any costs associated with performances of live music, as opposed to the ALJ's seemingly implicit conclusion that it is not entertainment if it is associated with a bona fide business meeting or outreach event, is more reasonable than the conclusion of the ALJ. An agency's interpretations of its regulations should not be overturned unless clearly erroneous. Therefore, this cost of \$950 must be disallowed. Exception No. 6 is granted and an additional bullet is added to Conclusion of Law paragraph 56 to state as follows:

The expenditure to IBEX for \$950.00 for a solo pianist and string quartet at the Scholars Reception on April 17, 2008, is an unallowable entertainment expense and is disallowed.

Exception No. 7

DEO takes exception to the ALJ's Conclusion of Law in paragraph 57, concluding that the remainder of the challenged expenditures was proven to be consistent with the requirements for use of government grant funds as set forth in the OMB Circulars.

Specifically, DEO takes exception to the expenditure paid to Issue Media Group for \$22,800 in July of 2009. In Finding of Fact paragraph 29 of the Recommended Order, the ALJ found that website pages taken from the magazine show the TBWA logo on the webpage, but no information was included about any of TBWA's grant programs. A user could, however, click on the link to get to the TBWA website and find information about the programs that TBWA provides. Because the website pages contained only a link to the TBWA website and no information about any of the grant programs that TBWA administers, the website pages seem to primarily promote TBWA, rather than the grant programs.

The ALJ provided no reasoning for his conclusion, "The remainder of the challenged expenditures were proven to be consistent with the requirements for use of government funds as set forth in the OMB circulars." In Finding of Fact paragraph 29, however, in addition to his finding that the webpage provided no information about any of TBWA's grant programs, he states the additional negative that "TBWA does not have any documentation to show that TBWA received job postings as a result of this expenditure." Though this negative fact is not relevant to the determination of whether an advertising or public relations cost is allowable, it is stated because, with regard to the CEO of the Year banquets (addressed in Exception 8 below), the ALJ used the fact that some attendees actually posted jobs as support for his conclusion to allow those expenditures. This distinction leads to the conclusion that the ALJ should not have allowed the cost for the Issue Media Group expenditures.

In accordance with the Finding of Fact that the webpage provided no information about any of TBWA's grant programs, and the OMB Circular prohibition regarding costs of advertising or public relations that promote only the organization (2 C.F.R. 230, App. B ¶ 1.f.(4)), it is more reasonable for DEO to conclude that the webpage, the resource that TBWA paid for, must promote the grant programs, and not just the organization itself, in order to qualify as an allowable expenditure. Since the webpage contained TBWA's logo alone, without any information about any grant program TBWA administers, the expenditure did not communicate anything on "specific activities or accomplishments which result from the performance of Federal awards" as required by 2. C.F.R. 230, App. B ¶ 1.d.(2), and TBWA did not demonstrate a benefit to the grant. Exception 7 is granted and the \$22,800 payment must be disallowed. An additional bullet is added to Conclusion of Law paragraph 56 to state as follows:

TBWA did not demonstrate a benefit to the grant for the expenditure paid to Issue Media Group for \$22,800 in July of 2009; therefore, \$22,800 is disallowed.

Exception No. 8

DEO takes exception to the ALJ's Conclusion of Law in paragraph 57, concluding that the remainder of the challenged expenditures was proven to be consistent with the requirements for use of government grant funds as set forth in the OMB Circulars.

In Finding of Fact paragraph 40 of the Recommended Order, the ALJ found that while there is no evidence that an employee attended the CEO of the Year banquets in 2008 and 2009, there is evidence that some attendees actually posted jobs with TBWA. As stated in paragraph 3, pertaining to Exception 7 above, whether jobs are posted as a result of an expenditure is not relevant to the determination of allowability of a public relations/public outreach expenditure.

The requirement of the OMB Circular is that TBWA must communicate with the public on “specific activities or accomplishments which result from the performance of Federal awards” in order for the expenditure to be allowable. 2 C.F.R. 230, App. B ¶ 1.d.(2). Because there is no competent substantial evidence in the record to establish that TBWA even attended the event, it is not possible for TBWA to have conducted public outreach at this event. This substituted conclusion is more reasonable than the conclusion of the ALJ. Exception 8 is granted and the \$1,695.00 in costs is disallowed. An additional bullet is added to Conclusion of Law paragraph 56 to state as follows:

There is no competent substantial evidence in the record to support the contention that the expenditures for CEO of the Year banquets in 2008 and 2009 were for the purpose of conducting outreach; therefore, those expenditures are disallowed.
(\$1,695.00)

Exception No. 9

DEO takes exception to the ALJ’s Conclusion of Law in paragraph 57, concluding that the remainder of the challenged expenditures was proven to be consistent with the requirements for use of government grant funds as set forth in the OMB Circulars.

TBWA failed to present any documentation for the \$4,500.00 it paid to the Tampa Bay Academy of Hope on April 30, 2008, or for the \$2,500.00 it paid to the Tampa Bay Academy of Hope on June 12, 2009 to indicate that it communicated with the public and the press about specific activities or accomplishments which result from the performance of federal awards. In Finding of Fact paragraph 39, the ALJ made the same findings regarding these expenditures that he did with regard to the sponsorship expenditures for the American Red Cross: “no evidence that any employees attended the function” and “no evidence of active involvement.” However,

with regard to the American Red Cross expenditures, the ALJ specifically concluded that they were not allowable in Conclusion of Law, paragraph 56, bullet 9. Therefore, these Academy of Hope expenditures are disallowed on that same basis. There is no competent substantial evidence in the record to establish that TBWA conducted public outreach at this event. This substituted conclusion is more reasonable than the conclusion of the ALJ. Exception 9 is granted and the \$7,000.00 in costs are disallowed. An additional bullet is added to Conclusion of Law paragraph 56 to state as follows:

There is no competent substantial evidence in the record to support the contention that the expenditures for the Tampa Bay Academy of Hope on April 30, 2008 and June 12, 2009 were for the purpose of conducting outreach; therefore, these expenditures are disallowed. (\$7,000.00)

Reconciliation of Findings of Fact in Paragraphs 10, 11, and 31 and

Resulting Modification of Conclusion of Law in Paragraph 56, Bullet 10

In Conclusion of Law paragraph 56, bullet 10, the ALJ incorrectly identified \$4,369.00 as the total for the disallowed promotional materials. The correct amount, in accordance with the ALJ's Findings of Fact in bullet 6 of paragraphs 10 and 11 is \$4,669.00. The "unallowable expenditures for promotional materials" category of bullet 6 consists of only two items: blankets at a cost of \$2,283.81 and Tervis tumblers at a cost of \$2,385.19⁶. Therefore, the first sentence of Finding of Fact in paragraph 31 is corrected to state, "TBWA spent \$2,385.19 to purchase 200 Tervis tumblers. This correction is necessary to reconcile Findings of Fact 10, 11, and 31 in the Recommended Order regarding the cost for promotional materials. The Conclusion of Law in

⁶ It appears that the ALJ, in Finding of Fact paragraph 31, relied on the dollar amount of \$2,085.19 as printed on page 125, line 19, of the transcript, which appears to be a transcription error, because the attorney's question is predicated on Plaintiff's Exhibit 10, which identifies \$2,385.19 as the cost of the Tervis tumblers.

paragraph 56, bullet 10 is corrected to identify \$4,669 as the total expenditure that is disallowed. The additional \$300.00 is disallowed.

Additional Modification of Conclusion of Law Paragraph 56, Bullet 10

In Conclusion of Law Paragraph 56, bullet 10, the ALJ states, “Although purchase of [blankets and Tervis tumblers] may be a way to improve employee morale, there is insufficient evidence that they were purchased or used for that purpose.” DEO disputes that these items could qualify as allowable expenditures for employee morale purposes as they are not in accordance with the employee morale expenditure requirements of OMB Circular No. A-122, Attachment B, paragraph 13.a. DEO interprets these requirements as potentially allowing for expenditures that invest in the physical and mental well-being of employees; whereas gifts to employees are not allowed.

Additional Modification of Conclusion of Law Paragraph 56, Bullet 11

Based on the modifications stated above, Conclusion of Law paragraph 56, bullet 11 is revised to state:

The total amount of disallowed expenditures is \$104,265.85.

CONCLUSION

Having fully considered all submissions of the parties, the applicable law in light of the rulings on the Exceptions above, and being otherwise duly advised, it is

ORDERED that:

- A. The Recommended Order (Exhibit A), as modified by the rulings above, is adopted in its entirety and incorporated herein by reference.

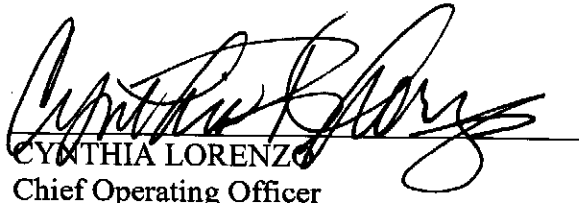
B. Tampa Bay Workforce Alliance must repay to the Department of Economic Opportunity \$125,559.28, using non-federal funds. This amount is comprised of \$104,265.85 in disallowed costs at issue in this hearing and \$21,293.43 in disallowed costs that TBWA did not contest. Repayment shall be made within 90 days of the entry of this Final Order.

JUDICIAL REVIEW

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 Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, The Caldwell Building, 107 East Madison Street, MSC 110, Tallahassee, Florida 32399-4128; 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 Department.

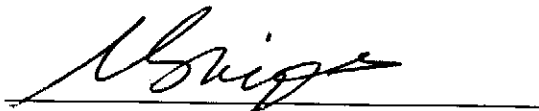
DONE AND ORDERED this 9 day of November, 2011, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ECONOMIC OPPORTUNITY


CYNTHIA LORENZO
Chief Operating Officer

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that the original of the foregoing Final Order has been filed with the undersigned Agency Clerk of the Department of Economic Opportunity, and that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on this 9th day of November, 2011.



Miriam Snipes, Agency Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Caldwell Building
107 East Madison Street, MSC 110
Tallahassee, Florida 32399-4128

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By Filing with DOAH:
The Honorable R. Bruce McKibben
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