DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education and Welfare

SUBJECT: Harambee Child Development Council, Inc. DATE: October 17, 1979
Docket No. 77-17
Decision No. 67

DECISION

This is an appeal from the disapproval by the Office of Child Development, (OCD), Department of Health, Education and Welfare, of grantee's written request for permission to incur an expenditure during the term of the grant.

Since 1966, the Harambee Child Development Council ("grantee") of Albany, Ga., has been a recipient of successive Head Start grants authorized by the Economic Opportunity Act of 1964. P.L. 88-452, Tit. II, Part B (42 USC §2809). During the years 1973-77 grantee has endeavored repeatedly to be permitted to expend grant funds in varying amounts to increase the salary of its program coordinator. The failure of OCD to approve such requests is deemed a determination of disapproval appealable to this Board. 45 CFR 16.5(a)(3).

Preliminary to the designation of the appeal panel the Chairman of this Board, conformably to the provision in 45 CFR 16.6(b)(2), has ruled, upon consideration of the record in its entirety, that grantee's appeal had not been timely filed as to the requests for raise in salary made prior to June 20, 1977. This ruling leaves for our consideration OCD's disapproval of the request made in grantee's letter of June 20, 1977, for permission to raise the salary of its program director from $14,999 to $21,000 for the 1976-77 grant year.

I

The amount of $14,999 received by the program director in 1976-77--as during the two previous years--reflected a special condition in the grant to the effect that "the grantee is prohibited from using Head Start grant funds to pay any salary in excess of $14,999 per year unless a waiver is obtained during the program year in accordance with OHD/OCD (Office of Human Development/ Office of Child Development) Instruction #30".

This special condition had its genesis in the Economic Opportunity Act, P.L. 88-452, Tit. II, § 244(2), as added P.L. 90-222, Dec. 23, 1967, 42 USC §2836(2), which provided that the Director of OEO "shall issue rules or regulations to insure that no employee engaged in carrying out community action program activities receiving financial assistance under this title is compensated from funds so provided at a rate in excess of $15,000 per annum."

A further provision in the above statute authorized the Director to provide for exceptions to this monetary limitation.

It is the grantee's position that, at least insofar as the 1976-77 budget year is concerned, the annual $15,000 limitation is inapplicable for the reason that the 1974 Economic Opportunity Amendments do not contain such limitation. Instead, they contain a direction to the Secretary of the Department of HEW - successor to the OEO in the administration of Head Start programs - to insure that persons employed in such programs receiving Federal assistance "shall not receive compensation at a rate which is (1) in excess of the average rate of compensation paid in the area where the program is carried out to a substantial number of persons providing substantially comparable services..." P.L. 93-644, sec. 573(a), 42 USC §2930b. Grantee further argues that in view of the non-applicability of the $15,000 limitation to the 1976-77 budget year, OHD/OCD Instruction #30, promulgated February 20, 1976, which contains guidelines governing a waiver of this limitation, is likewise without applicability.

The technical inappropriateness of keeping the $15,000 limitation nominally alive in agency Instructions and grant Conditions years after it ceased to be effective is quite clear. It is a practice which is confusing and even misleading. However, in the interest of our purpose to reach a decision addressed to the merits, we are inclined to treat these erroneous references as harmless error.

Descriptive citations notwithstanding, the voluminous record on appeal leaves no doubt that both the grantee and the agency have framed their presentations in terms of the comparability criterion found in the 1974 legislation. It does not even appear that either of the parties regards the question of "waiver" to constitute the crucial issue. OCD has disclosed to the grantee its willingness to waive the $15,000 limitation in its letter of October 6, 1976. Contrary to grantee's argument that it had met the requirements for establishing comparability as a justification for the requested raise in salary, OCD maintains that the submitted documentation was inadequate to establish comparability warranting an upward adjustment in salary in any particular amount.

Viewed in this aspect, it can not be said that OHD/OCD Instruction #30, or earlier issuances under the OEO label, and geared to the flat amount limitation on allowable compensation became irrelevant as administrative guides upon the substitution of the comparability standard effective January 4, 1975. It is useful to observe that the 1964 Act, besides mandating that the Director of OEO insure that compensation did not exceed $15,000 per annum, also vested him with discretionary authority to adopt exceptions on the ground, inter alia, of "prevailing local salary levels." The Director did provide for this exception by prescribing the criteria

for determining comparability with prevailing local salary levels in the regulations invoked by OCD in opposing the grantee's claim. No reason suggests itself why the regulations, to the extent that they are addressed to the exceptions in the 1964 Act, could not have been treated by the OEO as valid and subsisting independently of the abandonment of the $15,000 limitation. That which would have been competent for the Director of the OEO to do is equally proper for the OCD upon its succession to responsibility for Head Start programs in 1969. As published in 34 F.R. Part 9, p. 14700, at p. 14702, Section 4(b) of the Reorganization Order provides that

> "Except as inconsistent with the Order, all regulations, rules, orders, statements of Policy, or interpretations of the Head Start program, Office of Economic Opportunity, are adopted by the Secretary, Department of Health, Education and Welfare, as regulations, rules, orders, statements of policy or interpretations of the Department, and are continued in full force and effect until such time as they are reissued by the Department."

Similarly, H.R. Report No. 93-1043 to accompany H.R. 14449 which evolved into the 1974 Amendments, U.S. Cong. and Admin. News, 93rd Cong. 2nd session, at p. 8055: "In transferring this authority [over Head Start], the committee simply recognizes in the law the delegation of operating authority from the Director of the OEO to the Secretary of DHEW which took place in 1969".

II

A reading of the file does create the impression that in denying approval of grantee's request there was less than full consistency of theory as well as unnecessary vagueness and complexity in correspondence from OCD regarding the method to be followed by the grantee in establishing comparability. This observation does not, however, aid grantee in its appeal. Grantee can not obviously claim as a matter of contract. Its entitlement, if any, must be derived from pertinent statute or regulation and, insofar as statutes are concerned, it is significant that the 1964 Act as well as the 1974 Amendment have a common thrust in derogation of grantee's claimed right. Like the earlier statute which provides that the Director "shall issue rules and regulations to insure that no employee... is compensated... at a rate in excess of $15,000 per annum...," the 1974 Amendment directs that the Secretary "shall take such action as may be necessary to assure that persons employed... shall not receive compensation at a rate which is (i) in excess of the average rate..." etc. (italics ours).

As indicated earlier, the 1964 Act does authorize exceptions; but the total effect of the legislation is that of creating a burden of proof for the party seeking to bring itself within the exception. Similarly, if the duty imposed upon the Secretary in the 1974 Amendments to insure that no employee is compensated at a rate which is in excess of the comparable rate in the area is to be effectively discharged, a grantee asserting that its request for a raise in compensation for one of its employees will not violate the statutory standard must be prepared to demonstrate that such is the case. This is particularly true where, as here, nothing in the statute creates an entitlement to salary in any particular amount, or grade, above the required minimum, anymore than the 1964 Act can be said to have created an entitlement to salary of $15,000 per annum. Prescribing a method for demonstrating adherence to the statutory limitation is properly the responsibility of the administering agency; and reference to the Economic Opportunity Act, 42 USC Secs. 2835 (a)(d), id., 2942(n), is sufficient to show the wide scope of discretion vested in such agencies for fashioning practical guidelines in this area.

Administration guidelines for determining comparability in Head Start programs consistently include the requirement of an organization review to be submitted in support of a request for higher salary that should be comprehensive as well as equitable in respect of all positions in the program, Community Action Memo 23-B (March, 1967) Part A.5a; OHD/GAM, (Office of Human Development/ Grant Admin. Manual, Subpart A, Ch. 3, E.4a; Head Start Manual of Policies and Instructions, Sept. 1967, p.19; that the request be accompanied by a statement of justification, and of availability of funds, OHD/OCD #30 (Feb. 1976) II, 5,6; that a showing be made of programmatic need "for a person with qualifications calling for the salary requested..." and that reasonableness, in this context, refers to a position, rather than to a particular incumbent. OEO Instruction 6903-1 (July, 1968) sec. 3(b)(1) and 3(b)(1)(b).

The evidence reasonably supports the conclusion of non-compliance by the grantee with the cited requirements. The salary plan submitted by grantee would result in a considerable and inequitable differential between the salaries of the program coordinator and the two next lower ranking position in the program. We agree with OCD that grantee had failed to demonstrate inherent justification for the request in view of the circumstances that the responsibilities of the program coordinator relate to a program which operates on a part time (4 hours per day) basis, 9 months per year, for no more than 280 children; that similar programs in areas surrounding that of grantee, operating for longer periods of time and serving greater numbers of children, retain competent directors at salaries of less than $15,000 per annum, and that the program coordinator devotes only an indefinite part of her professional time to the Head Start program. Grantee's proffered justification is further impaired

by the circumstances that Head Start programs, unlike school systems employed as a standard of comparison, do not attribute significant weight to academic qualification, as such. OCD/HS Transmittal Notice 70.1; Head Start Manual (Sept. 1967) pp. 13,17. While grantee's submission does show a formally adequate statement as to availability of funding within the budgetary framework for meeting the request of a higher salary, the funding is shown to be available only because of grantee's practice of paying the salaries of some of Head Start personnel with funds derived from Department of Labor grants.

An additional and independent ground for sustaining OCD's determination is concerned with the effect that the granting of grantee's request would have upon the development and administrative costs of the grant. The 1974 Amendments, 42 USC §2928f(b), limit such costs to no more than 15% of the total cost 1)/. Cost of overall planning, coordination, and of general program director appear to be included in cost of administration and development. F.R. April 7, 1978, Part VIII, Head Start Grants, etc., p. 14933(k). The record does not contain any refutation by the grantee of OCD's allegation that if the Director's (i.e., program coordinator's) salary as proposed was allowed and other salaries adjusted upward to be in line with the director's salary, the administrative costs would exceed 35%.

For the reasons stated we dismiss grantee's appeal, and sustain the determination of OCD against approval of grantee's request to incur an expenditure.

/s/ Francis DeGeorge

/s/ David Dukes

/s/ Irving Wilner, Panel Chairman

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1)/ The statute provides that if the Secretary determines cost to be excessive, even if constituting less that 15%, he may take "such steps" as will eliminate such excessive cost.