DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education, and Welfare

SUBJECT: Knox County Economic Opportunity Council, Inc.
Barbourville, Kentucky
Docket No. 78-14
Decision No. 68

DATE: October 29, 1979

DECISION

Knox County Economic Opportunity Council, Inc. ("grantee") appealed on May 8, 1978, from the March 15, 1978, determination of the Chief, Technical Assistance Branch, Office of Financial Management, OHDS, Region IV, disallowing $6,818 which he found was expended in excess of the authorized budget for grantee's program year I (PY I) Head Start grant. Grantee's appeal was filed late because, in accordance with instructions included with the March 15, 1978 disallowance determination, grantee initially addressed an appeal to the Region IV OHDS Audit Board of Appeals, which was no longer in existence. Grantee's appeal was filed within 30 days of a letter from OHDS which notified grantee that the informal appeals procedure had been abolished and gave it correct information regarding appeals to the Departmental Grant Appeals Board. The record in this case consists of grantee's application for review; the Agency's response to the appeal, dated July 7, 1978; grantee's response to the Board's Order to Develop Record, dated December 19, 1978; the Agency's response to the Order to Develop Rocord, dated January 10, 1979; grantee's response to the Board's Order to Show Cause, dated April 25, 1979; and the Agency's belated response to the Order to Show Cause, dated June 6, 1979.

The basic facts of the case, confirmed by the parties' responses to the Orders, are as follows. In August 1976, the next-to-the-last month of its PY I grant, grantee requested and received oral approval (confirmed in writing the next month) to buy three vans for its Head Start program. Acting on the oral approval, grantee contracted in the same month to purchase the vans at a total cost of $17,295. Grantee made a deposit on the vans at the time it contracted to buy them, and paid the balance on delivery in October 1976, the first month of its PY J grant. Grantee charged $10,477 of the cost of the vans to its PY I grant, that being the amount of unexpended funds in that grant account at the time the vans were delivered, and charged the remaining $6,818 to its PY J grant.

The Agency's position is that the $6,818 cannot properly be charged to the PY J grant since grantee contracted to buy the vans in PY I, and that therefore the entire cost of the vans must be shown as a charge to PY I, resulting in expenditures in excess of the amount budgeted for PY I which must be disallowed. Grantee concedes that it may not charge amounts in excess of that budgeted for any grant, but contends that the costs in question were properly chargeable to PY J.

The Order to Develop Record and the later Order to Show Cause both noted that the disallowance seemed "harsh and contrary to common sense... in view of the...necessity of the vans and the availability of program year J funds," but observed that there might be some clear requirement binding on grantee which would compel the Board to deny the appeal. The Order to Develop Record called for briefing on a number of carefully defined questions. The Agency's response was clearly unpersuasive and unsatisfactory. The Order to Show Cause spelled out at length the inadequacy of the reply and again invited briefing on issues plainly identified. This time the Agency made no pertinent response to the key questions.

As has been pointed out in the Order to Develop Record and the Order to Show Cause, many regulatory provisions on which the Agency relies as a basis for the disallowance are either mis-cited or do not relate directly to the issue in dispute. The Agency also cited Section 3 of the terms and conditions of the PY I grant, which states, in pertinent part, that "[e]xpenses charged against program funds may not be incurred prior to the effective date of the grant...." This provision would not appear to be controlling with respect to the question presented here whether grantee can properly charge certain costs to the PY J grant, however. Even if the same provision appears in the PY J grant terms and conditions, there is a serious question as to whether it would be legally enforceable since it was not published in the Federal Register in accordance with 42 U.S.C. 2928f(d), which requires the publication of all rules, regulations, guidelines, and instructions for the Head Start program (among other programs) at least 30 days prior to their effective date. The Agency was requested to brief this question but did not do so.

While there was, on the one hand, no clear showing of a basis for the disallowance, the Agency did not dispute, on the other hand, that its behavior was so ambiguous that grantee might reasonably have taken it to mean that the Agency approved its use of PY J funds.

The Order to Show Cause noted that, because of the manner in which grantee's request to purchase the vans and the Agency's response granting that request were worded, grantee might have understood the Agency's response as authorizing the purchase of the vans from available funds not restricted to PY I funds. Grantee in its response to the Order asserted that this was indeed the case,

stating that "[t]he K.C.E.O.C. concedes that we had not obtained specific approval to defer the additional cost to Program Year J as the Regional Office informed us we should have after the fact though at the time the approval was requested and received it was assumed that the vans could be purchased from any funds available." Even assuming that this was not what the Agency intended, grantee should not under these circumstances be penalized for this failure of communication between the Agency and itself.

The Order to Show Cause also suggested that if grantee had in its PY I account at the time purchase of the vans was approved only a small sum which was obviously insufficient to cover the cost of the vans, and if the Agency was aware of that fact, it might be inferred that the Agency intended at the time to allow the use of PY J funds as well. The Agency's response neither admitted nor denied that the Agency had knowledge of the amount of funds left in grantee's grant account. Documentation furnished by the Agency in response to the Order only shows budget information and not funds expended to date. In any event, the Agency in its response argued that the Regional Office is not responsible for keeping track of a grantee's expenditures. While this may be true as a general proposition, given the fact that the purchase of several vans entailed a fairly large sum for a year-end expenditure, it is not unreasonable to expect the Agency to have inquired into how grantee intended to finance the purchase if the Agency intended to enforce a rule that only PY I funds could be used.

The Agency's behavior could also have been reasonably taken as constituting approval for the purposes of 45 CFR Part 74, App. F, Para. G.7., which requires Agency approval of equipment purchases. A reading of this provision as requiring separate approval of the use of PY I and PY J funds to purchase the vans seems unduly narrow in view of the apparent purpose of the provision simply to assure that a grantee does not use Federal funds to make an investment in durable goods of limited use to the grant.

The use of PY J funds in this case appears, moreover, to be consistent with 45 CFR Part 74, App. F, Para. B.4.(a), which states that a cost, to be allowable, must be allocable if it is incurred specifically for the grant. Grantee asserted, and common sense seems to bear out, that the vans "were principally of benefit to the program year J grant and until they become no longer useful." (Response to Order to Show Cause, p. 2.) Thus, the cost of the vans was incurred specifically for the PY J as well as the PY I grant within the meaning of Para B.4.(a).

Grantee requested and obtained permission to purchase the vans in question. It had a legitimate need for them and asked permission near the end of a program year. Pursuant to the authorization, it ordered the vans, making a down payment out of the current year. Taking delivery, as was surely to be anticipated, in the succeeding program year, it paid part of the balance out of that succeeding program year's funds. Grantee apparently believed in good faith, and reasonably so, that that is what it was authorized to do.

The Agency has shown no reason why its own ambiguous behavior should have been construed differently, nor any reason why grantee's apparently reasonable behavior should be penalized. Clearly, no misuse of federal funds has occurred. Our decision rests on the Region's lack of responsiveness in briefing to this Board on specific questions asked as well as on its responsibility for the ambiguous situation created in its dealings with the grantee. Accordingly, we sustain the appeal and set aside the disallowance.

/s/ Francis D. DeGeorge

/s/ Thomas Malone

/s/ Malcolm S. Mason
Panel Chairman