

DEPARTMENTAL GRANT APPEALS BOARD

The Department of Health, Education, and Welfare

SUBJECT: Afro-American Cultural
Education Center, Inc.
Docket No. 76-1

DATE: SEP. 11, 1978

OPINION AND ORDER

The grant which is the subject of this appeal was initially made by the Office of Education (OE) to the Greater Los Angeles Urban Coalition (Coalition or prior grantee) under the Emergency School Aid Act to provide in-service training to teachers in the Los Angeles schools to increase their capacity to handle multi-national and multi-ethnic teaching situations. The grant activities were carried out by the appellant here, Afro-American Cultural Education Center, Inc., (Center or grantee) and the Hispanic Cultural Center (Hispanic), as delegate agencies under the auspices and overall control of Coalition.

Dr. James L. Kendricks was the Director of Center, with day-to-day supervision over the activities conducted by Center under the grant. During a renewal period, in late 1974, conflict arose between Dr. Kendricks and Coalition. Coalition notified him that his services were terminated; he filed suit in State Court contesting that action. During January of 1975 the suit was settled on the following terms, relevant here, concurred in separately by OE: The grant was transferred to Center and Hispanic; Center was authorized to assume outstanding leave balances of transferred employees and to make outlays for materials ordered prior to the date of the transfer (February 1, 1975) but received subsequent thereto. Dr. Kendricks was not formally reinstated as an employee of Coalition, but he was President of Center and the agreement provided no limitation on his future activities in connection with the grant.

The current dispute between Center and OE is over various items of expenditure during the time in which the grant was administered by Center after the transfer. These items were the subject of audit exceptions which were concurred in by OE. Center filed its appeal in January of 1976 and in August of 1976 the Board issued an Order to Show Cause in the case which was responded to by the parties in October of 1976. There follows the Board's evaluation of the appeal in its present state, based on the original appeal documents and the responses to the Order to Show Cause.

The dispute between OE and Center has been difficult to resolve on the record before us. On several key issues, the parties have changed their positions, creating ambiguities of interpretation; on others assertions are not documented; yet a third group depend for their resolution upon information in the hands of persons not formally involved in this appeal.

The following opinion reflects the classifications mentioned above. As to those matters on which there appears to be no genuine issue and which the parties have had an opportunity to brief, the Board will rule in this opinion. (The effect of such rulings is set forth in the last paragraph of the opinion.) As to those matters on which there appears to be a genuine issue of material fact, or which the Board believes raise questions which have not been briefed, the parties will be given an opportunity to make an appropriate submission.

The Board would be remiss if it did not indicate its concern about the extent of the change in position by the grantee regarding matters which are essentially factual. For example, the payment of \$3,152 to Mr. Kendricks is either a payment for services or for accrued leave and severance pay. It was apparently carried on grantee's books, and described in the audit report signed off on by grantee's representative, as the latter, and the whole thrust of the initial appeal was on that assumption. Yet in the response to the Order to Show Cause, it is described as the former.

Similarly, the funding agency has resolved certain factual issues against the grantee without, so far as the record shows, making a thorough inquiry utilizing means readily available

to it. For example, grantee contended that the prior grantee, Greater Los Angeles Urban Coalition ("Coalition" or "prior grantee") owed Mr. Kendricks a sum for accrued leave. Coalition's representative advised OE that it owed Mr. Kendricks nothing. That is a classic issue of fact on which OE, before it took the serious step of disallowing the payment, could and should have resolved, given its power to obtain relevant documentation from both grantees.

Turning to the merits, there is a sum of \$10,773 which has been disallowed, as to which grantee currently maintains an appeal. This amount reflects the following items:

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|---|-----------------------------------|
| 1) Payment to Mr. Kendricks
(either accrued leave/termination
pay or salary for work performed
12/13/74-1/31/75) | \$3,152 |
| 2) Payment to Mr. Walker of
accrued leave | 1,900 |
| 3) Payment to employees Dixon & Britton
of accrued leave OR salary for work
performed during February, 1975 | 1,125 ¹ / ₂ |
| 4) Payment to IBM for lease of
typewriter | 1,196 |
| 5) Consultant Fees to Kendricks
and Walker | 3,400 |

There is a reference to an amount disallowed in the grant for FY 1976 which was not appealed, but was apparently a partial offset to Item No. 2.

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1. This was initially listed as \$1,112, due to an error in computation.

ITEM. NO. 1 - Payment to Mr. Kendricks (\$3,152)

First, the payment to Kendricks of \$3,152. Grantee's initial position on appeal was that it was for accrued leave. OE's response was, first, that the prior grantee had terminated Kendricks, and owed him no accrued leave, and second, that since he had been terminated by the prior grantee, and was not picked up by the Center initially as an "employee" (see item 5), he was not a "transferred employee" within the meaning of the settlement between Coalition and Center and the Transfer Agreement with OE. Grantee's subsequent position in the brief in response to the Board's Order to Show Cause was that the payment was in part for leave, and in part for work performed after the firing, but prior to the transfer of the grant.

The Board is of the view that if the grantee's latter position were adopted, there would be no question remaining, since the settlement is quite clear that with respect to costs incurred prior to the transfer, Center was only to assume responsibility for accrued leave and certain materials not relevant here. The crucial point is that salary (as opposed to accrued leave) for work performed prior to February, 1975 would not be reimbursable under the grant to Center. Grantee argues, in page 20-21 of grantee's appeal, that it was necessary to pay for work done prior to the transfer of the grant, for the sake of the credibility of the project. In the first place, Mr. Kendricks, as President of grantee, is not in the best position to question its credibility. Second, the credibility of grantee could be adversely affected by a gross disregard of the agreement entered into by the same person on behalf of the grantee. Finally, the agreement is itself quite specific on the point, unlike some other situations in which there is nothing more than the general policy against reimbursement for pre-award expenditures.

However, taking the matter in the light most favorable to Center, the Board is not yet in a position to rule on the item for the following reasons:

- 1) The view that Kendricks is not a transferred employee within the meaning of the settlement seems overly technical, given these facts, which are not in dispute: that he had

worked on the prior grant; he would be working on the new grant,^{2/} and the termination which would be the basis of the "break in service" was the event which triggered his lawsuit in the first place.

2) If he should be viewed as a transferred employee within the meaning of the settlement, we have the problem that Center considered him entitled to \$3,152, while Coalition considered him entitled to nothing.

Accordingly, with respect to Item No. 1, it is ORDERED,

1) that the parties are invited to brief the questions of whether Kendricks is a transferred employee within the meaning of the settlement; and whether payments of cash in lieu of vacation are allowable under the grant;

2) OE is ordered to obtain from Coalition or elsewhere and provide to the Board a full recapitulation of Kendricks' salary history under the prior grant, including the applicable leave policy, specifically indicating the amount of accrued leave (or cash value thereof) which would have been due Mr. Kendricks as of 12/13/74 by applying the policy to his employment record;

3) Both sides are invited to brief the question of whether, under the settlement agreement, assuming Mr. Kendricks was a "transferred employee" with accrued leave, the amount of accrued leave to which he was entitled was to be determined solely on the basis of time and attendance under the applicable leave policy, or was subject to such set-offs and deductions as the prior grantee might deem appropriate, and if so, what effect that would have on the disallowed item.

2. There seems to be some question of whether Kendricks and Walker in fact were employed on the new grant. OE's Quick Assessment Audit discussion of this item indicates that they were not. However, OE's discussion of the "consultant payments" (our item 5) refers to Kendricks and Walker being employees of the Corporation. Unless OE advises us that there is some evidence that these individuals, in fact, did not perform services under the grant between February 1, 1975 and June 30, 1975, the Board will proceed on the assumption that they did.

ITEM NO. 2. - Accrued Leave of Mr. Walker (\$1,900)

With respect to Mr. Walker; the first question is whether he was "transferred" within the meaning of the settlement agreement between Center and OE in light of OE's suggestion that he performed no work under the grant after the transfer. (We are asking OE, in connection with Item No. 5, to clarify its position on the issue of whether Mr. Walker was an employee and if so, at what level?) The second question regards amount of accrued leave which was due him. Grantee says \$1,900, OE says \$1,100. The Board has no basis for picking between these figures. Accordingly, it is ORDERED that OE obtain and submit a verified recapitulation of Mr. Walker's salary history with Coalition under the prior grant, as well as a copy of the applicable leave policy, specifically indicating the amount of accrued leave (or cash value thereof) which was due Mr. Walker as of 1/31/75 by applying the policy to his employment record.

ITEM NO. 3 - Payments to
Instructors Britton and Dixon (\$1,840)

Here again, the grantee switches the tune: from saying these payments were for vacation pay to saying that they were for work performed in February of 1975. If the payments were for vacation pay, there is disagreement between OE and Center regarding whether, as instructional staff, Britton and Dixon were governed by the personnel policies of the prior grantee which entitled employees to accrued leave. Grantee has submitted copies of Contracts between Center and Messrs. Britton and Dixon for the period July 1, 1974 to June 30, 1975. These contracts incorporate by reference pages 461-466 of the Joint Application for Emergency School Aid Act Grant for the period. (The page reference may be inaccurate. See OE Response to Order to Show Cause, p.3.) Grantee's Exhibit F, which it believes is identical to the personnel policies incorporated in Britton and Dixon's contracts, contains a section, "Paid Time Off," which includes the provision that instructional staff will be granted "one calendar month of vacation time" after 12 consecutive months of service. That language does not appear to authorize pay in lieu of vacation. We hereby invite both parties to brief that question.

However, in any event, based on the fact that there were T&A Sheets for these individuals in February, it is possible that the payments were, in fact, for salary. The work may not have been related to the project, since the items were entered on the Marina account. Grantee has created this confusion.

Accordingly, it is ORDERED that grantee provide a full recapitulation of time and attendance of Britton and Dixon and all payments made to them by grantee for work performed under the grant between February 1, 1975 and June 30, 1975, and any amounts paid for accrued leave from Britton and Dixon's service with the prior grantee. It is FURTHER ORDERED that OE provide copies of all leave policies of the prior grantee, a verified statement of a responsible official of the prior grantee regarding which leave policy was applicable to Britton and Dixon, and a verified list of all persons subject to the same policy under the prior grant, indicating the nature of the services performed by such persons.

ITEM NO. 4 - The Typewriter Rental (\$1,840)

Under the terms of the Grant and the settlement agreement, Grantee was only authorized to make expenditures for goods by Coalition ordered on or before January 31, 1975 and delivered on or after February 1, 1975. There is a dispute about whether Kendricks had the authority, under the former Director of Coalition, to order that equipment. However, the response to the Order to Show Cause states that they are dropping that from the appeal and will take it up with Coalition and IBM. To the degree that the amount of \$1,840 reflects costs incurred prior to February 1, 1975, it is not reimbursable. However, we do not know the terms of the lease. We do know that the grant had a \$1,000 ceiling for the typewriter during the grant period. OE disallowed \$1,196, which would result in Grantee being allowed \$644, or \$356 less than the \$1,000 ceiling on typewriter rental costs in the grant. Accordingly, Grantee is ORDERED to provide a copy of the lease and a schedule of the portion of the \$1,840 attributable to each month of the period in question (November, 1974 through June, 1975).

ITEM NO. 5 - The Consultant Fees
to Kendricks and Walker (\$3,400)

There are two major issues here: First, whether Center is an educational institution within the meaning of the governing HEW documents. Second, whether, in fact, Kendricks and Walker were employees of Center during the period of the "consultancy." (In this connection, in its response to the Order to Show Cause, grantee asserts that the persons in question did not receive any other compensation during the period in question. Since the materials available to the auditor indicated that they had each received \$850 in salary from Center during the period in question, a factual issue is presented.)

With regard to the first question, which has been thoroughly briefed, we hold that the Center is not an "educational institution" within the meaning of the rule. We agree with the position of OE. It is clear that the section in question contemplates an institution with a number of specialized departments, where there may occasionally be research which requires cross-disciplinary consultation. That is not our situation. Furthermore, even assuming that Center is an "educational institution," it is extremely questionable whether the director's activities come within the regulation. Getting things organized and keeping them going is central to the role of project director, not something to be contracted for, in addition to other services.

With respect to the second point, since there is a direct conflict between OE, which says Kendricks and Walker received \$850.00 during the month of February, and the grantee, which says they received no other compensation from Center for work performed during February, the Board hereby ORDERS that grantee submit a full recapitulation of any payments, disbursements or credits to Kendricks and Walker reflecting services performed under the grant either as employees or contractors and identified as such during February, 1975, such recapitulation to be verified by a responsible official of grantee.³

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3. If any of those sums were allocated to non-project activities, that should be indicated also. Each side's position here should be reconciled with its position on whether Kendricks and Walker were transferred employees in Item 1.

It is FURTHER ORDERED that the parties provide a statement of their opinion as to the reasonable value of the services rendered by Kendricks and Walker to Center with respect to the grant during the month in question, taking into account their salary level, time spent on the job and the like. Finally, the Board invites briefs on the question of whether grantee may be reimbursed a reasonable amount for the reasonable value of services performed under the grant in the consultant mode when the procedures required for using that mode have not been complied with.

All documentation and briefs required or invited herein to be submitted to the Board shall be filed 30 days from the date of this Order.

This is an interlocutory decision which states the position of the Panel on the principal legal issue that appears to be involved. When the parties have briefed the additional issues, referred to above, a further decision of the Panel will then be issued. Accordingly, comments to the "head of the appropriate constituent agency" under 45 CFR 16.10 are not called for at this time, but the parties may, if they wish, comment to the Panel.

/s/ Francis D. DeGeorge

/s/ David V. Dukes

/s/ Theodore A. Miles, Panel Chairman