DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education, and Welfare

SUBJECT: Southern Illinois University - Carbondale DATE: October 31, 1978
Docket No. 78-5
Decision No. 49

DECISION

Southern Illinois University - Carbondale was awarded a grant under the Veterans' Cost-of-Instruction Program for the period July 1, 1973 through June 30, 1974 for the establishment of an office of veterans' affairs which was to provide a range of services to veterans, including outreach, recruitment, counseling, and special education. Such grants were available "during any fiscal year" to any institution of higher education which submitted an application showing an increase of at least ten percent in the number of undergraduate students receiving certain veterans' educational benefits under Title 38 of the U.S. Code "during any academic year" over "the preceding academic year." (42 U.S.C. §1070e-1(a)(1).) The term academic year was apparently intended to refer to the July 1-June 30 period in keeping with the federal fiscal year then in force. Literally read this would seem to require a comparison of FY 1974 enrollment with FY 1973 enrollment as a basis for a FY 1974 grant. The University prepared its grant application, however, in accordance with 45 CFR §189.2, then in proposed form, which required the comparison of the veteran enrollment on April 16 of 1972 and 1973 in order to determine eligibility for a grant for the academic year ending June 30, 1974.

The grant-funded program operated by the University has been described by a former Commissioner of Education who held that position at the time the University received its grant and by the current Deputy Commissioner for Higher and Continuing Education as "exemplary." The Region V Veterans' Program Coordinator described the program as "one of the most comprehensive and best designed programs in Region V." The University's program coordinator, at HEW's request, ran workshops at several institutions on how to establish a campus veterans' program. Two-thirds of the way into the year, however, the University discovered that the veteran enrollment figures which it had included in its grant application were incorrect and that it had in fact experienced a a decline in veteran enrollment of 9.64 percent for the relevant period. The University promptly notified the Office of Education that it did not meet the statutory eligibility criterion, and at OE's request, ceased making expenditures under the grant in early April 1973 and refunded all unexpended funds.

OE subsequently made the determination that the University was required to refund to the government $86,663 expended under the grant prior to its discovery that the enrollment figures on the basis of which the grant was

awarded were incorrect. The ground for OE's determination was that the University did not meet the statutory eligibility criterion and that the Commissioner of Education had no authority under the statute pursuant to which the grant was awarded to waive the eligibility criterion.

The University in its appeal to this Board acknowledged that it was not eligible for the grant, but asserted as mitigating factors that: (1) The University used grant funds to provide services to veterans consistent with the goals of the grant; (2) the grant was awarded as the result of a technical and honest error which the University itself reported; (3) the University furnished free space, equipment and support personnel for the 1973-74 grant program even though no matching share was required; (4) the University continued the veterans' program with its own funds at an annual level of approximately $55,000 after grant support was withdrawn; and (5) the University met the statutory eligibility criterion but did not apply for grants for the 1974-75, 1975-76, and 1976-77 academic years because it had been led to believe (as the file tends to confirm) that OE, although it had no informal appeals procedure, might reconsider its decision to require the refund, and the University thought that it was ineligible for further assistance while the 1973-74 dispute remained unsettled.

In its response to the appeal, OE requested that the Board "waive the government's right to reimbursement" on many of the same grounds urged by grantee.

The University's conduct is the type of conduct that the government might well wish to encourage in all its grantees, and it would be unfortunate if the University were, in effect, punished for it. Although the University's case is a compelling one from the point of view of equities, however, the Board cannot disregard settled law in its decision-making process.

The Comptroller General has held that the government must recover all funds awarded from grantees subsequently determined to be ineligible for a grant under applicable law and regulations, except in certain unusual situations such as where the statutory or regulatory provisions governing eligibility are unclear. (51 Comp. Gen. 162 (1971), B-146285; B-146285, B-164031(1) April 13, 1972). An Order to Develop Record issued by the Board in this case on May 24, 1978, raised the question whether the statutory provision governing eligibility might not, in fact, have been ambiguous. It asked the parties to brief the issue whether that provision could reasonably be interpreted as requiring that an institution use its best efforts to increase veteran enrollment in the year for which the grant is awarded by 10 percent or that it reasonably project in good faith a 10 percent increase in that year. In its response to the Order, OE took the position that its program regulations correctly interpreted the statute as requiring an increase in fact in the year prior to grant award. The University, on the other hand, indicated that it found the statute ambiguous, and stated that although it had relied on the regulations (then in proposed form as noted above) in

order to determine whether it was eligible for the grant, it had also made a good faith effort to increase its veteran enrollment during the 1973-74 academic year.

The Board's Order to Develop Record also raised the question whether, even if the University was ineligible for the 1973-74 grant, the amount required to be refunded was offset by funds to which the University was entitled but for which it did not apply in the three succeeding years as a result of the pending dispute. The University operated a veterans' program in academic years 1974-75, 1975-76, and 1976-77 although it received no federal assistance. All services initiated under the grant were continued with the exception of outreach activities directed at counseling veterans not enrolled in an institution of higher education but who could benefit from such education. Both the University and OE have agreed that the University met the statutory eligibility criterion in those three years, although the precise amount it would have received in each year has not been determined. OE has indicated, however, that if the University maintained the same enrollment as was reported in May 1974, it would have been eligible for a total of $163,065, which would more than offset the $86,663 which it was requested to refund.

The Order to Develop Record suggested as a possible argument against the propriety of such an offset, however, the fact that the statute provides that an institution shall be eligible to receive the entitlement "only if it makes application therefor to the Commissioner." (42 U.S.C. §1070e-1(c)(1).) But on that point, the Order noted also the possible argument that because the purpose served by the application requirement had been satisfied, it remained only a technicality which should not bar the setoff of funds. The statute requires that an application shall (A) include the necessary showing of eligibility and (B) "set forth such plans, policies, assurances, and procedures as will insure that the applicant will make an adequate effort" (i) to maintain a full-time office of veterans' affairs, (ii) to carry out programs designed to prepare educationally disadvantaged veterans for postsecondary education, (iii) to carry out active outreach, recruiting and counseling activities through the use of funds available under federally assisted work-study programs, and (iv) to carry out an active tutorial assistance program. With respect to (A), the Order noted that both parties agreed that the University was eligible for grants for the three years after the 1973-74 grant. With respect to (B), the Order indicated that there was the evidence of grantee's actual performance in lieu of assurances. Although certain counseling activities were omitted, the Order suggested that if an institution which had actually received a grant had failed to include such activities in its program, at most some proportionate share of the funds might have been disallowed.

Both parties were given an opportunity to submit briefing on whether there could properly be a setoff of funds. OE did not comment on this issue, while the University essentially agreed with the argument suggested in the Order.

Since, however, the statute appears to require an application and, however understandably, none was made after the initial year, and general grant law requires an award (cf. Current Trends in Federal Grant Law - Fiscal Year 1976, 35 Fed. Bar. Jour. 163, 166 (1976)) and none was made after the initial year, we do not rest upon the ground of offset. OE appears inclined and properly so to take whatever steps are necessary to authorize retention of those funds, if legally permissible. Although under appropriate circumstances a retroactive award is not forbidden, it would be most unusual to make one retroactively over several fiscal years. The Board in any case does not undertake to direct the making of an award.

We return, therefore, to the position of the Comptroller General on this subject. The Comptroller General has expressly considered a number of situations having a more or less close analogy to the present one and has ruled on several occasions in favor of mandatory recovery of amounts paid to an ineligible grantee. In spite of these decisions of which we are aware, we believe that the appropriate result in this case is to permit grantee to retain funds which it has received in good faith and has, in fact, applied to the purposes of the grant award consistently with the basic purposes of the statute.

We reach this result on the following grounds. First, the Comptroller General has never taken an absolute and unqualified position regarding such recoveries. He has always noted that there was room to consider the specific facts of specific cases and that in an appropriate case a different result might be reached. We believe that this is such a case. In one decision, the Comptroller General advised the Secretary of HEW that "while there may be some instances where your Department would not be required to seek repayment from a 'technically ineligible grantee,' each case must be decided on its merits." (51 Comp. Gen. 162, 166 (1971), B-146285). A subsequent decision also recognized the possibility of "exceptional or unusual instances in which recovery might not be required," although it did not find that that case presented such circumstances. (B-146285, B-164031(1), April 19, 1972, at p.1). These comments clearly did not intend a wide-open door, but do allow quite deliberately for exceptional cases like this one that meet sufficiently strict tests.

In this connection, a recent decision of the Comptroller General (South Carolina State College, 57 Comp. Gen. 459 (1978), B-190847) gives concrete illustration of the principle that requirement of recovery is not absolute. The Department of Agriculture, having made a 1975 grant to South Carolina State College, subsequently, in fiscal year 1976, changed the scope of the project. The original obligation of 1975 funds was not de-obligated but was carried forward to fund the substitute project. The Comptroller General concluded that the old obligation had been extinguished and a new obligation chargeable to the 1976 appropriation had been created. Thus, with respect to the carryover funds, grantee in substance held them and applied them to the purposes of the project as amended in 1976 by virtue of an award which

for those purposes was not a valid award. The Comptroller General commented as follows:

> "We are also asked to decide whether the funds involved must be recovered from the grantee. Under our decision in this case, the original grant project terminated with an unexpended balance from fiscal year 1975. Any unexpended funds in the hands of the grantee or unallowable costs attributable to the original project should normally be returned by the grantee. However, the substitute grant created a new obligation in fiscal year 1976 that should have been charged against fiscal year 1976 appropriations. The grantee has used at least some of those funds on its new (fiscal year 1976) grant. In these circumstances, it would appear that no funds should be recovered from the grantee as a result of the replacement of the original grant with the substitute or new grant."

It is true that the Comptroller General directed that the Department of Agriculture appropriately adjust its 1975 and 1976 appropriations accounts. It does not appear, however, that the Comptroller General contemplated that this matter could necessarily be adjusted merely by a bookkeeping correction since this was said in the context of the realistic possibility that "the Department's unobligated fiscal year 1976 appropriations are not sufficient to make the adjustment," in which case "a reportable Anti-Deficiency Act violation occurred." Thus, this is a decision in which, on the special facts of this case and having in mind the goals of agricultural research funding to colleges eligible under the 1890 Land Grant Colleges program, funds held and applied in good faith by the recipient were not required to be recovered even though the Department had unintentionally exceeded its statutory and appropriations act authority.

We note secondly that the Comptroller General's decisions have been written primarily in the context of traditional contract law applicable to purchase of goods. The Comptroller General's position is that unlike contract procurement, no quantum meruit ("what he deserves") allowance may be made in a grant situation because, in the latter case, tangible benefits do not accrue to and services are not performed directly for the government. This view appears unnecessarily harsh and rests at least in part on authority concerning the similar but different common law doctrine of quantum valebat ("what it is worth"). Quantum valebat relates to goods had and delivered and naturally requires tangible deliveries (United States v. Mississippi Valley Generating Co., 364 U.S. 520, 566, n.22 (1961). Quantum meruit relates to services rendered and traditionally may well include services rendered by plaintiff to third parties at the request of defendant (or, here, the government). Cf. American Law Institute, Restatement of Contracts, Sec. 348, comment a at 592 (1932):

> "Service or forbearance rendered at the defendant's request is regarded as having been received by him; and the fair price that it would have cost to obtain this service or forbearance from a person in plaintiff's position can be recovered."

Accord, 5 Corbin on Contracts 573, §1107 (1964) at 574-575. Cf. American Law Institute, Restatement of Restitution, Sec. 110, comment b at 457 (1937):

> "A person who has failed to perform a promise has a duty of restitution...irrespective of the fact that the consideration for his promise is...a payment or transfer to a third person. The fact that performance has been given to the third person and not to the promisor does not prevent the promisee from obtaining from the promisor by way of restitution the value of what he gave."

Cf. 5 Corbin on Contracts 629, §1117 (1964) at 633:

> "A promises to convey land to B and the latter promises to support A's parents for a year. After B has rendered the promised support, A refuses to convey the land. B has the following remedies: ...restitution of the value of support received. This support, although not received by A in person, is exactly what he bargained for; and for purposes of the restitutional remedy, he has received it."

Cf. Winston v. Amos, 255 U.S. 373, 393 (1921); Restatement of Restitution, Sec. 107(1) (1937).

In a procurement of goods case, of course, there can be no quantum valebat recovery where the government has not, in fact, received goods of value and retained them for its use. Carrying this test over to the quantum meruit situation where services are called for, provides a somewhat artificial and inappropriate test which we believe the Comptroller General should, and we believe in a suitable case would, reconsider. Since traditional doctrine in the field of restitution permits such recovery where services are rendered by a plaintiff to third parties at the request of defendant, the Comptroller General's decisions denying such recovery in the case of grants to technically ineligible grantees acting in good faith carry the doctrine beyond the applicable precedents into an area where the results are inappropriately harsh and, we believe, contrary to the best interests of the government.

The possibility that the Comptroller General's view might be reconsidered in an appropriate case was recognized in 51 Comp. Gen. 162 (1971), B-146285, which stated that "...we do not believe that the quantum meruit doctrine would be applicable in cases involving grants, at least in the kinds of circumstances presently in question." (p.166.) That case involved a somewhat

parallel maintenance of effort clause where the grantee relied in good faith on a program officer's determination of eligibility. It was later found that grantee was ineligible, although it was otherwise "fully congruent with Congressional and program purposes." (p.164.) It does not appear, however, that the case was as extreme as this one in its facts or in its appeal to equity and discretion, the error here being an error in computation made in good faith, scrupulously reported by the grantee when discovered, the program performance by grantee being outstanding, the grantee having voluntarily continued the program at its own expense for over three years to honor its commitment to the program, and the Congressional purpose being directed more to the quality of the program than to the arithmetic of numbers served (although we do not suggest that that element is to be ignored).

It is understandable and appropriate that the Comptroller General would wish to establish a rather strict rule because a loosely stated position would, indeed, encourage and facilitate abuse. We believe, however, that the Comptroller General, as shown by his careful recognition of the possibility of exceptions, did not intend to apply a completely unqualified rule with no area for judgment, and we believe that a rule of reasonable strictness which is yet not completely unqualified can and should be framed. Since our Board proceeds on a case-by-case basis, it is not appropriate for us at this time to write a rule of legislative character. We suggest, however, that a rule can be developed which makes clear that a decision in favor of the grantee is possible only in cases where the mistaken determination of eligibility results from excusable error, where there is firm assurance of good faith, where the central purposes of the program have been achieved, in this case several years of excellent veterans' education largely paid for out of the grantee's own funds, and where the grantee's behavior with respect to the grant has been scrupulous and exemplary and deserving of encouragement, as is true in this case. This need not invite a loose standard permitting grants to be made to ineligible grantees and then allowed to stand on the ground of error.

Another element to be taken into consideration and which is persuasive here is an assessment of the fundamental purpose of the grant. In this case it was clearly a desire to encourage, stimulate, support efforts to supply special education to veterans so as to assist their readjustment to civilian society and to make up for a portion of the handicap they may have suffered by the interruption of their education and careers by military service. (118 CONG. REC. 5798 (1972) (Remarks of Senator Cranston).) The statute for reasons that are readily understandable and customary in this field requires an increase of effort on the part of the grantee, stated, however, in the form of a somewhat mechanical rule. That test, of course, since it is part of the statute, must not be ignored, and it is that test which turns out to have been violated. Nevertheless, we have no doubt as to the relative importance, in fact, of the educational achievement as compared with the increase of effort requirement. We are unable to believe that the Congress, if the issue had been explicitly presented to it, would not have placed more weight and

more value on the educational achievement than on the requirement of the meeting of an increase of effort clause in the precise and mechanical form set forth in the statute. We are fully satisfied that while Congress intended to direct an increase of effort, it did not intend that on facts as extreme as those presented here there should be no room for a discretionary judgment since that would clearly tend to defeat the purposes not only of this statute in this case but of good grants management and wise government more generally.

The increase of effort test as stated in the statute seems virtually unworkable because it requires as a preliminary to grant application a comparison of figures that cannot be available at the time of the application. The grant regulations resolve this problem but to that extent provide a different test from that in the statute. That fact reinforces the view that the unworkable increase of effort test was a marginal point which the statute cannot have intended to be served at the expense of the basic educational purpose. It also adds to the range of facts that tend to make grantee's error more excusable and more exceptional.

Accordingly, with full awareness of the Comptroller General's decisions in this area, we conclude that they do not necessarily exclude a decision in favor of grantee on these very exceptional and very persuasive facts and do not exclude the possibility that the rule hitherto applied by the Comptroller General will be, as we think it should be, re-examined and stated in a somewhat modified, although still very strict, fashion.

CONCLUSION

The appeal is granted. In view of the University's exemplary services rendered to veterans, fulfilling as they did in an outstanding manner the purposes of the grant award and of the statute, and in view of the additional equities resulting from grantee's scrupulously proper behavior in reporting the error in computation promptly and voluntarily and in continuing the program for the benefit of veterans at its own expense not only for the balance of the grant year but for three succeeding potential grant periods, the University should not be required to refund the amounts received and expended in good faith for the grant purposes before discovery of the error. We do not intend by this decision to give any countenance or support to a rule that would loosely authorize waiver of recovery in cases less extreme on their facts than the present.

/s/ Francis D. DeGeorge

/s/ David V. Dukes

/s/ Malcolm S. Mason, Panel Chairman