

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Circle of Parents
Docket No. A-12-18
Decision No. 2439
February 3, 2012

DECISION

Circle of Parents appealed the October 4, 2011 determination by the Administration for Children and Families (ACF) regarding Grant No. 90FR0098 (Promoting Responsible Fatherhood Program). ACF determined that Circle of Parents provided only \$93,964 of the \$111,121 in non-federal matching funds required under the terms and conditions of its fiscal year (FY) 2009 award. Consequently, ACF disallowed \$15,432 in federal funds based on 45 C.F.R. §§ 74.62(a)(2) and 74.25 and section 3.05.410 of the ACF Grants Administration Manual (GAM). Circle of Parents acknowledged it failed to provide the full amount of its non-federal share but argued that the balance should be waived because of its good faith efforts, the difficulty in raising sufficient funds, and ACF communications indicating that the amount of the non-federal share could be reduced when the grant was closed out.

For the reasons explained below, we conclude that Circle of Parents has not provided grounds for the Board to reverse or modify ACF's action. Accordingly, we sustain the disallowance.

Background

The Matching Funds Requirement

Under the terms of its FY 2009 award, Circle of Parents was required to provide a non-federal share of \$111,121 in cash or in-kind donations. Grant No. 90FR0098/03. This amount was 10% of the total project budget. *Id.* ACF notified grant applicants of the non-federal share requirement in the announcement of the availability of competitive funds to support the Promoting Responsible Fatherhood Program. HHS-2006-ACF-OFA-FR-0144. The announcement stated: "Failure to provide the required amount [of non-federal share] will result in the disallowance of Federal funds." *Id.*

The ACF Determination

ACF concluded in its October 4, 2011 determination that Circle of Parents “obtained \$93,964 of the required match” and that, consequently, \$15,432 of the federal funds provided should be disallowed. October 4, 2011 Determination at 2. Describing the basis for the disallowance, ACF stated that under 45 C.F.R. § 74.62(a)(2), ACF may take a disallowance if a grantee materially fails to comply with the terms and conditions of an award. ACF also relied on section 74.25 of the regulations, “Revision of budget and program plans,” which states that the budget plan is the financial expression of the project or program as approved during the award process. 45 C.F.R. § 74.25(a). In addition, ACF relied on section 74.25(b), which provides that grantees are required to report budget deviations and must request prior approval for budget revisions. Here, ACF stated, it was taking the disallowance because Circle of Parents admittedly “failed to meet the 10 percent matching requirement outlined under the terms and conditions of the grant award” and “failed to obtain [the] prior approval needed to reduce the non-Federal match to less than 10 Percent.” October 4, 2011 Determination at 2-3. ACF calculated the disallowance amount based on the methodology explained at section 3.05.410 of the GAM.

Circle of Parents' Appeal

In its appeal to the Board, Circle of Parents acknowledged that it did not meet the full 10% non-federal share requirement of its FY 2009 award. Circle of Parents stated that it had made its best efforts to meet the match fully. Circle of Parents noted that it had “instituted changes responsive to the findings and management recommendations [it] received, and [was] able to conclude the FY 2011 exceeding [its] non-federal match by approximately \$3,000.” October 27, 2011 Notice of Appeal at 1. Circle of Parents explained that it was successful in raising 85% of the amount required for FY 2009 in spite of the economic downturn and the prohibition against using federal funds to fundraise in OMB Circular No. A-122, Attachment B. Moreover, Circle of Parents stated:

In the course of the year, on two separate occasions our Executive Director . . . advised appropriate grants management of the challenges we were experiencing with raising the full match amount. On each occasion, she was encouraged to make a good faith effort to meet the full match, which we attempted to do. The Board did not formally seek approval to reduce the Non-Federal match because we remained hopeful that we would be able to do so in the end, and because we felt the communication from our executive director to the grants officer was sufficient.

Id. at 2. For the reasons cited, Circle of Parents asked the Board “to waive the remaining balance of \$15,432 against [its] matching requirement for 2009.” *Id.*

The Board's November 2011 Order and the Parties' Responses

In a letter dated November 7, 2011, the Board advised the parties that under 45 C.F.R. § 16.14, the Board is bound by applicable laws and regulations and does not have the authority to waive the non-federal share requirement. The Board noted that while ACF's determination stated that Circle of Parents did not obtain prior approval to reduce the non-federal share amount, ACF did not indicate whether a waiver could be granted by ACF retroactively in this matter. To clarify the issues, the Board ordered ACF to submit a statement as to whether ACF had the authority to grant approval retroactively in this case, and, if so, whether ACF had denied or is now denying Circle of Parents' retroactive request. The Board ordered Circle of Parents to submit a statement clarifying whether it was seeking only a retroactive waiver of its non-federal share requirement or was also challenging the underlying audit findings and disallowance. Acknowledgment of Notice of Appeal dated November 7, 2011, at 2-3.¹

In response to the Board's order, ACF submitted a statement that it had "considered the retroactive waiver request and . . . cannot grant it." ACF stated that "[u]nder the statute and regulations governing the Promoting Responsible Fatherhood program," it "does not have the authority to retroactively waive the matching fund requirement." ACF Letter to the Board dated November 28, 2011, at 2.

In response to the Board's order, Circle of Parents submitted a statement that it "seeks only a retroactive waiver of its non-federal share requirement for 2009," and is "not challenging the underlying audit findings and disallowance." Circle of Parents Letter to the Board dated December 16, 2011.

The Board's Case Summary and Order to Show Cause

On January 12, 2012, the Board issued a case summary and order to show cause why it should not issue a decision sustaining the disallowance. The Board stated that in light of the grant terms and legal authority, Circle of Parents' clarification that it did not dispute ACF's basis for the disallowance, and ACF's conclusion that it did not have the discretion to grant retroactive relief, it appeared that there was no basis for the Board to

¹ The letter also advised the parties that when the amount in dispute is \$25,000 or less, the expedited procedures under 45 C.F.R. § 16.12 usually apply. The expedited procedures are not appropriate, however, if the Board Chair determines that exceptional circumstances require additional procedures. See Appellate Division Practice Manual at <http://www.hhs.gov/dab/divisions/appellate/practicemanual/manual.html>. Here, the Board Chair determined that exceptional circumstances required additional procedures in order to develop a sound record for the Board's review.

reverse the disallowance. The Board noted that Circle of Parents was required by the notice of grant award to provide a non-federal share of \$111,121 in cash or in-kind donations, that Circle of Parents acknowledged that it provided only \$93,964, and that Circle of Parents did not deny that it did not request prior approval to revise its budget to reduce the non-federal share, as required under the applicable regulations. Accordingly, the Board stated, it appeared that ACF reasonably concluded that Circle of Parents materially failed to meet an express term of the grant and, consequently, \$15,432 of the federal funds provided should be disallowed.

The Board also noted that even if ACF had the discretion to grant the retroactive relief requested, the Board found nothing in the record to support a conclusion that ACF would abuse its discretion were it to deny Circle of Parents' request.² In this case, the Board said, ACF could have reasonably concluded that Circle of Parents' rationale to support its request – that it made its “best efforts” to meet the non-federal share requirement, that these efforts were impeded by the recession and the prohibition on the use of federal grant funds for fundraising, and that it kept ACF apprised of its efforts – was insufficient to warrant retroactive approval of a reduction in non-federal share. The Board observed that Circle of Parents' statement that it subsequently instituted changes based on the audit findings and recommendations and concluded FY 2011 exceeding the non-federal share requirement showed that the challenges to raising non-federal funds were not insurmountable.

Accordingly, the Board ordered Circle of Parents to show cause why the Board should not issue a decision to sustain the disallowance. The Board also stated that if it determined that Circle of Parents did not make that showing, the Board would proceed to decision without further submissions from the parties.

Circle of Parents' Response to the Board's Order

In response to the Board's order to show cause, Circle of Parents disagreed with the Board's description of its efforts to seek guidance on the matching funds issue and with the Board's “assertion that ‘ACF did not indicate whether a waiver could be granted by

² The Board has applied an abuse of discretion standard in reviewing agency denials of requests for retroactive approval of budget revisions where such retroactive approval was permitted by regulation or agency policy. *See, e.g., River East Economic Revitalization Corporation*, DAB No. 2087 (2007) (sustaining ACF denial of request to approve retroactively pre-award costs where retroactive approval was permitted under regulation); *Economic Opportunity Council of Suffolk, Inc.*, DAB No. 714 (1985) (sustaining ACF denial to approve retroactively expenditures that were not included in the approved budget where retroactive approval was permitted under the Grants Administration Manual as then in effect).

ACF retroactively in this matter.” January 20, 2012 Response to Order to Show Cause at 1. Circle of Parents stated that its Executive Director “did raise the subject of the challenges [it was] experiencing meeting the matching targets with appropriate grants management” [and] “engaged in a number of telephone conversations on this subject and one e-mail exchange.” *Id.* Circle of Parents provided copies of the e-mails, which were dated January 10 and 11, 2011. Circle of Parents stated that ACF’s e-mail “reiterated three points that [ACF] had . . . previously communicated” to Circle of Parents:

- The Office of Grants Management has the discretion to proportionately reduce the grant or perform a “de-obligation” to compensate for an unmet match;
- Such a determination is made as part of the closing process on the grant (suggesting there was no urgency in resolving the matter); and
- Circle of Parents was encouraged to make a good faith effort to meet the match requirement.

Id. “Based on this correspondence,” Circle of Parents stated,” it “made every effort to meet the grant matching requirement” *Id.* Circle of Parents asserted that it was “led to believe” that ACF would likely “reduce or de-obligate the matching requirement” when the grant “was closed out.” *Id.* at 1-2. Circle of Parents also stated that it “exceeded the full match requirement in FY 2011,” that it “spent only \$980,000 of [that] \$1,000,000 grant award, and that [o]ver the course of the five-year grant,” it “underspent by \$26,498.” *Id.* at 2. Circle of Parents requested that “a portion of this unspent balance of [its] FY 2011 grant be applied to meet the full balance of the unraised match difference from prior fiscal years.” *Id.* at 2.

Circle of Parents has not provided a valid basis for the Board to reverse or modify the disallowance.

Circle of Parents has not shown a valid basis for the Board to reverse or modify the disallowance. Circle of Parents misconstrues the statement in the Board’s order that “ACF did not indicate whether a waiver could be granted by ACF retroactively in this matter.” As reflected in the complete sentence from which the statement was drawn, the Board was referring specifically to ACF’s October 4, 2011 determination, not to any prior communications between the parties. (“The acknowledgment also noted that while ACF’s determination stated that Circle of Parents did not obtain prior approval to reduce the non-federal share amount, ACF did not indicate whether a waiver could be granted by ACF retroactively in this matter.” Order to Show Cause at 3.) Thus, to clarify the issues on appeal, the Board ordered ACF to submit a statement addressing whether ACF had the legal authority to grant a retroactive waiver in this case.

In any event, Circle of Parents' efforts to seek guidance on the matching funds issue and the prior communications between the parties do not provide grounds for the Board to reverse or modify the disallowance. The Board is bound by all applicable regulations, including the requirement at section 74.25 that a grantee must request prior approval for a budget revision and the provision at section 74.62(a)(2) that authorizes ACF to take a disallowance if a grantee materially fails to comply with the terms and conditions of an award. Circle of Parents does not deny that the non-federal share requirement was an express term of its award and that it did not seek the requisite prior approval needed to revise this part of its FY 2009 budget. Moreover, Circle of Parents' January 10, 2011 e-mail to ACF stated that Circle of Parents' "under[stood] that failure to meet a match requirement is subject to a proportionate reduction in the federal share." January 10, 2011 e-mail from Executive Director, Circle of Parents to ACF Office of Grants Management.

Furthermore, contrary to what Circle of Parents suggests, ACF did not indicate in its January 11, 2011 e-mail that it might grant a retroactive waiver in this matter. In response to Circle of Parents' question of how its failure to meet its match requirement would impact its federal share of funding, ACF stated: "At the discretion of the Office of Grants Management, your program *Federal funds* will/can be proportionately reduce[d], or a de-obligation will be performe[ed] as part of the closing process . . . when your grant has expire[d]." (Emphasis added.) ACF also advised Circle of Parents that "these steps will affect future funding decision[s] by ACF" and to "do everything in order to meet your matching requirement." Thus, ACF advised Circle of Parents that if it failed to meet the non-federal share amount in full, ACF had the authority to reduce the federal funds previously awarded under the grant, not that ACF had the authority to waive the non-federal share amount that Circle of Parents failed to raise.

Finally, the Board does not have the authority to permit Circle of Parents to use the unspent balance of federal funds awarded under its FY 2011 grant to meet the matching funds shortfall for its FY 2009 grant. "The Board does not have jurisdiction over determinations concerning the disposition of unobligated balances reported by a grantee." 45 C.F.R. Part 16, Appendix A, ¶ (C)(a)(1); *Putnam-Clay-Flagler Economic Opportunity Council, Inc.*, DAB No. 1521 (1995). Thus, the Board cannot direct ACF to allow Circle of Parents to apply the unspent balance from its FY 2011 grant toward the matching funds requirement of its FY 2009 grant.

Conclusion

For the reasons stated above, we sustain the disallowance.

/s/
Judith A. Ballard

/s/
Leslie A. Sussan

/s/
Sheila Ann Hegy
Presiding Board Member