

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Action for a Better
Community, Inc.
Docket No. A-06-130
Ruling No. 2008-2

DATE: November 20, 2007

Ruling on Request for Reconsideration

On August 7, 2007, we issued a decision, DAB No. 2104 (2007), affirming the determination by the Administration for Children and Families (ACF) to disallow expenditures of Head Start and Early Head Start grant funds by Action for a Better Community, Inc. (ABC). On September 10, 2007, ABC submitted a request for reconsideration of our decision. In support of its reconsideration request, ABC submitted ABC Exhibit T, which we have made part of the record.

The Board may reconsider a decision if "a party promptly alleges a clear error of fact or law." 45 C.F.R. § 16.13. Having considered the contentions and additional evidence supporting ABC's request for reconsideration, we conclude that our August 7, 2007 decision was not based on a clear error of fact or law and, therefore, decline to modify or reverse the decision.

The reconsideration request concerns the portion of our decision which affirmed a disallowance of \$534,158 in expenditures that ABC charged to Head Start grant number 02CH0730/40.¹ ACF disallowed that amount based largely on a Financial Status Report (FSR) that ABC prepared in June 2005. See DAB No. 2104, at 15-16; ACF Ex. 17. The June 2005 FSR, which was signed and certified as "correct and complete" by ABC's president and chief executive officer, James H. Norman, showed a negative "unobligated balance of federal funds" of \$534,158. DAB No. 2104, at 9 & n.10. On its face, this negative value indicated that, for the Head Start program authorized under grant number

¹ Our August 7, 2007 decision affirmed a disallowance of expenditures totaling \$906,745. The reconsideration request specifically asks us to revisit our conclusions regarding \$534,158 of those disallowed expenditures. Request for Recon. at 3. Accordingly, our discussion here does not concern – and we do not reconsider – our conclusions with respect to the balance of the disallowance.

02CH0730/40, ABC had expended \$534,158 (in federal funds) more than it had been authorized to spend for the period February 1, 2004 to April 30, 2005. Id. at 9, 15-16, 19.

ABC contended in its appeal briefs that the June 2005 FSR shows an over-expenditure of \$534,158 because of an accounting error. In particular, ABC claimed that it reported an over-expenditure on the June 2005 FSR because expenditures authorized under grant number 02YC0325/05 were mistakenly counted and reported as outlays under grant number 02CH0730/40. DAB No. 2104, at 16-17. In support of that claim, ABC submitted ABC Exhibit M, which contained the following:

- a revised but *unsigned* FSR for grant number 02CH0730/40, which showed a positive unobligated balance of federal funds for the period February 1, 2004 to April 30, 2005; and
- an *unsigned* final FSR for grant number 02YC0325/05 for the period May 1, 2002 to December 31, 2005.

Id. at 17-18. ABC also submitted a November 16, 2006 opinion letter from Heveron & Heveron, an accounting firm. Id. at 18. The November 16, 2006 opinion letter states that Heveron & Heveron had "audited the amounts reported on line J" of the FSRs in ABC Exhibit M, and further states that, in the firm's opinion, line J of those FSRs "present[s] fairly, in all material respects the total federal share of net outlays in conformity with accounting principles required for the Financial Status Report."² ABC Ex. K. ABC contended in its appeal briefs that the FSRs in ABC Exhibit M, the November 16, 2006 opinion letter, and the documents in ABC Exhibits L through S, which ABC alleged were the "working papers" supporting the opinion letter, were sufficient evidence that the "unobligated balance of federal funds" under grant number 02CH0730/40 for the period February 1, 2004 to April 30, 2005 was positive, not negative as indicated in the June 2005 FSR. See Reply Br. at 1-3.

ABC now contends, in its request for reconsideration, that our decision to affirm the disallowance of \$534,158 "hinges on" two

² The opinion letter does not identify the FSRs it refers to by grant number, so we cannot be absolutely certain that the opinion actually concerns the FSRs in ABC Exhibit M or their signed versions in ABC Exhibit T (submitted with the request for reconsideration). For purposes of our August 7, 2007 decision and this ruling on ABC's reconsideration request, we have assumed that the letter expressed an opinion about those FSRs.

erroneous findings. Request for Recon. at 1. According to ABC, one of those findings was that the FSRs in ABC Exhibit M "were not credible because they were unsigned." Request for Recon. at 1. ABC asserts that this "credibility" finding is erroneous in light of the documents contained in ABC Exhibit T. Id. at 2. Among other things, ABC Exhibit T contains a July 23, 2007 letter to ACF from Mr. Norman, ABC's president. In relevant part, the July 23rd letter states:

After reconciling the federal expenditures for the periods covered by these awards, we have noted that federal expenditures authorized under grant award 02YC0325/05 were inadvertently included on the SF269 under grant award 02CH0730/40 (resulting in a reported over-expenditure [on the June 2005 FSR]) and that a final SF269 for the grant award 02YC0325/05 was never filed with ACF. We have corrected these issues in the enclosed documents which have been certified by ABC's external auditors.

ABC Ex. T (emphasis added). The "enclosed documents" are apparently the second, third, and fourth pages of Exhibit T. Page two of the exhibit is a revised FSR regarding grant number 02CH0730/40 for the period February 1, 2004 to April 30, 2005, and page three is a final FSR for grant number 02YC0325/05 for the period May 1, 2002 to December 31, 2005. These documents are identical to the unsigned FSRs in ABC Exhibit M except that they are signed and certified by ABC's president, whose signature is dated November 13, 2006. (Page 4 of ABC Exhibit T is a copy of Heveron & Heveron's November 16, 2006 opinion letter.) ABC asserts that "to the extent that the lack of a signature/certification cast[s] doubt on the credibility of ABC's evidence, ABC's submission of the executed and corrected Financial Status Reports [to ACF on July 23, 2007, and to the Board in the request for reconsideration] should dispel any doubts." Id.

None of these assertions is a basis for reversing or modifying our decision.³ First, we disagree that our decision hinged on a finding that the FSRs in ABC Exhibit M lacked "credibility" because they were unsigned. Our decision contained no such finding. We merely determined that those documents were entitled

³ ABC does not contend that the July 23, 2007 letter in ABC Exhibit T has any independent significance. The letter merely transmits certain documents to ACF and repeats ABC's chief contention in the underlying appeal, which is that the over-expenditure reported on the June 2005 FSR was the result of an accounting error.

to less weight than the June 2005 FSR, which ABC prepared, certified, and submitted to ACF in the normal course of business (and not for purposes of litigation, as the FSRs in ABC Exhibit M and T seem to have been⁴), and which showed an over-expenditure whose existence ABC's chief financial officer confirmed in pre-disallowance communications with ACF. ACF Ex. 13, at 2 (May 2005 e-mail messages between Todd Humphrey (ABC's chief financial officer) and Hilda Falcon-Santos (ACF Financial Operations Specialist)); DAB No. 2104, at 19-20 (stating that the Board was assigning more weight to the signed and certified June 2005 FSR "absent clear evidence" that the June 2005 FSR was not correct or complete).

In any event, the signed and certified FSRs in ABC Exhibit T add no significant or material weight to ABC's position.⁵ In particular, their existence does not, in itself, establish that the "expenditures authorized under grant award 02YC0325/05 were inadvertently included" on the June 2005 FSR for grant number 02CH0730/40 or, more importantly, prove that the disallowed expenditures are allowable under one or more of ABC's grants. They merely create or accentuate an evidentiary conflict. With respect to grant number 02CH0730/40, the record now contains two

⁴ The FSRs in ABC Exhibit T purport to have been executed on October 13, 2006, more than four months after ACF issued its notice of disallowance, and were not submitted to ACF until July 23, 2007, after the last appeal brief in this case was filed.

⁵ ABC asserts that ACF did not raise the absence of signatures on the FSRs as an issue until its July 6, 2007 sur-reply and thus it lacked an opportunity to address the issue or submit relevant rebuttal evidence. Request for Recon. at 2. This contention provides no basis for reconsideration because ABC could have objected to the sur-reply or asked us for leave to file rebuttal evidence prior to the issuance of our decision but failed to do so. In addition, because ABC had the burden of showing that the disallowance was erroneous (see DAB No. 2104, at 14), and because the signed-and-certified FSRs in ABC Exhibit T indicate that they were signed by ABC's president on November 13, 2006, those documents could – and should – have been submitted with ABC's appeal briefs. (ABC's appeal briefs were filed on December 22, 2006 and May 2, 2007.) In any event, we have considered and made part of the record the only rebuttal evidence that ABC has identified or proffered – namely, the contents of ABC Exhibit T. Having done so, we disagree, for the reasons explained more fully in the text above, that the reliability or accuracy of the "executed and corrected" FSRs in ABC Exhibit T has been established.

signed and certified FSRs that report radically different results for the same accounting period: the June 2005 FSR shows an over-expenditure of \$534,158, and the revised FSR in ABC Exhibit T shows an under-expenditure of \$129,914. Both FSRs are certified as "correct and complete." It was ABC's burden to show which document was, in fact, correct and complete.

As indicated, ABC attempted to carry that burden by relying on the November 16, 2006 opinion letter as well as ABC Exhibits L through S, which ABC characterized as the basis for the letter's conclusions. DAB No. 2104, at 17-18. ABC contends that the second error upon which our decision rests was our refusal to give those conclusions any weight because the opinion letter did not contain a sufficient description of Heveron & Heveron's audit methodology. Request for Recon. at 1-2. According to ABC, this refusal was inappropriate partly because -

the Board's reference to Heveron & Heveron, P.C. as ABC's "accountants" suggests that the Board did not understand that Heveron & Heveron, P.C. was ABC's independent auditor - the very auditing firm responsible for the audit report that ACF cited in support of its disallowance determination. ABC cannot otherwise discern any basis on which the Board would credit the 2005 audit finding regarding the \$534,158 over-expenditure, yet discount a later opinion of the same auditors revising that finding.

Request for Recon. at 2.

We find no merit in these assertions. We understood that Heveron & Heveron had acted as ABC's independent auditor in performing a financial compliance audit required by the Single Audit Act (SAA), 31 U.S.C. § 7502, for the fiscal year ending September 30, 2004. See DAB No. 2104, at 18 & n.18. However, there is no evidence that, in issuing the November 16, 2006 opinion letter, Heveron & Heveron was acting as an independent auditor or that its audit of the FSRs in ABC Exhibit M was part of the earlier financial and compliance audit.

ABC's suggestion that the November 16, 2006 opinion letter "revised" a prior audit finding presumably refers to the following statement in the report of Heveron & Heveron's financial and compliance audit for the year ending September 30, 2004:

The Cash Management general requirement stipulates that federal advance payments be disbursed in a timely manner. The organization's financial statements

confirm that the organization received approximately \$567,000 of advance payments in excess of total approved contract awards.

ACF Ex. 14 (pg. 18 of Independent Auditors' Report). We see no evidence that the November 16, 2006 opinion letter revised that finding. The opinion letter itself does not so state. Instead, the opinion letter states conclusions about an audit of FSRs that cover fiscal periods ending in April 2005 and December 2005, periods that extend well beyond the period covered by the financial and compliance audit. In addition, the report of the financial and compliance audit does not indicate that Heveron & Heveron reviewed the disputed FSRs in connection with that audit.⁶

In addition, our decision provided clear and adequate reasons for discounting the November 16, 2006 opinion letter. One of those reasons was that Heveron & Heveron "failed to describe the evidence and analysis supporting [that] opinion." DAB No. 2014, at 20. Another reason was that ABC failed to prove that, in auditing the FSRs in ABC Exhibit M, Heveron & Heveron actually examined or relied on the documents that were alleged to be the "working papers" supporting its opinion (*i.e.*, ABC Exhibits L through S). Id.

ABC contends that these were improper grounds for ignoring the opinion letter and its conclusions. Request for Recon. at 2-3. ABC maintains that it "provid[ed] the analysis supporting the

⁶ It is true that, in support of its disallowance of \$534,158, ACF's August 23, 2006 notice of disallowance states that Heveron & Heveron's financial and compliance audit for the year ending September 30, 2004 "found, as confirmed by the financial reports, that the grantee had drawn approximately \$567,000 of Federal cash advance payments in excess of total approved awards." ABC Ex. A, at 1. But it is clear from the record that the basis for the disallowance was not an audit finding by Heveron & Heveron but ABC's reporting of an over-expenditure on the June 2005 FSR, an over-expenditure that ACF says it confirmed during a June 2005 on-site monitoring review. ABC Ex. A, at 1; see also ACF Ex. 17 (September 27, 2005 letter from ACF to ABC stating that ACF had received the June 2005 FSR and that its reported over-expenditure of \$534,158 was subject to disallowance); ACF Ex. 16, at 2 (letter from ABC's chief financial officer, Todd Humphrey, to the ABC Board of Directors stating that ABC had "reported an excess of Head Start expenditures over awarded revenue over the last two Head Start contract years (1/31/04 and 1/31/05)").

revised Financial Status Reports and which Heveron & Heveron reviewed in auditing those revised reports[.]” Id. at 3. ABC further states:

Neither ACF’s further objection in its surreply nor the Board’s observation that “there are no statements or other evidence that the so-called working papers were a basis for, or related to, the accountants’ November 2006 opinion regarding the revised FSRs” can justify simply disregarding ABC’s evidence on a matter so central to ABC’s appeal. The more appropriate course of action would have been to hold either an informal conference where the parties would have an opportunity to address any lingering concerns that the Board might have or an evidentiary hearing at which ABC would have been able to present testimony from Heveron & Heveron, and ACF would have been able to conduct cross-examination.

Id.

These contentions are unavailing. ABC’s suggestion to the contrary notwithstanding, there is no evidence that Heveron & Heveron, whose November 16, 2006 letter essentially expresses an expert opinion, based that opinion on the documents in ABC Exhibits L through S. ABC’s attorney asserted that these exhibits were the “working papers underlying the auditors’ certification,” Reply Br. at 2, but that assertion is, of course, not evidence. The opinion letter itself fails to confirm counsel’s assertion. It merely states that Heveron & Heveron’s audit included an examination, on a “test basis,” of “evidence supporting the amounts reported” without specifying what that supportive evidence was. ABC Ex. K.

By itself, the opinion letter has practically no value. The letter expresses only conclusions. We are not required to accept such conclusions – or, for that matter, the opinion of any expert – at face value. If a party seeks to rely on the opinion of an expert, it must offer, or seek to offer, evidence of the opinion’s foundation to ensure that it is reliable. Cf. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (discussing a trier of fact’s obligation under the Federal Rules of Evidence to inquire into the reliability of expert testimony); Koester Pavilion, DAB No. 1750 (2000) (“An expert’s opinion lacks relevance when based on factual foundations that are not proven.”). As our decision found, DAB No. 2104, at 20, ABC failed to submit evidence of the facts and reasoning underlying Heveron & Heveron’s conclusions or show why those conclusions, none of which mention the June 2005 FSR, prove that ABC committed

an accounting error when it reported an over-expenditure on the June 2005 FSR. This failure justified our refusal to credit Heveron & Heveron's opinion.

Finally, contrary to ABC's assertion, it was not inappropriate for the Board to decide the appeal without an informal conference or evidentiary hearing. Parties do not have an absolute right to a Board conference or hearing. The Board "may," on its own initiative or at a party's request, hold an informal conference in order to give the parties an opportunity to clarify issues and to question the parties about matters which it may not yet fully understand from the record. 45 C.F.R. § 16.10(a). Similarly, the Board will approve a party's request for an evidentiary hearing, or schedule such a hearing on its own, if it finds that there are "complex issues or material facts in dispute the resolution of which would be significantly aided by a hearing, or if the Board determines that its decisionmaking otherwise would be enhanced by oral presentations and arguments in an adversary, evidentiary hearing." 45 C.F.R. § 16.11(a). Our regulations state that if a party believes that a hearing is appropriate, it "should specifically request one at the earliest possible time (in the notice of appeal or with the appeal file)." Id.

Prior to the Board issuing its decision, ABC did not request an informal conference or an evidentiary hearing. Nor did ABC contend in its briefs that the existing record created a dispute of material fact that made an evidentiary hearing necessary. The Board itself had no "lingering concerns" or unanswered questions, finding the briefs and exhibits submitted by the parties sufficient to reach a decision. Nothing in ABC's reconsideration request has altered the Board's conclusion in that regard. As discussed, ABC failed to substantiate the opinion of Heveron & Heveron. It also failed to offer evidence disavowing or retracting statements by its former chief financial officer indicating that the over-expenditure reported on the June 2005 FSR was the result of circumstances other than an accounting error. See DAB No. 2014, at 22. In addition, the Board concluded – and ABC does not now dispute – that the evidence that ABC alleged was the basis for Heveron & Heveron's opinion (ABC Exhibits L through S) failed to confirm that expenditures associated with grant number 02YC0325/05 were erroneously included in the amount reported as expenditures in the June 2005 FSR. DAB No. 2104, at 20-22. Under the circumstances, the Board appropriately resolved this matter without an informal conference or evidentiary hearing.

Conclusion

For the reasons discussed, we deny ABC's request for reconsideration.

Leslie A. Sussan

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