DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: South Dakota Department of Social Services DATE: January 21, 1981
Docket No. 78-72-SD-HD
Decision No. 142

DECISION

The South Dakota Department of Social Services (State) appealed by letter dated July 24, 1978 from the June 8, 1978 determination of the Acting Regional Program Director, Region VIII, Public Services Division, Office of Human Development Services (Agency), disallowing Federal financial participation (FFP) in expenditures claimed by the State as training costs under Title XX of the Social Security Act for the quarter ended March 31, 1978. The items appealed were: (1) $2,757 claimed for travel and per diem costs which the Agency found were incurred in connection with training lasting less than five full days; and (2) $561.93 claimed for payments to two individuals hired to provide training at rates which exceeded their rates of pay in their regular employment. A third item, $300 claimed for supplies purchased by the Communication Service for the Deaf under a contract with the State agency to provide training, was disallowed but not appealed. The two items appealed are discussed separately below.

The record on which this decision is based consists of the State's application for review, the Agency's response to the appeal, the parties' responses to an Order to Develop Record issued by the Board Chairman, and documentation subsequently submitted by the State at the Board's request. The Agency declined an invitation to respond to the State's last submission.

Travel and Per Diem Costs

The Agency found that the State had claimed travel and per diem costs incurred for attendance at training programs which lasted less than five full work days and disallowed those costs on the ground that 45 CFR 228.84 (1977) allows only education costs for attendance at such training programs. That section provides, in pertinent part, that--

> "[c]osts matchable as training expenditures include:
>
> > (a)(2) For State agency employees in full-time training programs of less than eight consecutive work weeks: per diem, travel and educational costs;

(a)(3) For State agency employees in part-time training programs (part of work week, evenings, mornings): Education costs."

In its application for review, the State asserted that it was not advised that the Agency interpreted part-time training as including any training lasting less than five full days until some fifteen months after the final 1977 regulation was published, and that it was therefore unfair for the Agency to take a disallowance based on this interpretation. Since the regulation was issued in January 1977, the State's contention is that it did not have notice of the Agency's interpretation until after the end of the quarter during which the costs were incurred.

The Agency responded that Section 228.84(a)(3) clearly indicates by the phrase "part of work week" that "part-time" means less than five full days. In support of its position it cited PIQ 77-88, a memorandum from the Acting Commissioner, Administration for Public Services, to the Regional Program Director, Region IV, Administration for Public Services, dated September 14, 1977, which responds to a request by the latter for clarification of certain portions of the 1977 regulation. Part-time training is defined in PIQ 77-88 as training which lasts "less than a full day even though on a recurring basis or less than a full week, even though including one or more full days."

The State also argued that the Agency's interpretation was unfair in its application to the State of South Dakota. It noted in particular "distances involved and travel time," that many State agency offices are small and cannot afford to have staff absent for periods as long as five full days, and that it is difficult to obtain qualified trainers for that length of time. It also indicated that a shorter training program might be more effective than one lasting five full days.

The State also contended that the costs claimed in Voucher #148390 ($15.00) were not incurred for travel and per diem but rather for tuition and thus were allowable as an education cost under 45 CFR 228.84(a)(3). It further stated that the costs claimed in Voucher #144899 ($113.80) were in fact for training lasting five days. It also argued that a training program which it identified as "Regulatory Administration & Licensing" in connection with which travel and per diem costs were claimed, (amount not identified), lasted five full days, although the individuals who incurred the travel and per diem costs did not attend the entire program.

The issue of the allowability of travel and per diem costs for training lasting less than five full days has been addressed in several prior Board decisions. Montana Department of Social and Rehabilitation Services, Decision No. 119, September 29, 1980; Alabama Department of Pensions and Security, Decision No. 128, October 31, 1980; Oregon Department of Human Resources, Decision No. 129, October 31, 1980; and Utah Department of Social Services, Decision No. 130, October 31, 1980 (copies enclosed). In those decisions, the Board found that the practice of the Agency's regional offices had been to allow travel and per diem costs incurred with respect to such training, and further, that it was Agency policy not to hold states to the Agency's interpretation of "part-time training" as training lasting less than five full days until the states received actual notice of the interpretation. The Board found in addition that the Agency's interpretation was clearly articulated in PIQ 77-88, and sustained the disallowances in those cases to the extent that they covered periods after each state received actual notice of PIQ 77-88 or its contents.

In the Order to Develop Record issued in this case, the Agency was asked to provide documentation showing when and in what manner PIQ 77-88 was communicated to the State, if it was. The Agency responded that "[w]hile respondent's regional office in Denver sent all PIQ's to the states within its jurisdiction as soon as they were received as a matter of practice, there is no documentation available in the regional office that will document that fact." (Respondent's Reply to the Board's Order to Develop Record, p. 1.) This response does not constitute a sufficient showing that South Dakota received PIQ 77-88 before March 31, 1978, the close of the quarter in question, however. Accordingly, since there is no evidence in the record that the State was otherwise informed of the interpretation prior to March 31, 1978, we reverse the disallowance of travel and per diem costs in full. In view of this conclusion, we need not address either the State's contention that certain of the travel and per diem costs were allowable even if the Board were to determine that the State was bound by the Agency's interpretation during the period in question, or its contention that the State was not bound by the Agency's interpretation on other grounds.

Trainers' Salaries

The State paid to a Mr. Gull and a Mr. Stewart $675 each for four days of training, or $168.75 per day. The Agency stated that in their regular positions as college teachers, these individuals were paid $76.62 and

$73.47 per day, respectively, and disallowed the difference between the daily rate paid by the State and the daily rate normally earned by each individual, for a total disallowance of $749.24, or $561.93 FFP. The notification of disallowance cited in support of the disallowance 45 CFR 228.84(c)(1), which allows FFP in salaries, fringe benefits, travel and per diem costs incurred by experts outside the State agency engaged to develop or conduct special programs, but did not indicate specifically how this regulation governed the rates at which salaries could be paid.

In its response to the appeal, the Agency did not contend that Section 228.84(c)(1) specifically limits salaries paid to outside experts to the salaries paid in their regular employment. It argued, however, that the services performed by the trainers for the State were "commensurate with their regular employment," and that common sense therefore dictated that the salaries received by them in their regular employment should be determinative of the amount chargeable to Title XX for training provided by them. It asserted that in the absence of specific information regarding the duties performed by the individuals as Title XX training, it could only conclude that payments which were double their regular rates of pay were unreasonable. The Board's Order to Develop Record noted that some support for the Agency's approach might be found in 45 CFR Part 74, Subpart Q, Appendix C, Part II, Section B.10.a. (made applicable to this grant by 45 CFR 201.5(e)), which provides that compensation for personal services "will be considered reasonable to the extent that it is consistent with that paid for similar work in other activities of the State or local government."

The basis for the State's objection to the disallowance of the trainers' salaries was not clear in its application for review. In response to the Order, the State indicated that it agreed that the trainers' rates of compensation for Title XX training should be limited to the rates at which they were paid in their regular employment. The State asserted, however, that the Agency did not but should have considered the time spent by the trainers in preparing and developing the training session in determining the rate at which they were paid for the training. The State noted that 45 CFR 228.84(c)(1) explicitly refers to "development" of training programs. The Agency, on the other hand, offered the "suggestion" in its response to the appeal that "preparation time is also reflected in the daily salary of [a college] instructor," so that "no additional money would be necessary to compensate for this time." (Response to appeal, p. 8.) This suggestion lacks substantial merit, however, since the academic year for which a college instructor is paid includes nonteaching days which may be devoted to course development. We therefore agree with the State that preparation and development time is properly considered, and proceed to consider the evidence submitted by the State in support of its position.

The State's submission includes a memorandum from the State's former training specialist which states that the training course in question, called "Investigative Interviewing," was designed by Mr. Gull and Mr. Stewart specifically for State employees. According to the memorandum, the trainers met several times with the training specialist to identify training needs and then developed appropriate course materials. The memorandum further indicates that the amount paid to the two trainers also covered the cost of reproducing course materials, including the cost of some clerical support. A letter from one of the trainers states that "9.75 days were used to develop the workshop" presented by the trainers.

As noted previously, the total amount paid to each trainer was divided by the number of days of training (four) to determine the rate at which he was paid. If the divisor is changed to include an additional 9.75 days for course development, then the rate of pay would clearly fall below the daily rate earned by each individual as a college instructor. Furthermore, if the cost of the course materials themselves is deducted from the amount paid to each trainer, the rate of pay becomes lower still.

We note that the information provided by the State consists of personal recollections of a somewhat general nature unsupported by any contemporaneous documentation. Although the Board has in the past found similar evidence unacceptable (see Head Start of New Hanover County, Inc., DGAB Decision No. 65, Docket No. 78-94, September 26, 1979,), we accept it here since it appears credible under the circumstances of the case and the Agency has not challenged it.

Conclusion

For the reasons specified above, we reverse the disallowance appealed from.

/s/ Cecilia Sparks Ford

/s/ Donald F. Garrett

/s/ Norval D. (John) Settle
Panel Chair