DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: City of Hope National Medical Center DATE: May 31, 1981
Docket No. 79-71
Decision No. 186

DECISION

On April 11, 1979 Grantee, City of Hope National Health Medical Center, appealed the April 5, 1979 decision by the National Institutes of Health (NIH) Grant Appeals Board upholding the August 11, 1978 disallowance by the NIH Audit Resolution Section. The disallowance was in the amount of $30,435 expended by the Grantee on items considered to be general purpose equipment purchased without prior approval from NIH.

This decision is based on the Grantee's application for review, the response of the National Institutes of Health of the Public Health Service (Agency), an Order to Develop the Record issued by the Board, and the responses of both parties thereto.

Statement of the Case

It appears from the record that Grantee is operated by an accredited national philanthropic organization, the City of Hope, and provides patient care and conducts medical research and educational activities. In 1976 the Regional Audit Agency of the Department of Health, Education and Welfare (HEW, now HHS) completed an audit of costs claimed by the Grantee under HEW grants and contracts, which originally covered the period from October 1, 1970 through September 30, 1973. However, with regard to general purpose equipment claimed to be purchased without prior approval, the audit was extended to September 30, 1975. The auditors determined purchases of at least $11,169 came within this classification and recommended that this amount be refunded to the Federal government. This was based upon examination of 31 purchases selected as a sample, of which the auditors determined that 24 had been purchased without prior approval. No attempt was made to extrapolate from the sampling, and the $11,169 represented the amount of the actual items claimed to be purchased without prior approval. The auditors did recommend that the Grantee review all general purpose equipment purchases made subsequent to October 1, 1970 to see which were without prior approval.

The Grantee did subsequently furnish such a list with documentation. Based upon this submittal, the Agency determined that an additional $20,286 of general purpose equipment was purchased without prior

approval. However, the Agency in reviewing the original $11,169 questioned by the Auditors, determined that this should be reduced by $1,379 for general purpose equipment acquired under a specific grant which did not require prior approval. This brought the original amount questioned by the auditors down to $9,790, which, added to the additional $20,286, came to a total of $30,076. Various minor adjustments were made both ways, resulting in a final disallowance of $30,435. Of this amount, the major item is an Ampex Tape Recorder costing $10,149, which the Grantee claims is scientific or research equipment not requiring prior approval by the Agency before being purchased. This is the primary issue to be discussed in this decision.

The disallowance letter of August 11, 1978, cited no authority for the action. It merely stated that general purpose equipment "required prior approval ... before purchase", and that since such approval was not obtained, nor was the equipment included in the grant budget, the cost was unallowable. The letter goes on to say that even if any of the items were "solely scientific equipment", as Grantee contended, an institutional prior approval system was required to approve the purchases.

So also the NIH Grant Appeals Board, in upholding the disallowance, gave no reference to any particular authority. It merely said that "[t]he [NIH] Grant Appeals Board examined the PHS policy statements pertaining to general purpose equipment applicable to the period in question."

When the Board notified the Agency of the Grantee's appeal, it asked for applicable policy statements, which were then furnished. 1/ The references given to support the disallowance are the July 1, 1972 revision to the NIH Grants for Research Projects Policy Statement and the July 1, 1974 Public Health Service (PHS) Grants Policy Statement. The Agency, in its Response to the Board's Order to Develop the Record, stated that all NIH grantees were advised of the 1972 revision in an NIH Guide dated August 16, 1972, and were sent copies of the Policy Statement about the same time. Copies of the 1974 Grants Policy Statement were distributed in the spring of 1974. The Grantee admits in its Response that copies were in its hands not long after they were issued.

It is clear that the Tape Recorder in issue here was purchased in 1974 but the exact date is not in the record. If it were purchased under a grant awarded before the Grantee had any notice of the 1974 PHS Grants Policy Statement the Grantee might well not be bound by its

1/ The first authority cited was Section J. 13 of the Office of Management and Budget (OMB) Circular A-21. This Board has in its Order to Develop the Record pointed out that this Circular on its face appeared to apply only to educational institutions.

provisions. Both parties have treated the matter as if both the 1972 and the 1974 Policy Statements were binding on the Grantee. The Board wll do the same, since the applicable provisions of the two policy statements are similar enough so that the decision of the Board would be the same if either or both applied.

The 1972 NIH Policy Statement states that individual items of research equipment costing $1,000 or more

> must have been in the grant budget approved by the NIH or will require prior approval by the designated grantee institution official (p. 18).

For rebudgeting (departing from the grant budget to meet unanticipated requirements of the research project), prior approval is required by "an appropriate institution official" designated for that purpose by the grantee (p. 28).

For general purpose equipment costing $200 or more, prior approval by the NIH awarding unit is required (p. 28). General purpose equipment is defined as:

> items which are usable for activities of the institution other than research, i.e., office equipment and furnishings, air conditioning, reproduction equipment, automatic data processing equipment, etc. (p. 18).

The 1974 PHS Grants Policy Statement requires prior approval by NIH for:

> 1. Project - specific equipment - purchase of such equipment having an acquisition cost of $1,000 or more per unit.
>
> 2. General purpose equipment - Purchase of such equipment having an acquisition cost of $300 or more. p. 52.

For rebudgeting "between budget categories within the total direct cost budget of the grant to meet unanticipated requirements" (p. 57),

> 3. Grantee institutions which are colleges, universities, hospitals, research institutes or research foundations may establish and utilize an institutional prior approval system ... for rebudgeting actions in the following categories:

> b. Each individual item of project-specific equipment with acquisition cost of $1,000 or more; ... (p. 58).

General purpose equipment in the 1974 PHS Policy Statement

> refers to items of equipment that are generally usable for activities in the institution other than the technical, specialized activities supported by the grant, e.g., office equipment, air conditioning, office furniture, reproduction equipment, etc. (p. 51).

Discussion

1. Tape Recorder

The major item in dispute in this appeal is the Ampex Counter and Voice Log Tape Recorder costing $10,149. As to the other items, the Grantee, in its letter of April 21, 1981 responding to the Order to Develop the Record, says simply:

> [W]e did not follow proper prior approval precedures. We acted in good faith, but we agree that the Agency has a right to insist on our suffering the consequences. 2/

If the recorder were general purpose equipment, clearly Agency prior approval would be required for its purchase. If it were "research equipment" or "project specific equipment" prior approval by the Agency would not be required for rebudgeting, but "institutional prior approval" would. It is not disputed that the purchase of the recorder came under rebudgeting, nor that prior Agency approval was not requested.

The factual situation for classifying the Ampex recorder is by no means clear. The basis for Grantee's position that it is not general purpose equipment is set out in two letters from the Assistant Administrator of Grantee to NIH, submitted with Grantee's appeal to this Board. In the first, dated April 21, 1978, the recorder is described as follows:

> The device covers a frequency range of DC to 30KH2 with tape speed to 60 ips; it is designed for use in analog data processing of high frequency events and is not appropriate for any general audio

2/ It appears that Grantee is going further than necessary since the Agency has modified its disallowance in its Response to the Order to Develop the Record, and other items may have been purchased before any Policy Statements requiring prior approval were sent out to the Grantee. See second part of discussion below.

> purposes; and it was acquired to replace a pen recorder and long-recording camera whose status as "project specific" equipment was never in question.

The letter of June 8, 1978 is more detailed, and speaks of the use by investigators in specific research projects. On April 16, 1979, Grantee submitted to the Board the manufacturer's descriptive literature of a recorder which Grantee states is the nearest current equivalent of the instrument in question here. This includes the following:

> In medical, aerospace, automative, chemical and defense research this recorder continues to log data that extends the limits of man's knowledge.

The disallowance letter hardly cites convincing authority for the ruling that this recorder was general purpose equipment. After reciting that this question had been discussed at length in correspondence between the Grantee and the Agency, and also discussed internally in the Agency, the following rationale for the finding is given:

> A member of the scientific staff of NINCDS (the awarding institute) has concluded that "this recorder can be used for other than laboratory purposes ..."

An examination of the letter in which these words are contained gives a different light on the matter, in describing the instrument.

> About the instrument, it is a four channel FM recorder that has specifications more stringent than the usual model one finds in stereo systems. Instrumentation recorders tend to have linear frequency responses from DC to frequencies well beyond auditory ranges. Furthermore, they have high quality shielded motors that permit the instrument to record faithfully at steady speeds and do not introduce mechanical or electrical noise into the data collection process. Motor cases also act as well-grounded spark shields. In other words, this recorder can be used for other than laboratory purposes, and are (sic) used for electrophysiological data recording because the specifications allow for relatively faithful storage of electrical activity at frequencies of interest to the scientist. (Agency Response to NIH Grant Appeals Board, September 29, 1978, Exhibit B).

The discussion continued unabated following the Board's Order to Develop the Record. Grantee submitted (Exhibit B) a letter from the manufacturer which included the following:

> The PR-2230 is a wideband instrumentation recorder widely used in scientific research and testing programs where accuracy, reliability, and repeatability are important factors. The following are examples of applications where one time data must be preserved accurately for further studies.
>
> UCLA Brain Research Institute is currently using the PR-2230 for Epileptic Siezure Studies.
>
> Edwards Air Force Base is using the PR-2230 for Rocket Booster Stability Research.
>
> NASA at Edwards is using it for Acoustical Studies.
>
> The PR-2230 is also being used by the Dept. of Energy at the Nevada Test Site on various classified research programs.

The Agency in its Response persisted in its contention that the Recorder was general purpose equipment.

> It is a quality instrument proven to be effective in medical research enterprises but likewise just as useable in any general data capture or sound recording activity. It does not require medical research expertise in its operation, rather emphasizing in its advertising its simplicity, mobility, and multi-purpose utility. p. 3.

This time the Agency submitted a copy of an advertisement of the instrument, which stressed its adaptability for multiple uses.

The determination of what is in each instance "general purpose equipment" is not an easy one in the absence of clear guidelines. The definitions given in the 1972 NIH Policy Statement and the 1974 PHS Policy Statement are very similar. The first is "items which are usable for activities of the institution other than research." (p. 18). The second defines general purpose equipment as items "that are generally usable for activities in the institution other than the technical, specialized activities supported by the grant." (p. 51).

The examples given are also similar. The NIH 1972 Policy Statement's examples are:

> Office equipment and furnishings, air conditioning, reproduction equipment, automatic data processing equipment, etc. (p. 28)

The 1974 PHS Policy Statement's are:

> Office equipment, air conditioning, office furniture, reproduction equipment, etc. (p. 51)

The Agency has admitted that the recorder is "a quality instrument proven to be effective in medical research enterprises" (Response to Order to Develop the Record), and is "used for electrophysiological data recording because the specifications allow for relatively faithful storage of electrical activity at frequencies of interest to the scientist." Its basis for calling the recorder general purpose equipment is that it "can be used for other than laboratory purposes." See Agency Response to NIH Grant Appeals Board, Exhibit B.

The reading of the Agency is too narrow. There must be a great many instruments which are intended primarily for a scientific project but which can be used for purely mundane purposes. Thus the elaborate Hasselblad cameras used in space vehicles and satellites for photographing and mapping the earth could presumably be used for taking a family snapshot. While price alone is not conclusive, it seems unlikely that a tape recorder costing over $10,000 would be purchased for ordinary office use. The test should not be whether the equipment can under any stretch of the imagination be used for another purpose than the one for which it is bought, but whether its primary ordinary use is in a scientific project. Taking all the factual submissions into consideration, the Board finds that the recorder is not general purpose equipment. The finding of the NIH Grant Appeals Board to the contrary is not a reasonable one supported by the evidence.

This determination is appropriate in this case since the NIH Grant Appeals Board did not give any detailed explanation of its decision on this point. It states only its conclusion:

> The NIH Grant Appeals Board examined the statements on general purpose equipment in ... published grants policy statements applicable to the periods in question. The Board noted that the definitions had remained reasonably consistent with only modest additions and revisions which were obviously intended to provide clarity and that the equipment listed, to which an audit exception has been taken, is in agreement with these definitions.

There is still left the "institutional approval" issue. The 1972 NIH Policy Statement requires for rebudgeting of individual items of research costing $1000 or more, a "prior approval by the designated grantee institution official." (p. 28) The 1974 Grants Policy Statement has similar but more detailed requirements. (p. 58-59)

The Grantee had, prior to the Order to Develop the Record, submitted two documents bearing on the institutional approval issue. The first was a letter from Grantee's Assistant Administrator to the Grants Management Officer of the NIH dated June 8, 1978 which has the following language:

> Dr. Ishikawa had a grant from NINCDS, in which there were funds awarded for specific items of scientific equipment. In the course of Dr. Ishikawa's work on this project his equipment needs changed, as so often happens in scientific research. The recorder and long-recording cameras he was using did not meet the needs of his work, and by reviewing his priorities he came to the decision to acquire the Ampex equipment. He discussed this with me since re-budgeting was involved. After consultation with the then Medical Director (who has professional responsibility for matters of scientific research) there was no doubt in our minds that the item in question was needed to further the project in the best possible way, and that it was clearly scientific equipment and not "general purpose equipment." I enclose a copy of Dr. Ishikawa's memo to me dated June 19, 1974 in substantiation.

The memo referred to, dated June 19, 1974, contains the following:

> Thank you for your arrangement for my purchase of the Ampex tape recorder. This recorder will substitute the functions of the pen recorder and the long-recording camera with the added capability of storing data for further analysis by different means ...
>
> Now I am requesting another rebudgeting ... [for other equipment]

In the Order to Develop the Record the Grantee was directed to indicate whether these two statements were intended to be institutional prior approval, how they fulfilled the requirement, and furnish any additional evidence available. The Response of the Grantee said that the statements were intended to reflect institutional prior approval, and in substance repeated the prior statements.

The Agency was in the same Order directed to state what formalities are required for an institutional prior approval to be valid and state the authority therefor. The Agency in turn submitted a Circular from 1968, which was superseded by two 1972 Guides. These really add nothing to the Policy Statements previously referred to. They do say that an "appropriate administrative official" must review the rebudgeting request for scientific or program propriety in relation to the objectives of the specific project supported by the grant, and decisions

affecting rebudgeting must be "well documented." NIH Guide for Grants and Contracts, May 15, 1972, and December 15, 1972, p. 3, 6.b.(2) and 6.b.(6).

Agency personnel certainly had different opinions as to whether the person who gave the rebubgeting approval for the Grantee was an "appropriate administrative official." In a memorandum dated September 29, 1978 to the Chairman of the NIH Grant Appeals Board, the Chief of the Agency Audit Resolution Sections says:

> Additionally, we do not believe that an employee with the title of administrative assistant would be the proper official to grant a request for rebudgeting of funds. (Item 7, Submission of Agency to this Board)

In commenting on this statement, the Chief of the Agency Grants Management Branch said that: "The logic of this rational (sic) escapes me," since this "administrative assistant" is "the same official with the same title" who has been the official authorized to sign grant applications for the grantee. (Item 9, Submission of Agency to this Board).

In fact, in this letter addressed to the Chairman of the NIH Grant Appeals Board, he substantially admits that institutional prior approval was given. In explaining why prior approval was not obtained from the Agency, he stated that:

> the grantee had determined the recorder to be project-specific equipment and, having so determined, utilized its Institutional Prior Approval System to authorize the purchase of the recorder.

It is the opinion of the Board that the requirements for institutional approval have been met by approval by the appropriate designated official and with adequate documentation. The decision of the Board is reinforced by two factors. The first is that this Board has, in several previous decisions, construed prior approval requirements in favor of a grantee, on grounds that advance approval requirements not plainly warranted by the nature of the case should not be read into ambiguous provisions. University of California - General Purpose Equipment, Decision No. 118, September 30, 1980; St. Landry Parish School Board, Decision No. 17, May 28, 1976; see Point Park College, Decision No. 16, May 20, 1976. The second factor which supports the Board's decision on the recorder is that, whenever given the opportunity, the program officials of the Agency (as distinguished from the audit personnel) have indicated that they would have given prior approval, or even retroactive approval, if requested.

Thus, the Chief of the Agency's Grant Management Branch had this to say to the Chairman of the NIH Grant Appeals Board:

> [A] review of the file ... indicates NINCDS (Agency) would have acted favorably upon a request for retroactive approval ... (Item 9, Submission of Agency to HHS Grant Appeals Board).

So, also, the very person whose opinion that the recorder "can be used for other than laboratory purposes" was relied on as the basis for the disallowance (Exhibit B attached to Item No. 7 in Submission to the Board), has this to say when asked to comment on the Auditor's review:

> If the City of Hope had requested prior approval for the tape recorder for the use to which it was put, I would have approved the purchase and appropriate rebudgeting if funds were available. (Item No. 8 in Submission to the Board).

In its Order to Develop the Record the Agency was directed to state why it should not now give retroactive approval for the recorder, in light of the above two statements from NIH officials. In its response the Agency said that while it was possible that retroactive approval had been given in similar circumstances, the policy was not intended to require retroactive approval even though criteria for consideration of approval had been met.

The Board can of course not require the Agency to give retroactive approval, even though it may feel the Agency's refusal to do so is unreasonable. However, on consideration of all the circumstances, the Board finds that all requirements for institutional prior approval for rebudgeting to purchase the recorder had been met. Therefore the Board sustains the appeal on this item, and reverses the disallowance of $10,149 for the purchase of the recorder.

2. Other Items

The original amount disallowed was $30,435. The Ampex recorder cost $10,149, so the reversal of its disallowance brings the total down to $20,286. In its Response to the Order to Develop the Record the Agency withdrew its exceptions to four items purchased in 1971:

Camera Bolex Rex Motion Picture w/26 mm lens	$ 887
Film Cassette, Zeiss	210
Camera Body - Nicon with waist level finder bellows	526
Camera C-27	496
	$2,119

This reduces the amount of the disallowance to $18,167. In addition, the Agency is willing to reduce its disallowance by $6,596 for three items purchased in 1971 if the Grantee can establish that proper prior

institutional approval was given for their purchase. The Agency will also withdraw the exception to an $865 Sharp Calculator (listed as $866 by Grantee) if there was institutional prior approval and it was purchased prior to August 16, 1972 (the date of distribution of the 1972 NIH Policy Statement). An exception to a Sears refrigerator for $288 will also be withdrawn if it was purchased prior to August 16, 1972.

Conclusion

The Board does not believe it necessary to keep this case open while the parties see if they can resolve their differences in the above items. Since the dispute before the Board is only as to the Ampex recorder, the Board sustains the disallowance of $18,167, subject to further reduction if the Grantee can furnish the Agency with the proof requested for the other items referred to above. If the Grantee is unable to effect a satisfactory resolution with the Agency on these items, it may file a separate appeal with the Board.

/s/ Cecilia Sparks Ford

/s/ Donald F. Garrett

/s/ Alexander G. Teitz, Panel Chair