

DEPARTMENTAL GRANT APPEALS BOARD

The Department of Health, Education, and Welfare

SUBJECT: Point Park College  
Pittsburgh, Pennsylvania  
Docket No. 75-12  
Decision No. 16

DATE: May 20, 1976

DECISION

Grantee requested approval of certain transfers of funds among cost categories. Approval was denied on the ground that advance approval of the transfers should have been sought, and grantee appeals. We conclude that the requirement of advance approval by the Regional Contracting Office was unauthorized by statute or published regulation.

The appeal involves a grant for fiscal year 1974 for an Upward Bound Special Veterans Program under the authority of PL 92-318, Educational Amendments of 1972, Title III, Subpart 4. Such programs are governed by the General Provisions for Office of Education Direct Project Grant Programs, 45 CFR 100a.10(23).

The general grant terms and conditions set forth in Appendix A to Part 100a yield to special terms or conditions set forth in the grant award document, 45 CFR 100a.290(a). The special conditions in this grant award provided:

"4. All request for transfer of budget line item, in order to be considered, must be submitted to the Region III Office of Education at least 30 days prior to the initiation of change."

Nothing in the general conditions or special conditions appears to require advance approval of either all or a defined category of line item transfers.

Grantee negotiated certain specific changes in its budget. Thereafter, however, it actually expended in excess of the budgeted amounts for certain line items as thus adjusted without obtaining advance approval. The overall grant budget was not exceeded, however.

Grantee does not appear to question the fact that these budget categories have been increased as stated without advance approval. Grantee argues, however, that there are extenuating circumstances that should be taken into consideration. Among these extenuating circumstances are the facts that grantee suffered a change of Project Director during the course of the grant, that it promptly supplied justification for excess expenditures when it learned of them and that the overall budget was well in line with the grant and did not exceed the allocated \$60,000. There is no indication that had grantee requested advance approval this would not or should not have been granted.

In a letter dated March 13, 1975, the (Acting) Regional Contracting Officer advised the grantee that indirect costs claimed in excess of 8% were disallowed and that justification must be submitted for three items totalling \$2626.95. The justification called for was promptly submitted March 19, 1975, but was then rejected, not on the merits but for the procedural ground of lack of advance approval which, if valid, was clearly apparent when the justification was requested. We do not believe this ground was valid.

The decision disallowing the request for approval is dated April 29, 1975. It recites Article 4 and the previous negotiated changes and states:

"3. Our policy is that the grantee may transfer funds among cost categories in the negotiated budget to the extent necessary to assure the effectiveness of the project within the approved award. However, no transfers may be made which alter the original objectives of the grant, and no increases may be made in the 'personnel', 'equipment', 'travel', 'cultural field trips', 'miscellaneous or consumable supplies', categories of the approved budget, without prior approval of the Grants Officer." (Underlining in original.)

The case appeared ripe for decision. The Board issued an Order to Show cause narrating the facts and issues substantially as above and calling upon the parties to show cause why the Board should not proceed to decision on the record already made, identifying the respects, if any, in which the summary of facts and issues is materially incomplete or inaccurate, the reasons if any why the appeal should not be dismissed on the ground of failure to obtain required advance approval, or, on the other hand, should not be sustained because of the extenuating

circumstances and particularly the lack of willfulness or gross negligence and the likelihood that if approval had been duly requested in advance it would have been granted and should now be granted retroactively. Both parties were invited to brief any aspect of the case they wished and were particularly invited to address a number of specific questions.

The parties have submitted responses to that Order. Neither response is satisfactory. The Government response is particularly disappointing because a Government official may fairly be expected to meet a higher standard of responsiveness and cooperativeness than appears to have been met here.

Neither party has shown any cause why the Board should not proceed to decision. Grantee's response accepted our summary of the essential facts as stated, added certain clarifications and references with respect to three points and invited further questions if necessary.

The Regional Contracting Officer's response, dated February 18, 1976, like grantee's response, shows no cause why the Board should not proceed to decision. It has not clarified for us how the specific disallowance of indirect cost was calculated, whether it represents a disagreement as to rate or as to base or both. It apparently concedes that the earlier change of indirect cost rate from 8% to 7.16% was improperly approved and that grantee is now entitled to the 8% rate. It offers no comment on the Board's observation that a portion of the disallowed amounts, namely the printing and Xeroxing costs, was not within the categories stated in the disallowance to require advance approval.

The response argues that the summary misdescribed the disallowance decision of September 15, 1975 by characterizing the disallowance decision as based on "policy." The disallowance decision appealed from, however, was dated April 29, 1975. The letter of September 15 is not the disallowance decision. It is the Agency response to the appeal, and in this respect does not contradict nor correct the disallowance decision. In disallowing the expenditures involved, the Regional Contracting Officer referred to "Our policy" permitting transfers generally but forbidding them in specified cases without prior approval.

We take that to be a decision based on grantee's alleged violation of "Our policy." Nothing in the disallowance letter of April 29, nor in the September 15, 1975 response to the appeal, cited statute or regulation or published policy statements giving notice of the requirement.

The General Provisions for Office of Education Programs, Direct Project Grant and Contract Programs 45 CFR 100a.29(b), provide that recipients other than a State and local government may make minor deviations from the project without the necessity for an approved amendment or revision where

- "(1) they do not result in expenditures in excess of the total amount granted,
- (2) there is not any material change in the content or the administration of the approved project, and
- (c) [(3)] expenditures are otherwise made in accordance with, and for kinds of expenditures authorized in, the approved application."

These three conditions are all satisfied here. (In the case of State and local governments, budget revisions without prior approval are permitted under similar rules, up to 5% of a budget under \$100,000). Under these rules, the line item transfers would have been proper.

The General Provisions were not promulgated in final until November 6, 1973. The grant here concerned covers a period beginning July 1, 1973 and running to June 30, 1974. The General Provisions were published, however, as a Notice of Proposed Rulemaking, April 26, 1973, 38 FR 10386, and are described as "basically a recodification of existing rules with changes as required by" OMP Circular No. A-102. (The section in question is not affected by A-102).

Under these circumstances, the General Provision budget flexibility for minor deviations would appear to be applicable and a contrary conclusion would require an unmistakable text, which is lacking. Any such text must be contained in statute, or published regulation, or the equivalent. The Regional Contracting Officer may neither waive nor alter the published regulations, 45 CFR 100a.483. The General Provisions concerning Education, 20 U.S.C. 1232(b) (popularly referred to as the "Pucinski amendment") require that no standard, rule, regulation or requirement of general applicability prescribed for the administration of any applicable program (i.e., one for which the Commissioner of Education has responsibility for administration) may take effect until thirty days after it is published in the Federal Register. See Sky, Rulemaking

in the Office of Education, 26 AD. L. REV. 129, 130-131 (1974). Nothing in the substantive statute nor in the published regulations so far as we can find, or so far as we have been advised by the Regional Contracting Officer, requires advance approval, either generally or in specified categories, for budget line items transfers otherwise than as specified in §100a.29(b) quoted above.

The response to the Order asserts that the "only reasonable understanding of the term in question," (we assume this means the only reasonable understanding of the Article in question) "is that advance approval is required." The natural reading of this provision, however, is not that it asserts that advance approval is necessary but that it assumes that approval is sometimes necessary and sometimes not necessary and asserts that in those cases in which approval is necessary, the request must be submitted 30 days in advance. There is no implication that approval is required in all cases or in any particular set of cases. The contrary implication is strongly reinforced by the Regional Contracting Officer's letter of April 29, 1975, which says:

"Our policy is that the grantee may (underlining added) transfer funds among the various cost categories in the negotiated budget to the extent necessary to assure the effectiveness of the project within the approved award." This clearly permits transfers between cost categories. There is added, however, a limitation as to a specific class of transfers:

"However, no transfers may be made which alter the original objectives of the project..." (no such alteration being here alleged)

"and no increases may be made" in five specified categories, namely:

"in the 'personnel,' 'equipment,' 'travel,' 'cultural field trips,' 'miscellaneous or consumable supplies,' categories of the approved budget, without prior approval of the Grants Officer." (Underlining in original.)

This list of five includes some but not all of the cost categories recognized by the program. Thus, Article 4 does not appear to be a valid source for a requirement of advance approval; that must

be found elsewhere. The definition of which cost categories require advance approval appears to be in an unsupported statement of "Our policy" and not in any binding statute, regulation or publicly stated policy. The Order to Show Cause expressly asked what statutory or regulatory or published public policy statement supports the policy relied on by the Regional Contracting Officer. That question has not been answered. There is an unfortunate tendency toward excessive requirement of advance approvals. This appears to be such a case, not supported by statutory or regulatory provision. Some advance approvals are required by OMB Circular, for example, but such requirements should not be unnecessarily proliferated. In this case, although we asked, we were shown neither the necessity for the requirement nor an adequate legal basis for enforcing it.

We also asked why submission of a justification was invited if the mere absence of advance approval was to be relied on as requiring a disallowance. Of course, if the disallowance was legally required, the Regional Contracting Officer might not be authorized to waive the requirement even by misleading and inconsistent action. We have, however, concluded that there is no such legal requirement. The invitation to submit a justification appears to be a recognition of that view of the law, which the Regional Contracting Officer now seeks unpersuasively to deny.

We also asked for an explanation of the policy or program purpose served by the disallowance in the light of the justification submitted and the extenuating circumstances urged. Of course, again, if the disallowance were legally required and there were not room for a discretionary decision, the explanation would not affect the result. In the absence, however, of any persuasive showing that that is so, an explanation is called for. The Regional Contracting Officer's response in substance says: Whether what we have done is fair or not, reasonable or not, conducive to the goals of the program or not, we say we had a right to do it and we do not intend to explain it. That is an attitude that clearly makes for arbitrariness in Government. It is an inadequate answer to a grantee and an unacceptable answer to the Appeals Board established by the Secretary to give Department-wide assurance of fair dealing in post-award disputes between grantees and constituent agencies.

#### CONCLUSION

The special conditions of the grant are not reasonably construed as imposing a requirement of advance approval for all changes. There is only a requirement of how approval is to

be requested when it is required. Notwithstanding argument to the contrary which we have considered and rejected, the disallowance decision of the Regional Contracting Officer rests on a policy not articulated in statute or regulation. The policy as stated does not justify the full disallowance, and the policy in any event may not properly be enforced without a published regulation or equivalent, supporting it. That is lacking here, so far as our research or the Agency's response to our direct question shows us.

The appeal is allowed in full

/s/ Bernice L. Bernstein

/s/ Francis D. DeGeorge

/s/ Malcolm S. Mason, Panel Chair