

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Oregon Department of Human Resources DATE: October 31, 1980
Docket No. 80-76-OR-HD
Decision No. 129

DECISION

The Oregon Department of Human Resources (State) requested reconsideration of the determination of the Office of Human Development Services (Agency) issued on March 26, 1980, disallowing \$25,489 claimed by the State as reimbursement for training costs under Title XX of the Social Security Act. The Agency found that the training programs conducted by the State did not satisfy the regulatory requirements for Federal financial participation in travel and per diem costs during the period beginning October 1, 1977 and ending March 31, 1978.

A number of other cases before the Board present the same issue. The findings and conclusions in the Board's first decision concerning that issue, Montana Department of Social and Rehabilitation Services, Decision No. 119, September 30, 1980, are incorporated herein as pertinent to the specific facts in this case.

Background

Title XX of the Act provides at Section 2002(a)(1) that the states shall be entitled to FFP for services provided to achieve the goals enumerated in the enabling legislation. Services for which reimbursement is available include expenditures for personnel training and retraining. Section 2002(a)(2) of the Act further provides that no payment may be made for expenditures, other than personnel training or retraining, which exceed a state's pro rata share of the appropriations authorized for Title XX expenditures during the fiscal year. Thus, the question of whether an expenditure is an allowable training cost may have a significant effect on the FFP available to a state.

The regulations governing expenditures for training and retraining, 45 CFR 228 Subpart H, were amended on January 31, 1977 (42 FR 5848). The amendment resulted in changes in the organization and terminology of 45 CFR 228.84 - - "Activities and costs matchable as training expenditures." The earlier version of the section had been published on June 27, 1975 (40 FR 27354) and, as pertinent to this case, read as follows:

Costs matchable as training expenditures include:

. . .

- (c) Payment of travel, per diem and educational expenses of employees while they are attending training programs for less than eight consecutive work weeks;
- (d) Payment of educational expenses (tuition, books, supplies) for employees on part-time educational leave (part of the working week, evenings, mornings).

As pertinent, the regulations were amended in 1977 as follows:

Costs matchable as training expenditures include:

- (a) State agency employees.
 - (2) For State agency employees in full-time training programs of less than eight consecutive work weeks: per diem, travel and educational costs;
 - (3) For State agency employees in part-time training programs (part of work week, evenings, mornings): Education costs.

The Agency, in disallowing the amounts in dispute, relied upon 45 CFR 228.84(a)(3) (1977). The Agency found that the disallowed training costs represented expenditures for travel and per diem for employees attending training programs of less than five full days. Inasmuch as the training programs lasted only "part of [a] work week" (45 CFR 228.84(a)(3)), the Agency determined that the regulations did not allow reimbursement for such costs.

The Agency noted that the audit report on which the disallowance was based recommended that \$106,309 in training costs be disallowed for the period from July 1, 1976 through March 31, 1978. The Agency determined, however, that inasmuch as the Agency publication which specifically stated that "part-time training programs" included programs which lasted less than five full days was not issued until September 1977, it would only disallow the travel and per diem costs claimed for the period from October 1, 1977 to March 31, 1978. The Agency publication was an official response to a policy interpretation question (PIQ). The response was designated PIQ 77-88 and was issued on September 14, 1977 to all of the Agency's regional offices.

In its request for reconsideration, the State argued that the Agency's interpretation of part-time training programs as programs lasting less than five full days was contrary to the former Agency practice of allowing FFP in travel and per diem costs for short-term training programs. It argued that since there was no mention of a policy change during the rulemaking which resulted in the 1977 amendments of 45 CFR 228.84, it assumed that Section 228.84(a)(3) (1977) was parallel to Section 228.84(d) (1975), and that, in accordance with the Agency's past practice, the new section did not preclude FFP in travel and per diem costs for training programs lasting less than five full days. The State further argued that if the Agency should be sustained in its interpretation of the regulations, October 1, 1977, was not the appropriate date from which to compute the disallowance. The State alleged that, according to its records, December 1978 was the earliest date that it was apprised of the existence of PIQ 77-88.

Issues

Interpretation of the Regulations

An Agency's interpretation of a statute or the regulations promulgated to implement a program the Agency is charged with administering is entitled to great deference. Udall v. Tallman, 380 U.S. 1, 17 (1965). In this case, the Board notes that the statutory language which exempts training costs from the ceiling imposed on a state's expenditures for services under Title XX of the Act is extremely broad and requires further definition. In everyday usage, the concept of "training" includes activities ranging from informal on-the-job instruction given by a supervisor to intense classroom instruction given at an institution for higher education. The Agency must make distinctions as to those activities which properly constitute "personnel training or retraining directly related to the provision of [Title XX] services." In this respect, the Board takes notice of the fact that the Agency, through its day-to-day dealings with the states and its evaluations of state program operations, is in a position to determine which activities constitute effective training. The regulations and PIQ 77-88 represent a valid definition of those training costs eligible for Federal sharing.

Viewed on its face, the term "part-time training programs" in 45 CFR 228.84(a)(3) seems clearly to include training programs lasting less than five full days. In Decision No. 119, noted above, however, the Board found that even though the Agency's central office may have always had a policy which, consistent with this interpretation of Section 228.84(a)(3), precluded FFP in travel and per diem costs for training programs lasting less than five full days, the Agency's field

components followed a different practice. (Decision No. 119, p. 5.) Apparently because of the confusion generated by the Region's prior practice of allowing FFP in these costs, the Agency determined in the instant case to allow FFP claimed for costs incurred prior to the time the State received actual notice of PIQ 77-88. We do not find any basis, however, for allowing FFP in costs incurred after that time.

Effective Date of PIQ 77-88

The Agency has alleged that the State was furnished a copy of PIQ 77-88 in September 1977. James Gaultney, a Social Services Specialist employed in the Region X office of the Administration for Public Services, stated in an affidavit dated August 7, 1980, that to the best of his knowledge he hand-delivered a copy of PIQ 77-88 when he visited the State agency from September 20 - 24, 1977 (Response of the Office of Human Development Services, August 7, 1980, Exh. 2). The Agency further alleged that the State was first put on notice of the Agency's official position with respect to the required duration of training programs in July 1977. In support of this assertion, the Agency submitted a copy of a letter to the State dated July 6, 1977 which stated, as pertinent:

A verbal definition from our central office is that "part of work week" as stated in 45 CFR 228.84(a)(3) means up to 4 days but less than 5 working days.

(Response of the Office of Human Development Services, August 7, 1980, Exh. 1).

The State alleged in its request for reconsideration that according to available records it was not apprised of the existence of PIQ 77-88 until December 1978. The State reaffirmed this contention on September 22, 1980 in reply to a request from the Board that it submit comments, briefing and documentation to support its request for reconsideration. In neither instance was the allegation supported by statements from responsible State officials or other documentation, or an explanation of circumstances which would tend to substantiate it.

Upon consideration of the evidence of record, the Board finds that the Agency did furnish the State a copy of PIQ 77-88 in September 1977. The State was given ample opportunity to furnish evidence in rebuttal to the sworn statement of the Agency official and in support of its allegation, but it failed to do so. Under these circumstances, the weight of the evidence favors the Agency.

The Board found in Decision No. 119 that in accordance with Information Memorandum HDS-IM-79-10 (APS) issued on August 23, 1979 (see Response of the Office of Human Development Services, August 7, 1980, Exh. 3), it was Agency policy not to hold a state accountable for the interpretation contained in PIQ 77-88 until such time as the state received actual notice of the interpretation. In the instant case, the Board finds that the State received actual notice of the Agency's official policy with respect to Federal sharing in per diem and travel costs incurred for training programs lasting less than a five full days when it received a copy of PIQ 77-88 in September 1977.

Conclusion

The Board sustains the Agency's disallowance of \$25,489 in training expenditures incurred for the period from October 1, 1977 through March 31, 1978.

/s/ Clarence M. Coster

/s/ Norval D. (John) Settle

/s/ Donald G. Przybylinski, Panel Chair