

DEPARTMENTAL GRANT APPEALS BOARD

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SUBJECT: University of Minnesota
Docket No. 77-4
Decision No. 44

DATE: August 14, 1978

DECISION

Facts

The University of Minnesota has appealed a decision of the Public Health Service (PHS), which disallowed \$10,140 of claimed salary and related costs for training under a Special Health Career Opportunity Grant authorized by Section 774(b) of the PHS Act.

On August 2, 1972, PHS 1/ made a grant to the University's School of Dentistry for the first year of a contemplated three-year training project, to commence September 1, 1972. The action contemplated continuation awards for the two succeeding years at a level of approximately \$175,000 per year, and the University was informed: "Budgets to be negotiated annually contingent upon availability of funds."

On March 3, 1975, the HEW audit agency, reporting on an audit of operations under the grant for the first two years of the project, stated that, in the second year, ending August 31, 1974, the University claimed \$10,140 in excess of the approved budget for that year. The University responded that it intended to apply the excess expenditure to the continuation grant for the third year under the National Institutes of Health (NIH) Policy Statement 78-9 of September 1, 1972, which provided: 2/

The grantee institution may, at its own risk prior to the beginning date of a continuation award, incur expenditures which exceed NIH authorization, but which are considered essential to the conduct of the training project. The NIH awarding unit will allow reimbursement of such expenditures

1/ "PHS" is used in this decision to refer only to that part of the agency, including regional officials, which has jurisdiction over the grant here.

2/ The grant was made by the PHS Office of Health Manpower Opportunity, which is not a part of NIH. That office, however, notified the grantee that the NIH policy statement would be applied to the administration of the grant.

from the continuation grant when awarded, provided that the items concerned are incorporated in the approved budget of the continuation grant and that, where required for restricted categories, prior approval was obtained.

In a letter dated March 27, 1975, some seven months after the start of the third-year continuation grant, the University requested that PHS apply the amount of the questioned claim to the budget for the third year and allow it. That request was denied by the Regional Health Administrator, and his denial was upheld on March 17, 1977, by the PHS Regional Grant Appeals Board. The denials were based on (a) the fact that the items were not incorporated in the approved budget continuation grant, and (b) the failure of the University to show that the expenditures were essential to the project. (The underlined words are from the NIH policy statement which is quoted more fully above).

The PHS officials explained that the grantee should have known before the end of the second grant year that it required additional funds. If a request had been made at that time, PHS could have authorized a transfer to the budget for the second year if it considered that to be appropriate. In fact, a similar adjustment was made just one month before the end of the second year when PHS authorized the transfer of \$21,105 from third- to second-year use for a special summer program. PHS objected to the University's reliance on NIH interpretation of its policy for other projects, rather than on prompt consultation with PHS officials in the Regional Office. They held that, in any event, the University had failed to meet the requirement that the expenditures be "essential" to the project.

The Regional Grant Appeals Board summed up its holding by stating:

The purpose of the policy cited by the grantee is to provide flexibility in case of rare, unusual circumstances or in the event of an emergency. It is not a general authorization to spend funds against the next year's award. If it were, it would destroy any point in submitting yearly budgets and the word "approved" would be without meaning.

After this appeal was taken, PHS further explained its position on the essential nature of the expenditures by stating in a memorandum dated May 23, 1977, addressed to the Executive Secretary of this Board:

The University in all its correspondence claims that these salary costs were essential to the conduct of the project. However, at no time did it demonstrate the purpose of these costs, the individual or individuals to whom these salary costs applied, the allowability of these salaries, or whether these services were actually performed.

The Panel Chairman considered this to raise an additional question which involved the most elementary principle of grant administration: a requirement that a grantee have documentation to show that claimed expenditures were, in fact, incurred to further the purposes of the project. ^{3/} He, therefore, requested the grantee to provide a detailed explanation of exactly what services were provided and by whom, as well as documentation that they were reasonable, project-related, and accorded consistent treatment with other project costs. Unfortunately, the grantee's response and the PHS comments were not sufficiently enlightening on this point to enable us to decide this issue. The grantee submitted names of individuals and the amounts paid them for what it says were project-related activities for the month of August 1974. The Board, however, had no information as to the type of documentation of these expenditures on the University's records nor whether the amounts claimed here duplicate any of the \$185,508 of expenses which were previously allowed.

The PHS action appealed from did not turn on the issue of proper documentation and, in light of the inadequacy of the record, the Board is confining its present consideration to the grounds on which PHS originally based its disallowance. Our decision leaves the way open for PHS to consider as part of its administrative process the inadequacy of documentation of the expenditures and whether they have already been allowed in the \$185,508 referred to in Footnote 3 of this decision. PHS may be able to make such a determination on the basis of the payroll and other records already in its files but which are not a part of the record here.

^{3/} The audit report also questioned \$185,508 in personnel costs, other than those involved here, on the basis that the records did not contain after-the-fact documentation that such an amount was spent on project activities. The record contains a letter from the University to PHS, dated February 4, 1976, which refers to enclosures, including all payroll sheets and appointment records for each individual employed on the project, to document personnel costs for the first two years. Those enclosures were accepted by PHS as adequately documenting the questioned \$185,508. They were not, however, included in the record before us.

DISCUSSION

- a. The requirement that the expenditure be "incorporated in the approved budget of the continuation grant"

The University requested the budget change in its letter of March 27, 1975, five months prior to the closing period of the continuation grant. While plenty of time remained to amend the budget for the third year, PHS viewed the policy as one which gave it broad discretion to withhold the authorization. They thought that the request for a budgetary change should have come even prior to the end of the year in which the expenditure was incurred. Since the University's request of March 27, 1975, was not timely in the PHS view, they disallowed the claim.

The difficulty with the disallowance is that neither the NIH policy nor the consistent application by NIH specified any time by which a request for incorporation in the budget for the continuation grant should take place. In fact, NIH had applied the policy as not requiring the budget for the continuation year to include a particular amount for the specific purpose of the prior year's expenditure, but only to include otherwise unused funds which could be available to cover the prior expenditures. The interpretation is confirmed by the language of the restatement of the policy contained in PHS Grants Policy Statement, DHEW Publication (OS) 77-50,000, Rev. October 1, 1976, page 22. That statement makes no mention of incorporating the expenditures in the budget for the continuation grant. In light of the prior NIH application, this change is a clarification of what was intended by the prior NIH policy. The memorandum of May 2, 1977, from Dr. Robert P. Akers, Policy and Procedures Officer, OERT, NIH, to the Director, Division of Grants and Contracts, ORM/EAM, confirms that the October 1976 statement is "an excellent refinement of a policy that has been existing for over 14 years."

Even if the incorporation of a specific expenditure had been required, PHS could not frustrate the quoted policy by arbitrarily denying the University's request. The policy affirmatively authorizes a grantee to make expenditures in one year to be charged to the grant for the continuation year. It does not state that this option is not available if the grantee could, or should, have foreseen the need soon enough to amend the current budget, or in time to obtain prior approval. True, it specifies that the grantee incurs the expenditure "at his own risk," but means only that it must risk the later availability of sufficient funds for the continuation year to cover both the needs of the project during that year and have left over enough to cover the expenditure incurred in the prior year.

The PHS Regional Grant Appeals Board expressed concern that construing the policy as applicable to other than unusual or emergency situations would constitute a general authorization for a grantee to spend funds against the next year's award, in which case "it would destroy any point in submitting yearly budgets and the word "approved" would be without meaning." Such concern ignores the fact that the grantee has responsibility for the continued conduct of the project, and it can be called to account should it borrow against funds for the following year to an extent which places the proper continuation of the project in jeopardy.

The policy specifically authorizes an expenditure without a prior approval of the item. If the intent had been to confine that policy to unusual situations or emergencies, grantees could not be expected to make use of it when needed if their judgment were subject to a judgmental decision by PHS, unrestrained by any criteria. The policy makers could either have set out standards or left the matter to the judgment of the grantees, subject only to restrictions prescribed in the policy. They did the latter and, apparently, the NIH practice of accepting grantee judgment has not demonstrated cause for change because, as noted above, the policy was not made more restrictive when it was restated in the October 1976 publication.

b. The requirement that the expenditure be "considered essential" to the project

Although the prior administrative action was based, in part, on the University's failure to show that the expenditure was "essential" to the project, there is no indication that the University was asked to make such a showing or that it was informed as to the interpretation of "considered essential."

PHS assumed, without discussing it, that the expenditures must be "considered essential" by them. Viewed in that light, the University might have to convince them that, but for the expenditure, the project (almost certainly? probably? possibly?) would have failed. It is not likely that the policy intended to make grantees gamble that PHS officials would later consider the expenditure to be essential, particularly since no criteria are stated as to what would be essential. Rather, the intent must have been that it is grantee which must consider the expenditure to be essential. This is a way of telling the grantee that it should not make an expenditure to be charged to the budget for the next year, unless it considered in good faith that such action was of compelling importance and urgency. There is no indication that Federal officials were supposed to second-guess such a judgment. As shown by the NIH application of the policy, Federal review should

be based on the general requirement that the expenditure be project-related. The potential for abuse under such a practice is no greater than under the policy which permits a grantee unilaterally to shift items in an approved budget. Moreover, if there is a danger of abuse, it can be obviated by a change in the policy which more clearly limits grantee action.

CONCLUSION

The grounds used by PHS to disallow the expenditure were not valid. The amount should be allowed unless PHS now determines either that: (a) the University does not have the proper documentation that the claimed items are related to the project and were not previously allowed or (b) the budget for the continuation year did not contain an otherwise unused amount which could have been applied to the expenditure as requested in the University's letter of March 27, 1975. Any further PHS determination which is adverse to the grantee may, of course, be appealed to this Board.

/s/ Edwin H. Yourman, Panel Chairman

/s/ David V. Dukes

/s/ Francis D. DeGeorge