

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Montana Department of Social and
Rehabilitation Services
Docket Nos. 79-73-MT-HC
79-149-MT-SS
Decision No. 141

DATE: January 5, 1981

DECISION

As the result of an audit report (Audit Control No. 08-80258), dated October 31, 1977, issued by the HEW Audit Agency, Region VIII, a notification of disallowance was sent to the Montana Department of Social and Rehabilitation Services (State) on January 24, 1979 by the, Director, Medicaid Bureau, Health Care Financing Administration (HCFA). The notification stated that \$19,639 that had been claimed by the State in Title XIX Federal financial participation (FFP) for salaries of county commissioners as administrative costs for the period July 1, 1972 through December 31, 1975 had been disallowed on the basis of 45 CFR Part 74, Appendix C, Part II, D.3.

The notification of disallowance also informed the State that it had thirty days to appeal the disallowance to the Departmental Grant Appeals Board. In a letter dated February 20, 1979 the State formally requested reconsideration of the disallowance under Section 1116(d) of the Social Security Act, but addressed this reconsideration request to the Director, Medicaid Bureau. By memorandum dated April 12, 1979 the Assistant Director, Office of Financial Management, HCFA, forwarded the State's request to the Executive Secretary of the Departmental Grant Appeals Board. On June 21, 1979 the Executive Secretary informed the State that the Chairman of the Board had accepted jurisdiction over the State's request for reconsideration. The case was assigned Board Docket No. 79-73-MT-HC.

Based on the same audit report, the Office of the Regional Commissioner, Social Security Administration, Region VIII, issued a notification of disallowance on March 27, 1979 to the State. Included in the disallowance was \$26,650 in Aid to Families with Dependent Children (AFDC) maintenance assistance administrative funds. In a July 11, 1979 letter the State sought review of the disallowed \$26,650, an amount claimed by the State as a portion of the salaries of the county commissioners. This second case was assigned Board Docket No. 79-149-MT-SS.

Inasmuch as the two disallowances were based on the same audit report, the two cases both involve the allowability of the salaries of the county commissioners, and the two federal agencies involved are being represented by the same counsel (Agency), the Board will consider the cases jointly with a combined amount of \$46,289 in dispute.

The record on which this decision is based includes the applications for review; the Agency's responses thereto; a November 21, 1979 memorandum from the Director, Office of Grant and Contract Financial Management, DHEW; the parties' responses to a February 5, 1980 Board inquiry concerning this memorandum; and a December 22, 1980 submission by the State in response to a December 12, 1980 telephone conference among the parties and a Board staff member. The Agency was given the opportunity to respond to the State's submission, but did not elect to do so.

Statement of the Case

Both notifications of disallowance, in denying the State's claim for FFP for the county commissioners' salaries, cited 45 CFR Part 74, Appendix C, Part II, D.8, based on Federal Management Circular (FMC) 74-4, as the grounds for the disallowances. This subsection states:

Legislative expenses. Salaries and other expenses of the State legislature or similar local governmental bodies such as county supervisors, city councils, school boards, etc., whether incurred for purposes of legislative or executive direction, are unallowable.*

The basis for the State's contention that FFP is allowable for the county commissioners' salaries is its assertion that the activities of the county commissioners during their service on the county welfare boards do not fall under the "legislation or executive direction" cost prohibitions of Part 74, Subsection D.8, but rather are administrative in nature. Referring to certain State statutes, the State maintains that each county is statutorily required to establish a county board of public welfare (§ 53-2-301, MCA) and that this county welfare board shall consist of the county commissioners (§ 53-2-302, MCA). While the compensation of county commissioners for their regular duties is fixed at either an annual or a per diem rate, depending on the size of the county (§ 7-4-2107, MCA), any additional time that they spend in their capacity as a county welfare board on public assistance matters will be compensated separately on the same basis as their services as county commissioners (§ 53-2-302, MCA).

*It should be noted that 45 CFR Part 74 was not promulgated until September 19, 1973. The costs claimed by the State herein are for the period July 1, 1972 through December 31, 1975. The cost prohibitions of Appendix C, Part II, D., are identical to the provisions set forth in the HEW publication OASC-6, "A Guide for State Government Agencies--Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Department of Health, Education, and Welfare," March 1969, based on Bureau of the Budget Circular A-87, that had governed Medicaid and other public assistance programs prior to the promulgation of Part 74.

The State asserts that the disallowed \$46,289 was for compensation for additional "administrative direction" within the scope of § 53-2-302. The State indicates that it did not claim additional FFP for the occasional "executive direction" activities undertaken by the commissioners while sitting as a county welfare board. (State's letter of 2/20/79, p.2, ¶ 3).

In response the Agency considers any attempt by the State to draw a distinction between compensation for "legislative or executive direction" prohibited in Part 74 and for administrative activities to be unsupportable. The Agency contends that the rule set forth in Part 74, Subsection D.8, is all-encompassing concerning the salaries of government bodies and permits no exceptions by interpretation. The Agency argues additionally that the term "executive direction" includes the normal administrative duties of officials.

Discussion

On February 5, 1980 the Board asked the parties to comment on a November 21, 1979 memorandum from Henry G. Kirschenmann, Director, Office of Grant and Contract Financial Management, DHEW, circulated to all Regional Directors, Division of Cost Allocation. This memorandum reads as follows:

This transmittal is intended to clarify the allowability of costs of elected or appointed officials. Federal Management Circular 74-4 is silent with respect to elected or appointed officials. It is specific however, in disallowing costs of general government, such as the salaries and expenses of the Office of the Governor of a State, the chief executive of a political subdivision and State legislature or similar local government bodies. Also, State and local judicial bodies are normally construed as a general expense required to carry out the overall responsibilities of State or local governments, and therefore unallowable.

Our policy will be to recognize as allowable costs, the costs of services performed by individuals, based on their benefit to programs, irrespective of their status as elected or appointed officials, except where those costs are specifically excluded by the Circular because they are considered a cost of general State or local government. However, the portion of salaries and expenses directly attributable to managing and operating Federal programs within general State or local organizational units is allowable.

The parties were asked whether the policy enunciated in the Kirschenmann memorandum was applicable to the facts of these cases, and if so, if the State should supply adequate documentation to substantiate its claim for FFP for the salaries of the county commissioners, whether the disallowances could be withdrawn.

In a reply dated March 6, 1980 the State argued that the Kirschenmann memorandum further supported its position. The State cited several Montana laws requiring the county board of public welfare, composed of the county commissioners, to determine the eligibility of individuals for public assistance and the type and amount of assistance to be received. According to the State, the determination of eligibility specifically for Title XIX Medicaid assistance and for Title IV AFDC program participation is to be determined by the county welfare board.

In its March 17, 1980 response the Agency contended that the applicable regulations of 45 CFR Part 74 specifically exclude the expenses of certain state and local officials and that "the Kirschenman memorandum was addressed to the expenses of other officials, such as city controllers and county auditors, who perform completely administrative functions but whose positions may be elective or appointive by local tradition." The Agency argued that irrespective of what the county commissioners may call themselves, they still remain elected officials performing one of the normal functions of local government. Hence, the Agency reasons, their salaries are unallowable under the cost principles set forth in FMC 74-4 and 45 CFR Part 74.

We have concluded that the State's claim of FFP for salaries of the county commissioners should be upheld if the State can show by adequate documentation that the salaries are directly related to the administration of the Medicaid and AFDC programs.

The particular facts of these cases, regardless of the effect of the Kirschenmann memorandum, support the State's position. The Agency's interpretation of FMC 74-4, the basis of 45 CFR Part 74, that the salaries and other expenses of local government bodies are at all times unallowable is unreasonable when the local elected officials are required to spend a considerable amount of their time in the administration of federally assisted programs. These costs, in the form of salaries, are directly related to the practical execution of these programs and would be accepted as reasonable by the Agency if the functions represented by the salaries were to be performed by persons other than local government officials. In fact, 45 CFR Part 74, Appendix C, Part II, B.10 specifically allows salary costs if the compensation is reasonable for the services rendered.

The presumable purpose behind the exclusion of government salaries in FMC 74-4 is that the federal government should not be required to participate in the general costs of local government by sharing in the payment of salaries of officials whose time would be completely occupied with the performance of their offices irrespective of any possible involvement with

federal programs. While this proposition may be plausible for officials who receive a set annual salary and are unable to adequately document the amount of time they spend working solely on federally assisted programs, it loses its validity in the case of officials such as the State's county commissioners, some of whom are paid on a per diem basis, whose work as members of the county welfare boards in administering the Medicaid and AFDC programs is distinguishable from their work on purely county matters as the county commissioners. In the case of commissioners paid on a per diem basis, for example, it is arguable that the commissioners on some days would not have had any office responsibilities except for the administration of the federal programs; to deny the State a federal share for some portion of the compensation on those days is inequitable.

We therefore believe the State has made a valid point in distinguishing between the administrative nature of the commissioners' work on the welfare boards and the "legislative or executive direction" prohibited by FMC 74-4. The Kirschenmann memorandum's interpretation of FMC 74-4 further supports this distinction. The last sentence of the memorandum states that "the portion of salaries and expenses directly attributable to managing and operating Federal programs within general state or local organization units is allowable." The task of the county commissioners in deciding eligibility in the Medicaid and AFDC programs is an action directly attributable to managing and operating those programs. The Agency's interpretation of the memorandum would restrict FFP to the salaries of officials who perform solely administrative functions. Yet under that interpretation if the county commissioners had hired or appointed personnel to perform the same administrative tasks of determining eligibility as they themselves did while acting as a county welfare board, the salaries of those personnel would qualify for FFP. The salaries of the persons directly administering and operating a federal program should be considered an allowable cost to the program, regardless of whether the persons are elected officials or not.

In agreeing with the arguments presented by the State, we note that the State may need to provide documentation to support its claim of FFP for a portion of the salaries of the county commissioners. Accordingly we direct the agencies involved in these cases to determine what documentation by the State is needed to show that the commissioners did, indeed, spend time directly managing the federal programs; to request that documentation from the State; and, if the State should then provide documentation satisfactory to the Agencies, to withdraw the disallowances in whole or in part.

Conclusion

For the reasons stated above, we hold that the portion of the salaries of the county commissioners directly attributable to the commissioners' administration of federal assistance programs is an allowable cost. This matter may be reopened for further action by the Board if the State and the agencies do not agree on the proper amount of FFP to be paid to the State.

/s/ Cecila Sparks Ford

/s/ Donald F. Garrett

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