DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Eastern Virginia Medical Authority DATE: June 30, 1981
Docket No. 78-111
Decision No. 197

DECISION

On September 8, 1978 Eastern Virginia Medical Authority (EVMA or Grantee) appealed the August 10, 1978 determination by the Alcohol, Drug Abuse, and Mental Health Administration (ADAMHA) Grant Appeals Committee of the Public Health Service (PHS or Agency). The Committee sustained a decision dated May 12, 1978 concerning costs claimed under Community Mental Health Centers (CMHC) staffing grants. The original disallowance was made by the Financial Advisory Services Officer, Division of Grants and Contracts Management, ADAMHA, and was based on an Audit Report (Control Number 03-70352) prepared by the HEW (now HHS) Audit Agency. This decision is based on the notice of disallowance, the decision of the ADAMHA Grant Appeals Committee, EVMA's application for review dated September 8, 1978, the Agency's response dated December 4, 1978, and the Board's Order to Develop Record dated April 10, 1981 and the responses of both parties to the order.

The HEW Audit Report concerned two EVMA staffing grants: an "initial" staffing grant (grant number 03-H-000-753, abbreviated as "grant no. 753") for the period September 1, 1970 to August 31, 1975 and a "growth" staffing grant (grant number 03-H-000-758 or "grant no. 758") for the period February 1, 1973 to January 31, 1975.

The Audit Agency concluded that $150,726 out of $2,179,940 charged to these grants for the period covered by the audit represented unallowable or unsupported costs and had to be refunded. In its September 2, 1977 response to the Audit Report, EVMA agreed that $89,282 of the charges were unallowable and disputed $61,444 of the charges. Instead of proceeding to refund the undisputed amount, however, EVMA proposed to offset the amount against new charges to the grants. EVMA contended that $16,442 of payments made to part-time psychiatrists had been incurred for grant-related purposes during the period covered by the audit but had not been charged to the grants. EVMA proposed that these costs be used to offset an equal amount of disallowed charges that EVMA did not dispute. Also in its September 2, 1977 response, EVMA claimed a 5% increase in eligible costs for grant no. 758 for the period February 1, 1976 through January 31, 1978. EVMA asked that

the amount of the increase, which had originally been withheld from the grant award due to lack of funds, be offset against the remaining unallowable funds not disputed by EVMA. EVMA identified the amount of the 5% increase as $73,367. This amount plus the $16,443 claimed for part-time psychiatrists would equal $89,810 and, when reduced by the amount of disallowed charges not disputed by EVMA, would leave a balance of $528 owing to EVMA.

EVMA also stated in its September 2, 1977 comments that it disputed $61,444 of the $150,726 recommended disallowance. This amount included $48,110 for accrued vacation leave between January 1, 1974 and April 30, 1975, and $13,334 for consultant fees and miscellaneous costs.

EVMA raised generally the same issues before the ADAMHA Grant Appeals Committee that had been raised previously. Instead of disputing the entire $13,334 amount for consultant fees and miscellaneous costs, however, EVMA disputed only $4,372 for the services of a part-time psychiatrist and $255 for a nurse on an "as needed" basis. The disputed amount for services of a part-time psychiatrist raised the same substantive issues as the $16,443 offset claim for part-time psychiatrists. All issues that were before the ADAMHA Grant Appeals Committee are before this Board, except for the $255 nursing fee charge. 1/ EVMA's position concerning issues before the Board may be summarized as follows:

1) EVMA appeals the disallowance of $48,110 for accrued vacation leave from January 1, 1974 through April 30, 1975.

2) EVMA claims $16,443 for payments made to part-time psychiatrists. Although this amount had not originally been charged to the grants, EVMA now asserts it should serve as an offset against an equal amount of undisputed disallowed costs. EVMA also disputes $4,372 of disallowed payments to a part-time psychiatrist.

1/ Since EVMA did not appeal $8,962 of the $13,334 disallowed for consultant fees and miscellaneous costs (including the $255 nursing fee charge), that amount may be added to the original undisputed disallowed amount of $89,282. The undisputed amount now equals $98,244.

3) EVMA claims $73,367 for a 5% increase in grant no. 758 from February 1, 1976 through January 31, 1978 and asks that this amount be offset against an equal amount of unallowable costs identified by the audit. 2/

I. Accrued Vacation Leave

EVMA claims $48,110 for accrued vacation leave covering January 1974 through April 1975 for grants no. 758 and 753. The accrued vacation leave claimed by EVMA was estimated by computing 6% of total salary costs. EVMA figured that its employees received an average of 4 weeks vacation (the number of weeks earned after one year of employment) and that employees would likely have used only one of the four weeks due to Grantee's start-up and recruiting problems. EVMA's response dated May 18, 1981 to the Board's Order to Develop Record. Since three weeks represented 6% of a year (rounded off), EVMA determined the accrued leave charge by taking 6% of total salaries charged. EVMA has not been able to provide any further substantiation for this charge other than through its assertion that the actual accrued leave for the period July 1, 1975 through January 31, 1977 (alleged to be $67,210) demonstrates that the charge for the 1974-5 period was reasonable. EVMA justifies its use of an estimate by stating that accrued vacation leave records for each individual were not available until a new payroll system became operational for the fiscal year beginning July 1975.

The Agency objects to EVMA's estimated charge on several grounds. It questions why charges for accrued leave were not made to other EVMA programs (those not funded by the CMHC staffing grants) until a new payroll system was implemented in July 1975. It also expresses concern that a claim based on an estimated rather than an actual amount could subject the Agency to duplicate charges and would not reflect leave actually used during the period in question. The Agency indicates that it would have been willing to analyze and report on information which showed the amount of annual leave EVMA employees actually accrued

2/ This Board would not ordinarily consider a grantee's "offset" claims since those claims would not be part of the audit findings and disallowance that gave rise to an appeal. In this case, however, the $16,443 claim for payments to part-time psychiatrists was specifically addressed in the Audit Report and in the disallowance. Further, the claim for a 5% increase was addressed in the original disallowance after having been raised by the Grantee in its September 2, 1977 response to the Audit Report.

while working on grant-related activities, but that this type of information was never provided to it. See Regional Audit Director's memorandum of May 7, 1981 attached to Agency's response dated May 14, 1981 to the Board's Order to Develop Record.

We believe that the Agency is correct in disallowing this charge. The Grantee has the burden of documenting its claims 3/ and we are not convinced that the Grantee has met its burden in this instance. The Grantee's estimate is based on the assumption that each employee accumulated an average of four weeks of vacation annually and used only one of those weeks. We believe that the Agency is entitled to more than this type of speculation as a basis for a charge. Although EVHA referred to "established" continuing liability for accrued vacation leave as of January 31, 1977 as support for its claim, it did not attempt to demonstrate how the 1977 amount related to and supported a claim for 1974-5. To the extent that Grantee's estimate for unused annual leave in 1974-5 is higher than the unused leave that actually accrued during that time, Grantee would be receiving reimbursement for an expense that it will never incur. This Board has previously sustained a disallowance of charged fringe benefits for a community mental health center when that charge was based on a flat percentage rate and not substantiated as an actual expense. Lane County Community Mental Health Center, Decision No. 33, March 3, 1977. 4/

3/ See, e.g., LEGIS/50, The Center for Legislative Improvement, Decision No. 48, September 26, 1978; California Department of Health, Decision No. 55, May 14, 1979.

4/ Our decision does not preclude Grantee from presenting evidence of actual accrued leave that the Agency might be willing to accept as a basis for a revised accrued leave charge. Presumably, EVHA had to know at least during the time in question how much accrued leave each employee had so that it could pay the employee for the leave when the employee resigned or was terminated. EVHA has not indicated why records for each employee were not available or why it could not reconstruct an accrued leave balance for each employee. The Agency has suggested it would be willing to consider claims based on such evidence or even on an alternative method of proof so long as the evidence could reasonably assure the Agency that the charge represented an actual accrued amount and was not duplicative. See Regional Audit Director's memorandum of May 7, 1981 attached to Agency's response dated May 14, 1981 to the Board's Order to Develop Record.

II. Part-time Psychiatrists

EVMA disputes the disallowance of $4,372 for payments made to a part-time psychiatrist from February 1, 1973 to January 31, 1974 charged to grant no. 758 and claims additional charges of $16,443 for the services of part-time psychiatrists from February 1, 1974 to January 31, 1975 to grant no. 758 (by proposing an offset against disallowed charges it does not dispute). EVMA argues that because of recruitment problems for doctors and psychiatrists during the early years of its program, it was forced to use non-employees as consultants. EVMA asserts that these individuals provided essential center services and could be reimbursed pursuant to Chapter 4 of CMHC Policy and Standards Manual dated September 1, 1971.

The Agency argues that the services at issue should have been claimed under standards applicable to "employee" reimbursement. The Agency states:

> [A] consultant [is]...generally considered an expert or specialist in other fields of activity beyond the capabilities found within the institution. Employees, however, are those staff members who carry out the duties and responsibilities of the institution. See Agency Response dated May 14, 1981 to Board's Order to Develop Record.

The Agency, like Grantee, cites Chapter 4 of the CMHC Policy Standards Manual as the applicable standard for use of consultants. Section 4-11 of that Manual provides:

> In special circumstances, grantees may use staffing grant funds for professional consultants under a fee for services or other arrangement set forth in a contract which includes certain minimum provisions prescribed in the staffing grant regulations. In such instances, however, the grantee must satisfy the NIME that it is unable to recruit and hire center employees to provide the necessary services. Further information and regulations governing the use of consultants is available from the Regional Office, Department of Health, Education and Welfare.

The Manual authorizes the use of consultant arrangements only when the same services can not be provided by individuals in an "employee" status. 5/ Thus, the fact that EVMA's Center might have been understaffed

5/ The Manual also requires a contract "which includes certain minimum provisions prescribed in the staffing grant regulations." Since staffing grant regulations were never published in final form, we conclude PHS may not properly hold Grantee to specific contractual arrangements.

at the time these services were performed would not be critical. EVMA must demonstrate that the individuals concerned as well as other qualified individuals could not have been hired as part-time Center employees rather than as consultants. Although questioned by the Board, EVMA has never indicated specifically why the individuals involved could not have been hired as Center employees. The CMHC Manual seems to view the use of consultants as a last resort measure when the more typical employer-employee arrangement is not possible. The consultant rules do not appear to have been designed as an alternative for claiming what would otherwise be employee costs.

Further, as the Agency argues, it is doubtful whether the individuals concerned could qualify as "consultants" rather than as staff members since they performed precisely the same mental health functions as the center's full time salaried employees. Thus, these individuals should have been hired under the procedures applicable to "employees" rather than consultants.

Accordingly, we sustain the Agency's treatment of these claims.

III. 5% Increase in Eligible Costs

On February 25, 1976 the Regional Health Administrator, PHS in approving a continuation application for grant no. 758 for the period February 1, 1976 through April 30, 1976 denied a 5% increase in eligible costs and gave as his reason "the limited amount of funds available at this time." PHS subsequently issued similar denials of 5% increases in eligible costs for the period covering May 1, 1976 to January 31, 1978. On February 23, 1977, the Vice President for Administration and Services of EVMA requested that audit discrepancies from the audit in progress (which subsequently gave rise to the disallowances under review here) be offset by funding withheld from grant no. 758 due to lack of funds for the period February 1, 1976 through January 31, 1977. In its response to the report on the same audit, EVMA also claimed an offset for funds withheld for the period February 1, 1977 through January 31, 1978. The funds withheld totaled $73,367 for the two year period.

The ADAMHA Grant Appeals Committee denied both requests because "a grantee may only charge up to the amount actually awarded and additional funds may not be authorized to cover unallowable charges." Page 2 of Decision, dated August 10, 1978. In its September 8, 1978 letter to this Board, EVMA replied that:

> EVMA is not asking for the 5% funding to cover unallowable charges...but to cover allowable charges incurred by EVMA for necessary program operations. The 5% increase in eligible costs were awarded by Region III, HEW for cost of living raises to the other related staffing grants (753-05 and 753-06).

This reply is not persuasive, however. Grantee might have incurred excess salary costs in the February 1, 1976 through January 31, 1978 period which would have been allowable as charges to Federal funds for that period had sufficient funds been awarded. Such excess salary costs would not, however, be allowable as charges to funds awarded for earlier periods, since they did not benefit those periods.

Further, the approval of a 5% increase by the Board would be tantamount to a supplemental award on the continuation application. The Grantee has not indicated the basis for the Board's authority to make an award of funds under these circumstances. Several prior Board opinions indicate that the Board lacks such authority. See e.g., Macon County Community Action Committee, Inc., Decision No. 93, April 29, 1980; Anderson-Oconee Headstart Project, Inc., Decision No. 90, April 28, 1980; Yakima Public Schools, Decision No. 81, February 6, 1980.

Accordingly, the Board lacks the authority to review the Agency's decisions concerning the requested 5% increase. The Grantee effectively is asking the Board to substitute its judgment for the Agency's concerning a request for additional grant funding.

Conclusion

For the reasons discussed above, the Board sustains the Agency's position on all three issues raised by this appeal.

/s/ Norval D. (John) Settle

/s/ Alexander G. Teitz

/s/ Donald F. Garrett, Panel Chair