DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Alabama Department of Pensions and Security DATE: October 31, 1980
Docket No. 80-59-AL-HD
Decision No. 128

DECISION

The Alabama Department of Pensions and Security (State) requested reconsideration of the decision of the Office of Human Development Services (Agency) disallowing Federal financial participation (FFP) in certain training costs for personnel employed by the State to provide services under Title XX of the Social Security Act (Act).

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 sessions 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 disallowance was based on an audit (Audit Control No. 04-00563) conducted in May and June 1979. The audit covered the period from October 1, 1975 through March 31, 1979, but the auditors did not identify training expenditures for fiscal years 1976 and 1977 because the State had not exceeded its allotment of Title XX funds for those periods and could have properly claimed the training expenditures as administrative expenses at the same rate of FFP.

The Agency disallowed the following training costs:

10/1/77-9/30/78	$50,205
10/1/78-3/31/79	8,400
4/1/79-6/30/79	8,918
7/1/79-9/30/79	9,451

The State, although it still believed the disallowances were unjustified, agreed to charge the $8,400 claimed for the period from October 1, 1978 through March 31, 1979 as administrative expenses. The State also agreed, under protest, to discontinue the practice of claiming as training costs travel and per diem for training programs which did not last a five full days. The State contests the remaining disallowance on several grounds, discussed separately below.

The Board has considered the general issues raised by the instant request for reconsideration in a prior case, Montana Department of Social and Rehabilitation Services, Decision No. 119, September 30, 1980. Portions of Decision No. 119 have been incorporated, as appropriate, within this decision to the extent that the facts and circumstances compel the same conclusions.

Issues

I. The Audit

The State has questioned the validity of the audit inasmuch as the auditors failed to cite the regulations in effect during a portion of the audit period. The audit report only refers to the 1977 amendment of 45 CFR 228.84 although the period reviewed included a portion of 1975 and 1976. The State argued that the "Standards for Audit of Governmental Organizations, Programs, Activities and Functions," (U.S. General Accounting Office, 1972), requires that the applicable laws and regulations be applied in reviewing accounts, and the auditors' failure to recognize the existence of an earlier version of the pertinent regulations raises a question whether the audit was made in compliance with the Standards.

The Board rejects this argument. The primary purpose of an audit is to verify or establish certain facts. The audit report itself has no binding legal effect. It is an evidentiary item subject to interpretation and review by deciding officials at various stages of Agency review. The Board also notes that the Agency did not disallow FFP for any period prior to October 1, 1977. Insofar as the audit is concerned, the earlier version of 45 CFR 228.84 was not material.

II. Amendment of the Regulations

The State has argued that 45 CFR 228, Subpart H, as amended on January 31, 1977 (42 FR 5848), was improperly promulgated. The State alleged that the amendment of 45 CFR 228.84 represented a change in Agency policy regarding reimbursement for training costs, but the preamble and the summary of changes failed to note or describe the changes. According to the State, this did not satisfy the requirements of 5 USC 553(b)(3) which requires that the notice of proposed rule-making include, "either the terms or substance of the proposed rule or a description of the subjects and issues involved." The State cites Florida v. Mathews, 422 F. Supp. 1231 (D.D.C. 1976), to support its contention that, "...the new 'part-time training' regulation should be declared null and void...." (Rejoinder to "Memorandum in Support of Respondent's Disallowance," dated September 8, 1980).

The Board does not find it necessary to rule on this question in view of its other findings and conclusions. However, even if the State was correct in its assertion that the change in terminology signaled a change in official Agency policy, this should have been sufficient to alert the State that the former Agency practice might no longer be applicable. The State cannot have it both ways. It cannot claim good faith observance of Agency requirements if the amendment of 45 CFR 228.84 raised significant questions whether former Agency practices still applied.

II. Interpretation of the Regulations

The State argued that the costs in question were allowable under Section 228.84(c) of the 1975 regulations and that publication of the amended regulations in 1977 constituted a substantive change in the Agency's policy. It argued in particular that the part-time activities were characterized as "part-time training programs" in the 1977 regulations and as "part-time educational leave" in the 1975 regulations. It stated that such activities involved two different concepts and argued that the State's interpretation of the regulations was reasonable in view of the lack of notice of the change in policy.

The Agency stated that its rules governing reimbursement of state training activities have not changed since the inception of the program. The Agency asserted that the duration of the training program has always been determinative of the extent to which FFP was allowable for training costs. According to the Agency, the criteria are and have been that if the training lasted at least five full days but less than eight consecutive weeks, the State may claim for travel and per diem as well as education costs. The Agency denied that it ever drew a distinction between "part-time training programs" and "part-time educational leave." It stated that the regulations were amended in 1977 in order to clarify the Agency's existing policy rather than to establish new policy (see Declaration of Pauline Godwin dated July 29, 1980).

The evidence of record shows that the Agency articulated its policy with respect to reimbursable training costs in an official response to a policy interpretation question (PIQ). The response was issued on September 14, 1977 and was designated PIQ 77-88. Apparently, all of the Agency's regional offices receive copies of PIQs, but the regional offices do not necessarily transmit them to the states. The Agency characterized the PIQs as a means of providing uniform guidance to regional offices by furnishing interpretation and clarification of the existing law and 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 the Agency's published policy statements represent a valid definition of those training costs eligible for Federal sharing.

IV. Effective Date of the Policy Set Forth in PIQ 77-88

The Agency, through the declaration of its Director of the Division of Training and Education, alleged that it has always been Agency policy to disallow travel and per diem costs if the training activity lasted less than one week. The Board finds, however, that even if this was the policy of the Division of Training and Education, it was not the practice of at least some of the Agency's field components. The Board had requested the Agency to provide information in conjunction with an appeal by the State of Oregon (Docket No. 80-76-OR-HD). In answer to a question regarding the working definition of "part-time educational leave", the Agency replied that such leave was considered to be leave which lasted for less than one full day. Also, the Agency stated that Region X, Administration for Public Services (APS), defined "training programs for less than eight consecutive work weeks" as programs which lasted at least one full day but less than eight consecutive work weeks. The Agency acknowledged that Region X did permit FFP in travel costs and per diem if the training program lasted at least one full day (Agency's response dated August 7, 1980 to Board's request in Docket No. 80-76-OR-HD).

In addition, the Board notes that on June 20, 1977, the Director, APS, Region IV, requested the Acting Commissioner, APS, to provide written confirmation of the definition of part-time and short term training (PIQ 77-88). In his submittal, the Director, APS, Region IV, asserted that, "[s]tates in Region IV as well as in other Regions were led [by Regional Office] to give the interpretation to the phrase 'less than

eight consecutive work weeks' to accommodate any duration of in-service training programs where employees were engaged strictly in training and not in provision of services with FFP for travel, per diem and educational expenses." The Director, APS, Region IV, further commented with respect to the amended regulations and their effect on allowable FFP that "the practice had in fact been established which differentiated part-time educational leave activities from in-service training." Also, the Regional Program Director, APS, Region VII, addressed on November 10, 1977 additional questions regarding part-time training to the Acting Commissioner. His comments included the observation that the amended regulations appeared to omit "educational leave," which he distinguished from part-time in-service training. The tenor of the Program Director's presentation was that Region VII allowed FFP for travel and per diem costs even though the training was less than one full week in duration. A submittal from the Regional Program Director, APS, Region V, dated December 5, 1977, also affirmed that such training costs were customarily paid.

Based on the foregoing, the Board finds that even though the Agency's central office may have always had a policy which precluded Federal sharing in travel and per diem costs for training sessions lasting less than one full week, the Agency's field components followed a different practice. The Agency itself apparently realized this fact because on August 23, 1979, the Commissioner, APS, issued Information Memorandum HDS-IM-79-10(APS), which transmitted a complete set of PIQs to the state agencies administering social service programs under Title XX of the Act. The Commissioner stated:

> Since these interpretations have not been available on a routine or uniform basis, states will not be held accountable for administering their programs in accorandance with PIQs issued up to and including September 1, 1979 until receipt of them, unless they have previously been given actual knowledge of the contents.

Accordingly, the Board finds that it was Agency policy not to hold a state accountable for the policy interpretation contained in PIQ 77-88 until such time as the State received actual notice of the interpretation.

V. Notice to the State

Actual knowledge of the policy interpretation would have been sufficient to bind the State to the terms thereof. Whelan v. Brinegar, 538 F. 2d 927 (2d Cir. 1976); United States v. Aarons, 310 F. 2d 341 (2d Cir. 1962); Kessler v. FTC, 326 F. 2d 673 (D.C. Cir. 1963). The Board had asked the

Agency specific questions in a request dated June 17, 1980, in an attempt to elicit evidence as to the date the State was put on notice of the Agency's policy. In reply to the Board's request, the Agency merely stated, "... the State was given reasonable notice of the regulation's requirements upon promulgation of the Title XX regulations" (Memorandum in Support of Respondent's Disallowance, dated August 18, 1980). However, since in the context discussed in this decision, the State might reasonably have questioned what was meant by "part-time training," this conclusory statement is not useful.

The record is not specific with respect to the date the Agency informed the State that it was Agency policy that a training program must last five full days if travel and per diem costs were to be eligible for FFP. The report on the audit conducted by the HEW Audit Agency, however, indicates that State officials were aware of PIQ 77-88 at the time of the audit in May and June of 1979. (Audit Control No. 04-00563, p. 4.) The State in its comments on the audit report did not deny that this was the case, and has presented no contrary evidence. Accordingly, the Board finds that the State had actual knowledge of the Agency's policy as of that time and was bound by the terms thereof beginning July 1979.

Conclusion

The Board holds that the Agency's disallowance of FFP in training costs incurred during the period from October 1, 1977 through June 30, 1979 is reversed. The Agency's disallowance of FFP in training costs incurred during the period from July 1, 1979 through September 30, 1979 is sustained.

/s/ Clarence M. Coster

/s/ Norval D. (John) Settle

/s/ Donald G. Przybylinski, Panel Chair