DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education, and Welfare

SUBJECT: Macon County Community Action Committee, Inc.
Docket No. 78-7
Decision No. 93

DATE: April 29, 1980

DECISION

I. Procedural Background.

Macon County Community Action Committee, Inc. (Grantee), appealed by letter dated November 23, 1977, from the October 31, 1977 determination by the Acting Regional Director, Office of Human Development Services (OHDS), Region IV, disallowing $49,310 expended in excess of the authorized budget for its program year H Head Start grant (for the year ending September 30, 1974). On December 14, 1977 the Board wrote Grantee to inform Grantee that its appeal was improperly submitted as no copy of the adverse determination was included as required by 45 CFR 16.6(a)(2). On February 21, 1978 the Board received a telegram from Grantee inquiring as to the status of its appeal submission. On March 2, 1978 the Board again wrote Grantee, enclosing a copy of the 12-14-77 letter but allowing Grantee an additional 15 days to resubmit its application. By a letter postmarked March 14, 1978 Grantee submitted a properly filed application with the explanation that Grantee had no record of ever having received the Board's initial letter of December 14, 1977.

On August 23, 1979, an Order to Develop the Record setting forth the facts and issues as they appeared from the record and directing Grantee and the Agency to answer certain questions was issued by the Board Chairman. The Order was based on the application for review and attachments from Grantee and the Agency's April 24, 1978 response to the application. In submissions dated September 19, 1979 and October 1, 1979, Grantee and the Agency respectively responded to the questions posed in the Order.

II. Statement of the Case.

The audit report on which the disallowance is based (Audit Control No. 04-56628) shows that Grantee had incurred for program year H of its Head Start grant costs totalling $635,368, while having revenues of $586,058, resulting in a deficit of $49,310. Grantee was initially told that this overexpenditure would have to be repaid with cash from non-Federal sources, but the Agency in its response to the Order stated that an amount of $49,310 would be deducted from Grantee's budget for a future program year.

Grantee does not dispute the fact that it did exceed its budget for its program year H grant, 10/1/73 to 9/30/74. In explanation Grantee states that it decided to begin its program year I two months earlier (beginning August 1, 1974) than usual so that the Head Start Program would coincide with the local school system's operational year. Grantee believed this program change would benefit the Head Start Program because the major portion of its program was operated in buildings provided without charge by the school system, and also because regular school buses could be used to transport the program children.

Grantee asserts that it operated its program on essentially a nine month basis. Thus in a typical program year which ran from October 1 to September 30, most, if not all, of the expenses were incurred within the first nine months. In program year H (10/1/73 - 9/30/74) Grantee operated its typical program. At the end of June its nine month Head Start Program was completed. But in August and September of 1974, two months that fiscally belonged to program year H, Grantee started up its Head Start Program again for another nine month period and thus incurred two additional months of expenses, programmatically belonging to program year I, that were charged to program year H, resulting in excess costs of $49,310.

Grantee has argued throughout its presentations to the Board that it had received oral approval from the Agency's Program Field Representative to change its program year and considered this sufficient authorization to proceed without making any formal written request to the Agency's Regional Office. In response the Agency has steadfastly maintained that the Program Field Representative did not give his approval to the program year change, supplying in its response to the Order a statement from the Field Representative to that effect, and that, even if such approval had been given, it was not adequate to permit the change as the Field Representative did not have the authority to commit Office of Child Development (OCD) funds or to approve program changes which require such funds. The Agency asserts that Grantee was aware that it needed written permission of the Administration for Children, Youth and Families Program Director and OHDS Grants Officer on a notice of grant award prior to increasing Federal expenditures.

Since Grantee did not obtain such written permission, the Agency has stated, Grantee has violated 45 CFR 1301.2-5, 45 CFR 74.101, and the OHDS "Terms and Conditions" which were accepted with the grant award, and the disallowance of the overexpenditure should therefore be sustained.

In the Order Grantee was specifically asked what relief it was seeking from the Board. The record was unclear on this point because at one point in its correspondence with the OCD Director Grantee requested that it be allowed to reduce the level of its expenditures for a future program year

by $49,310. In its response to the Order, however, Grantee replied that it wished the Board to totally forgive the overexpenditure, an action which, as will be discussed below, is beyond the Board's authority.

Grantee was also asked whether it received its normal level of funding for its program year I grant. This was considered relevant because the $49,310 in overexpenditures disallowed for program year H represented two months of expenses that normally would have been charged against the operation of its nine month program during program year I. Grantee replied that it had received its normal level of funding for program year I beginning October 1, 1974 and ending September 30, 1975; Grantee also supplied its schedule of expenditures for that year which showed that Grantee ended the year with a surplus of $22,286, of which $12,906 represented the Federal share.

III. Discussion.

It is uncontested that the overexpenditure in question was program related and that there was no misappropriation of funds by Grantee. The Agency has stated that the amount represented by the overexpenditure was fair, reasonable, and approvable if only Grantee had submitted a written request in advance to the OHDS Regional Office to change its program year. Despite these considerations, and although the grounds offered by the Agency in support of the disallowance are not persuasive, the Board must rule against Grantee and sustain the disallowance.

The Agency's reliance on 45 CFR 1301.2-5 as one of the grounds for disallowing the overexpenditure is misplaced. Despite the Agency's continued assertions to the contrary, 45 CFR 1301.2-5 was merely a proposed regulation (41 FR 18607, May 5, 1976) that was never promulgated as a final rule. Consequently Grantee was in no way bound by the provisions of this proposed regulation.

Similarly, the Agency's citation of 45 CFR 74.101 as having been violated by Grantee is inappropriate. During the period in question, 1973-74, that regulation was only applicable to grants to State or local governments, not to grants to nonprofit organizations such as Grantee, unless made specifically applicable by a duly published HEW policy statement. See 45 CFR 74.4 (1973). No such policy statement has been furnished by the Agency.

To the extent that the appeal rests on Grantee's request that the Board totally forgive the overexpenditure in the program year H grant, we conclude that the appeal should be denied. The forgiveness of the overexpenditure would be tantamount to the awarding to Grantee of a supplemental grant. The Board is not vested with the authority to make an

award of grant funds. Pinellas Opportunity Council, Inc., DGAB Docket No. 79-58, Decision No. 80, February 6, 1980, at p. 3; Yakima Public Schools, DGAB Docket No. 79-3, Decision No. 81, February 6, 1980, at p. 2. Grantee's case is further weakened by the fact that it received its full funding in subsequent program year I, even though two months of expenses that should have properly occurred in that program year were charged by Grantee to program year H. To grant the relief Grantee is seeking by forgiving the overexpenditure would appear to result in a windfall for Grantee.

As indicated above, Grantee apparently had $12,906 in unexpended Federal funds remaining at the close of program year I. There is some room for argument that these funds could be properly used to offset part of the overexpenditures shown as a charge to the program year H grant since the costs incurred in August and September of 1974 were programmatically related to the program year I Head Start program. The record does not show, however, the fate of the unexpended Federal funds, whether the unexpended funds were retained by Grantee or returned to the Agency. Therefore, and because neither party has raised the issue, we do not rule on the possible applicability of a setoff to the facts of this appeal.

As for the issue of whether approval for a change in its program year had been granted, we find Grantee's arguments unconvincing. Asked in the Order why it had not sought prior written approval from the Agency's Regional Office for the change as it had done in the past on other matters, Grantee responded that it was faced with a "life and death" situation and that the Regional Office had been unpredictable in its responses to prior written requests. We consider this unpersuasive in light of the major alteration Grantee was proposing. Grantee's proposal was not a mere budget revision; it was, in effect, a change in the terms of the grant. For such a change Grantee should have obtained an amended notice of grant award from the Agency's Regional Office. Grantee's reliance on the Community Representative's oral approval, assuming for the sake of argument that it had been given, was nonetheless ill-advised. Reliance on oral representations is a risk-laden policy for grantees as misunderstandings as to what actually was stated or agreed to may readily occur, leaving the grantees with no solid evidence to support their claims. A requirement for prior written approval should be viewed as protection for a grantee as well as for the grantor agency. (Cf. Southern University, DGAB Docket No. 29, Decision No. 24, June 29, 1976, at p. 3). Grantee's failure to obtain prior written approval in this case has created an overexpenditure for which Grantee and not the Agency was responsible.

IV. Conclusion.

For the reasons stated above we deny the appeal.

/s/ David V. Dukes

/s/ Thomas Malone

/s/ Frank Dell'Acqua, Panel Chairman