

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Legal Aid Foundation DATE: January 9, 2008
 of Los Angeles
 Docket No. A-06-122
 Control No. A-09-06-84151
 Decision No. 2144

DECISION

The Legal Aid Foundation of Los Angeles (LAFLA) appeals \$19,423 of a total disallowance of \$21,391 claimed under grants awarded by the Office of Refugee Resettlement (ORR) of the Administration for Children and Families under a program for victims of human trafficking. ORR disallowed the \$21,391 on the ground that LAFLA failed to document and claim the costs in accordance with the applicable cost principles contained in Office of Management and Budget (OMB) Circular A-122, "Cost Principles for Non-Profit Organizations." ORR determined that the claimed costs were based on budgeted amounts and not supported with after-the-fact documentation such as payrolls and personnel activity reports that reflect the employee's actual time and account for the total activity for which the employee was compensated, as required by the Circular. The amount appealed represents 34 percent of the salary and related costs for a legal secretary who supported attorneys and paralegals who worked on grant-related activities during the relevant period, calendar year 2004. LAFLA determined that percentage by analyzing its documentation showing the percentage of time spent on ORR grant activities by the eight advocates for whom the secretary worked.

For the reasons stated below, we uphold the disallowance of \$19,423 since LAFLA did not demonstrate that its documentation met OMB Circular A-122 principles for time reporting.

Legal Background

OMB Circular A-122 is made applicable to the grants at issue by 45 C.F.R. § 74.27(a). To be allowable under a grant award, a cost must be allocable to the award. OMB A-122, Att. A, A.2.a. A cost is allocable to a particular cost objective, in accordance

with the "relative benefits received." OMB A-122, Att. A, A.4.a. A cost is allocable to a federal award if it is "treated consistently with other costs incurred for the same purpose in like circumstances" and if it:

- (1) Is incurred specifically for the award.
- (2) Benefits both the award and other work and can be distributed in reasonable proportion to the benefits received, or
- (3) Is necessary to the overall operation of the organization, although a direct relationship to any particular cost objective cannot be shown.

Id. Attachment B, subparagraph 8.m.(1) of the Circular provides that the "distribution of salaries and wages to awards must be supported by personnel activity reports, as prescribed in subparagraph 8.m.(2) . . . except when a substitute system has been approved in writing by the cognizant agency." Subparagraph 8.m.(2) provides:

Reports reflecting the distribution of activity of each employee must be maintained for all staff members (professionals and nonprofessionals) whose compensation is charged, in whole or in part, directly to awards. . . . Reports maintained by non-profit organizations to satisfy these requirements must meet the following standards:

(a) The reports must reflect an after-the-fact determination of the actual activity of each employee. Budget estimates . . . do not qualify as support for charges to awards.

(b) Each report must account for total activity for which employees are compensated and which is required in fulfillment of their obligations to the organization.

(c) The reports must be signed by the individual employee, or by a responsible supervisory official having first hand knowledge of the activities performed by the employee, that the distribution of activity represents a reasonable estimate of the actual work performed by the employee during the period covered by the reports.

(d) The reports must be prepared at least monthly and must coincide with one or more pay periods.

Although the Circular was revised in May 2004, this provision was in effect throughout the grant period at issue here.

Factual Background

ORR awarded LAFLA grants to provide training and technical assistance to other organizations providing services to victims of human trafficking. Under the awards, LAFLA was to "develop tools that legal services providers could use to identify and assist victims of trafficking, develop outreach materials, and facilitate a national network of communication and resource sharing among organizations assisting victims of trafficking." ORR Submission of 12/20/2006, at 1.¹

An audit report performed in early 2005 found that the time and effort charged to the trafficking program was "inconsistent with supporting documentation" and that the "salaries and wages charged to the grant were based on the budget and not adjusted to actuals" every month as required by OMB Circular A-122 (although LAFLA did make such adjustments periodically during the award period). LAFLA Ex. 4. Based on this finding, the auditors questioned \$21,391 in costs, for the year ending December 31, 2004. ORR disallowed that amount.

On appeal, LAFLA argues that the auditors' calculation of salaries paid under the grants did not include time "attributable to staff supporting the advocates performing the work under the grant." Notice of Appeal at 1. LAFLA admits that it had "failed to adjust budgeted hours to actual for our support staff," but asserts that "having now made those adjustments, we believe that a portion of the time of Christina Robles, a secretary performing support duties for those attorneys, should be allowable." Id.

LAFLA asserts that Ms. Robles spends all of her time supporting eight advocates (either attorneys or paralegals), four of whom worked on the trafficking victims grants, and four of whom did not. To calculate how much of her time was allocable to the grants, LAFLA added the "percent of time each of the advocates worked on those grants and divided by eight to determine the percent of Ms. Robles time that can properly be allocated to the subject grants" and, based on that calculation, determined that 34 percent of her time was spent on grant activities. Id. Multiplying that percentage by her salary and fringe benefit

¹ Although ORR's submission refers to only one grant, LAFLA says that the dispute relates to two grants, which ran concurrently and both of which were under Catalog of Federal Domestic Assistance Number 93598. LAFLA Submission of 12/26/2006. The auditors combined both grants for audit purposes. LAFLA Ex. 3, audit worksheet.

cost, LAFLA says, results in allocating \$19,423, a difference of \$1,968 from the amount of the questioned costs. Id.

LAFLA originally provided a document showing its calculations and supporting documentation that was summary in nature, showing what percentage of time each of the four attorneys spent on grant activities. LAFLA explained that the percentages were based on time records for the attorneys created under its recordkeeping system, which recorded the grants as Fund 26 and Fund 27. LAFLA also provided a copy of a grant budget, which showed a position for "Project Legal Secretary" at an annual salary of \$44,998, who was expected to spend 50 percent of his/her time on the project. LAFLA Ex. 5A.

The Board held a telephone conference with the parties to discuss the case. During the conference (which was digitally recorded), LAFLA clarified that all of Ms. Robles's work was for the eight advocates whose time LAFLA used to allocate her salary, that she did no secretarial work for other LAFLA staff, and that she did not have administrative duties. LAFLA also described the time-keeping system it had for its advocates to track their actual time spent on various activities. LAFLA explained that it had been a common practice to allocate support staff time to grants based on the time of the professionals whom the staff supported, and that, although LAFLA had been audited many times, the auditors (including government auditors) had never questioned this method. ORR did not take the position that it would never be reasonable to allocate support staff time based on advocates' time, but said that it did not have sufficient information from which to determine whether the relative amount of time the eight advocates spent on ORR grant-related activities would fairly reflect the actual time the secretary spent on grant-related activities. The parties agreed that LAFLA would have an opportunity to present additional documentation that might satisfy ORR's concerns, including:

- Detailed records relating to the time spent during the grant period by the eight advocates for whom Ms. Robles worked.
- Her position description.

Confirmation of Results of Phone Conference, 2/20/2007, at 1.
LAFLA subsequently submitted additional documentation.

The position description (for a Senior Secretary) gives the following as examples of the duties and responsibilities of the position:

- Prepares documents, such as legal documents and notices . . . from plain or corrected copy or rough drafts or marginal notes or oral or written directions.
- Independently handles a variety of complex specialized legal clerical procedures, such as maintaining a docket of the office's court dates and administrative hearing dates; maintains a follow-up system for legal matters in process.
- Types correspondence for signature of attorney, checking accuracy of legal citations and quotes, etc., as well as independently composing general correspondence.
- Possession and application of knowledge of legal terms, civil procedures, requirements and local practice . . . necessary for completion of work assignments.
- Categorizes and indexes pleadings for office pleadings bank to facilitate analysis by attorney staff.
- Responsible for assisting with on-the-job training of legal/administrative secretarial staff with less experience.

In addition, the position description refers to the skill of being able to translate oral and written materials.

LAFLA also submitted 2004 Activity and Time Reports for each of the eight advocates for whom Ms. Robles worked, showing the date, case number, case activity, fund to which the time was charged, and the amount of time spent on that activity on that date. The case activity codes include Meeting, Telephone Conf., Draft/Revise, Review/Analyze, Plan/Prepare, Intake, Legal Research, Court/Admin. Hearing, Discovery/Factual Inv., Community Education, Prof Dev/CLE, Travel, Compensatory, and Miscellaneous.

ORR rejected this documentation as inadequate to show that the costs of the secretary's salary were properly charged to the ORR grants, because the "records only account for time the advocates spent on the grant, and do not appear to include any time for secretarial support." ORR submission of 3/30/2007, at 1. "While it appears that there may be some overlap between the activities the advocates conducted in furtherance of the grant purposes and Ms. Robles's duties and responsibilities (e.g., time Ms. Robles spent typing up documents and entering revisions could have some overlap with an advocate's drafting and revision of documents related to the grant)," ORR says, "it is not possible to tell from the records whether Ms. Robles spent an equivalent amount of

time carrying out tasks needed for the grant." Id. at 1-2. According to ORR, to the extent LAFLA's argument is "based on the theory that Ms. Robles spent an equivalent amount of time engaged in the same activities as the advocates (i.e., if one advocate spent almost three hours in a meeting related to a grant, then Ms. Robles also must be considered to have spent three hours in a meeting related to the grant)," this theory must fail because it "does not appear from the position description that Ms. Robles's duties and responsibilities required her to attend meetings with the advocates, or to participate in telephone conferences" and both of these are activities for which LAFLA charged a significant amount of time to the grant. Id. at 2.

ORR also points out that LAFLA admitted that, at the time of the audit, it had not adjusted costs associated with Ms. Robles's work to reflect actual hours, and asserts that LAFLA's submission does not satisfy the "after-the-fact" documentation requirements established by OMB Circular A-122.

Analysis

We note at the outset that LAFLA's theory underlying use of the advocates' reported time to allocate a supporting secretary's time is not, as ORR posits, that the secretary will be engaged in the same activities as the advocates for an equivalent amount of time. Instead, as LAFLA explained in the telephone conference, the theory is that the ratio of the amount of time the advocates whom the secretary supports actually spent on ORR grant-related activities compared to their total time is a reasonable approximation of the percentage of time the secretary actually spent on ORR grant-related activities. ORR appeared to recognize in the telephone conference that the Circular gives agencies some discretion to accept such an allocation method if the agency determines that it is an equitable way of determining relative benefit under the facts of a particular case.

In any event, we find that the documentation LAFLA submitted does not support reversal of the disallowance. Unlike the general principle that a grantee must maintain adequate documentation of costs, the principles in OMB Circular A-122 at issue here are very specific with regard to the documentation a grantee should maintain to support allocation of time among benefitting activities. Unlike the awarding agency, this Board does not have the discretion to waive these principles and to accept lesser documentation, even if we are satisfied that a grantee has shown that some of its salary and related costs were allocable to a grant.

While LAFLA asserts that other grantor agencies from which it received funding (such as the Legal Services Corporation) did not question its timekeeping system, LAFLA also concedes that it did not have specific approval for its method of allocating secretarial time. More important, while the LAFLA official who submitted the appeal affirmed that he thought 34 percent was a reasonable estimate of the time Ms. Robles spent on grant activities, he did not certify that he had personal knowledge of her activities during the period in question, 2004, as required by OMB Circular A-122, Attachment B, subparagraph 8.m.(2)(c). This failure is compounded by the fact that LAFLA was not reporting her time on a monthly basis or having her certify monthly time reports, so there was no contemporaneous evidence that using the advocates' time resulted in a reasonable estimate of her time spent on grant activities each month.

Also, while there is no indication in her position description that Ms. Robles had administrative duties in addition to providing legal secretarial support to the eight advocates - a concern expressed by ORR in the telephone conference - there is mention in the position description of duties related to training other support staff. We have no way of knowing, from the information provided by LAFLA, whether this took more than a de minimis amount of her time or not. If it did, that could undercut the reasonableness of using the advocates' time to allocate her salary.

Conclusion

For the reasons stated above, we uphold the disallowance of \$19,423. The disallowance of the remaining \$1,968 questioned by the auditors was not appealed, and LAFLA said that it returned this amount in September 2006. LAFLA Submission of 12/26/2006, at 1, n.1.

_____/s/
Sheila Ann Hegy

_____/s/
Constance B. Tobias

_____/s/
Judith A. Ballard
Presiding Board Member