

DEPARTMENTAL GRANT APPEALS BOARD

THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SUBJECT: Southern Mutual Help Assoc., Inc. DATE: June 23, 1976
Docket No. 30
Decision No. 20

DECISION

STATEMENT OF THE CASE

As a result of an HEW audit for the period July 1, 1971 through September 30, 1973 (Control #06-40122) a number of Southern Mutual Help Associations (SMHA) expenditures under a migrant health service program grant were disallowed. Of these, disallowances for motion picture production and travel expenditures were appealed:

Motion Picture Production. An amount of \$7,000 expended for the production of a motion picture film was disallowed on the grounds that it was intended for public information purposes rather than training (pages 14 and 15 of the audit report). We hold that the disallowance was proper because the film was produced for viewing by the "general public" within the meaning of applicable policy and expenditures for such production required advance approval of the operating agency which was not obtained.

Travel Expenditures. Travel expenditures were disallowed for disbursements in excess of the approved budget, \$728; forfeiture of room deposits which could have been avoided, \$200; difference between first class and a lower fare, \$131; duplicate charge, \$120; clerical error, \$6, and unsupported expenditures charged to travel, \$200. The total of these items is \$1,385. (Pages 15 and 16 of the audit report.) We hold that the audit report states adequate reasons for the disallowances and the grantee has not refuted these reasons.

Reimbursement. The grantee raised a third issue concerning the agency's request that the grantee make cash repayment of these disallowances and of other amounts which were not appealed, rather than offsetting them against future allowable indirect cost. Since the audit was for a period ending September 30, 1973, the parties were advised that this issue would be considered moot by the passage of time unless they advised the Board otherwise. No contrary representation was made to the Board, so it takes no further note of this issue.

Absence of Factual Dispute. On January 28, 1976, the chairman of the panel wrote to the grantee to clarify the issues, invite the submittal of further information and arguments, and to inquire whether the grantee believes there are further facts in dispute which require a hearing or conference for proper resolution. The grantee responded with certain facts and arguments which are discussed below and noted the impossibility at the time of determining which facts are in dispute. It stated: "If the facts which are contained herein are disputed after HEW response, SMHA may wish to request a hearing, representation by counsel, and cross examination of witnesses." The agency made no response to the grantee's further submittal and the panel has determined that there is no dispute as to a material fact, the resolution of which would be materially assisted by oral testimony. The panel has also determined that an informal conference with the parties is unnecessary. The matter is now ripe for decision.

DECISION

The basis for disallowance of the motion picture production costs cited on page 14 of the audit report is from Item F 2 under Section V "Administrative and Fiscal Policies" of a "Policy Statement" entitled Project Grants for Health Services to Agricultural Migrants (May 1, 1970) which reads:

Films - allowable for purchase or rent. Funds may be used to produce a film if it will be used only for teaching purposes in connection with the grant supported activity.

Not allowed [except by prior approval] when intended for public showing.

This policy also was relied on by the operating agency in upholding this disallowance but we believe the controlling policy is that stated in HEW Grants Administration Manual Chapter 1-450 dated June 15, 1969. Before describing that policy and its application in this case, we must explain why we have come to the conclusion that it is applicable. Unfortunately, to do so we must retrace a complicated course by which the policy was implemented with respect to the grant involved here.

The policy statement of Chapter 1-450 of the HEW Grants Administration Manual, standing alone was not a direct requirement on grantees; rather it instructed operating agencies to take steps to make the policy it specified on the production of motion picture films, applicable to their grantees. This implementation was accomplished through

development of an HSM Grants Administration Manual by the constituent agency. The format described in an issuance entitled "Plan of the Manual" was that it would follow the numbering of the HEW Grants Administration Manual and explain provisions of the latter. All provisions of the HEW Grants Administration Manual would be applicable to grants of the agency except as the HSM Grants Administration Manual might provide to the contrary. Omission of explanation for a unit of the HEW Manual "will mean that the Department's statement needs no further HSMHA explanation." The earliest copy of this issuance which we have is dated March 31, 1970.^{1/}

Also under date of March 31, 1970 the HSM Manual Chapter 1-450-50B was released to establish "HSMHA procedure for requesting exceptions from the HEW policy regarding the use of grant funds for the production of motion picture films." It did not describe the policy but it was obvious from the issuance that HEW had a policy which imposed a restriction on use of grant funds for production of motion pictures in the absence of an exception being obtained. Without the HEW Grants Administration Manual one would not be aware of the nature of that restriction but he would know that some type of restriction existed.

Closely following the above was the "Policy Statement" for Project Grants for Health Services to Agricultural Migrants which is cited by the auditors in making the disallowance and which we have quoted above. That policy is similar but not identical to the policy under the HEW Grants Administration Manual. We have no explanation as to why the operating agency issued a policy which did not follow the wording of that in the HEW Grants Administration Manual.

The May 1, 1970 "Policy Statement" also contains a heading "V". "Administrative and fiscal policies", Subheading B-1 of which states:

"The applicant, when applying for a project grant, agrees to administer any grant awarded in accordance with the governing HSMHA policies in effect at the time of the award."

We have no indication as to whether the grantee did in fact have a copy of HEW Grant Administration policy at the time the initial grant was approved on June 24, 1971.^{2/}

1. Our copy of the March 31, 1970, issuance indicates that it supersedes HSMHA; 0-2 which we have not obtained since earlier issuance would have no bearing on this case.
2. This date is given for initial approval in a memorandum filed by the grantee in support of a motion for summary judgment in its action against the Secretary in the U. S. District Court for the District of Columbia (C.A. 74-1293). The grantee submitted a copy of the memorandum to us for our information.

The clear implication is that such a manual was available to grantees but we do not know in what manner. We conclude from the foregoing, however, that regardless of whether the grantee was in possession of the HEW Grants Administration Manual the information actually sent to it did provide sufficient notice prior to June 24, 1971, to put it on inquiry about restrictions applicable to use of grant funds for the production of motion pictures.^{3/}

Even assuming that 5 USC 552(a)(1) required Federal Register publication of the material as rules or policies of general applicability, the failure to publish is not a defect under the statute to the extent that a person has actual and timely notice of the terms thereof...". Rodriguez v. Swank (ND, ED, Ill. 1970) 318 F. Supp. 289; Aff'd 403 US 901 (1971). We have found no definitive holding as to what constitutes "actual...notice of the terms thereof," but believe such notice was given when the grantee was informed that a policy placed limits on use of grants for motion picture production and told how the grantee could apply for an exception or obtain further information. A person can have "actual notice" without having been furnished the complete text of the material. U.S. v. Floyd, supra note 3.

This brings us to the substantive question of whether the policy in fact required prior approval for the type of expenditure disallowed. The policy specified that grantees may use funds to produce motion pictures "intended for viewing by restricted audiences" but not to "produce motion picture film for viewing by the general public." Paragraph 1-450-30 B and C. The reason for the policy is stated in Paragraph 1-450-10 as follows:

Motion pictures have a unique impact when contrasted with other communications media. Their potential capability to educate, to persuade, and to inform make it imperative to be particularly sensitive to the implications of Federal sponsorship. When the general public is to be the primary or secondary audience of a film produced with HEW grant funds, it is necessary to introduce safeguards which will insure that the film content does not become a source of embarrassment to the Department or a detriment to the attainment of its objectives. The Office of Public Information, Office of The Secretary, has primary responsibility for such films. Its responsibility extends to such factors as quality, economy, effectiveness, adherence to policy, and content.

3. U.S. v. Floyd, (10th cir. 1973) 477 F.2d 217; cert. den. 414 U.S. 1044 1973)

The facts to which we must apply this policy are that without prior HEW approval of the specific item the grantee contracted with a motion picture production firm, Photographic Illustration, Inc., in March 1973, for the production of a film of fifteen to twenty minutes edited length, "featuring SMHA Health Clinic for educational purposes."4/

On page 14 of the audit report the auditor asserts that during July and August 1973, the film was shown a minimum of four times to... (1) clinic advisory board and Abbeville citizens in Abbeville... (2) LSU students and faculty... (3) Board members of SMHA and guests... and (4) A group of Women Religious in Washington, D.C."

Page 15 of the audit report states:

After viewing the film ourselves, and based on the viewing audiences above, we believe that the film was made for public information purposes rather than for teaching purposes and is therefore not an allowable cost. This opinion was supported by the project director, who stated that they hoped to raise funds by showing the film; however, she stated that they would not show the film anymore because it tends to alienate the community from the program by showing conditions in the area.

Page 21 of the audit report notes that the grantee's officials stated the project director was incorrect in claiming the purpose of the film was to raise money.5/ They stated it was made to educate the individuals needing and delivering health services; however, the auditor states that "they agreed it was not made for teaching purposes in the regulation sense."

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4. The contract specifies payment of \$6,000. The audit report does not refer to this amount but states \$7,000 was expended. Since the grantee has not challenged the amount we assume \$7,000 was expended, rather than the amount specified in the original contract.
 5. It would have been helpful had the auditor clarified from the then project director (administrator) the manner in which she thought the grantee expected that the film would raise funds. We see no indication that there would have been a market for sale or rental of the film. Did she mean that there was a plan to use the film in connection with fund solicitation?

The agency agreed with the auditor's conclusion that the film was not for "teaching purposes." The Acting Chief, Grants and Contracts Management Branch of the Bureau of Community Health Services, added in a memorandum of July 2, 1974: "There is little question that it was probably a useful device to the project, but the procedures for the prior approval and clearance are specific and must be followed."

The attorney for the grantee contends that the film was educational, a characterization given it in the procurement contract. According to the attorney the audit report incorrectly states that the grantee conceded that it is not made for teaching purposes in the regulation sense. Instead, she contends officials of the grantee stated the film "was not made for teaching in the traditional sense."

As an indication that the film was "educational" the attorney states that the showings were to groups with either a professional or special social interest in migrant health and to prospective beneficiaries. She notes that HEW had indicated that the thrust of the rural health initiative is to encourage the development of rural health care systems, thus she makes the point that the film "was intended to be used to educate farm worker families on the development and delivery of health care systems. This was an especially important goal in lieu (sic) of HEW's mandate to have farm worker involvement in health care policy." In support of this a letter written by the grantee's administrator, Rose Mae Broussard, on February 13, 1974, to Ms. Lorna Bourg describing some of the January 1974 activities of the grantee states:

Some of the things we will be doing is sponsoring special "weeks" such as "Hypertension Week," "Heart Week," "Obesity Week," etc. We will show films and have special screening procedures set up for the general public. Patients not within normal screening will be advised to consult with their own physician.

We agree with the grantee that the context of "general public" in the above quotation refers to the potential beneficiaries in the target area. By the same token, we believe that potential beneficiaries are the "general public" within the meaning of the restrictions on the use of grant funds. It might be that professional, college, or volunteer

groups with a special interest in migrant health would be "restricted audiences" within the meaning of the policy but the intent in producing the film was broader - an intent to include viewing availability to those in the community who might care to see the film. This is an intent to show to the "general public." Indicative of the grantee's intent is the following statement by its attorney.

The reason the film was only shown four times is clearly stated in the audit on page 15:

"She (Ms. Rose Mae Broussard) stated that they (the clinic staff) would not show the film anymore because it tends to alienate the community from the program by showing conditions in the area." It is not surprising that certain elements in the community (especially if they were responsible for poor health conditions in the first place) would be upset to hear that farm workers were getting educated in effective health care delivery to change conditions. At any rate, Chapter 1-450 of the Grants Policy Statement does not specify the number of times a film must be shown to qualify as allowable. Additionally, after having replaced Ms. Broussard with a new project director and had SMHA not been prematurely and unjustly terminated by HEW, undoubtedly the film would have been shown many more times.

It is not for us to decide the wisdom of the policy or whether this type of film should have received approval had a request been made. We are bound by the policy which required that HEW have an opportunity to consider the "quality, economy, effectiveness, adherence to policy, and content" of films to be paid for with grant funds, if intended to be shown beyond "restricted audiences." The fact that after production showings might have been restricted, does not obviate the need for prior approval. The test is the use intended at the time of the expenditure.

Admittedly, the policy was far from crystal clear. It stated that there is no universal rule for determining "whether the intended audience for a motion picture should be regarded as general or restricted." One example of what constitutes showing to the general public is described as "showing to civic associations, schools (except when used as a teaching tool in a classroom setting), clubs, fraternal organizations or similar lay groups." Paragraph 1-450-40E.

Certainly the policy was specific enough that the grantee should have anticipated that the intended use at least raised a question as to which further inquiry would be prudent. We therefore conclude that at the time of procurement of the film the intended use by the grantee brought it within the HEW policy which required prior approval and such approval was not obtained here.

The grantee asserts that even if prior approval normally would be required, failure to obtain it in this case was excused because HEW officials and the grantee's Project Administrator at the time were responsible for that failure, contrary to the desires of the grantee's central office official. In support of this contention, the grantee submits internal documents which it contends show that in late 1972 and early 1973 its central office official attempted to have the project administrator get approval for various budget revisions including an increase in the amount available for films but the Project Administrator never made the request to HEW. The grantee feels this discharges it from further responsibility because of what it feels was the practice of HEW officials to refuse to deal with any of the grantee's officials other than the project administrator. In addition, the grantee believes the HEW officials generally sided with the Project Administrator against the grantee and protected the Project Administrator even when she committed improprieties for which HEW should have taken action.6/

These assertions are wide of the mark because the disallowance for the production of the film is not based on unavailability of a budgeted amount for that purpose but rather upon failure to obtain approval of a film which was

6. These allegations are the basis for litigation in the U.S. District Court action referred to in footnote 2 of this decision. We do not know the current status of that litigation.

intended for showing to the general public. Had the grantee submitted evidence to the effect that it requested approval in accordance with the procedures under HSM Manual Chapter 1-450-50B, which HEW ignored, or that actions of HEW officials prevented it from following that procedure (or even that the Project Administrator used her position as the only channel of communication to HEW to frustrate the order of higher officials to seek such approval) a different problem might be presented. The grantee was invited by the panel chairman to submit evidence on these points and it failed to do so.

The grantee raises the additional question taken from the legal action referred to in footnote 2 of this decision, that the grant was terminated by HEW without affording the grantee the procedural protections of law and regulations for grant termination. Such a question is not relevant to the matter now before the Board. It is sufficient here, as noted above, that the procedure for seeking approval for the production of films intended for showing to the general public was issued by HSM 1-450-50B, dated March 31, 1970. The HEW policy was applicable to all grants awarded after the effective date of agency implementation. (HEW Grants Administration Manual Chapter 1-450). The grant here clearly was made after March 31, 1970.^{7/}

Travel Expenses Disallowances

The grantee objected to the travel expense disallowances because HEW "has failed to specify what travel cost are being

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7. The first award for this project was made on June 24, 1971. Subsequent budgets were approved in 1972 - 1973. In the litigation described in footnote 2 of this decision the grantee asserts that the first award provided a right to a hearing upon refusal to approve funding for a later period. HEW contends that refusal to approve a budget for a new period is tantamount to the refusal to award a grant and thus does not give rise to the right to hearing for a grant termination. The distinction would be relevant in the matter before us only if the policy had been issued after June 24, 1971, when the grantee's project was first approved. In such a case, the grantee could have argued that since the policy was applicable only to grants awarded after its issuance, it would not apply to budgets approved after issuance of the policy since they would not be an award of a grant.

disallowed and why any specific travel costs are thought to be 'unsupported.'" The panel chairman directed attention to the grantee to pages 15 and 16 of the audit reports which do assign reasons and invited the grantee to clarify its position in light of that. It failed to do so and was thereupon advised that in the absence of further submission, the only question to be determined on travel costs would be whether adequate reasons were given for the disallowance. We have received no such further submission.

The audit report not only describes the categories of disallowances as indicated at the outset of this decision but also specifies reasons. For example, the auditor's narrative on page 15 states that travel costs in the first grant year exceeded the approved budget line items for travel by \$728 and that he found no evidence that approval for such excess was requested or given. The auditor cites the policy statement which precludes exceeding the travel amount in an approved budget without prior awarding agency approval. In the case of room deposits the auditor asserts that forfeits resulted from switching hotels at a training session for the advisory board and for clinic staff members without cancelling previous reservations and obtaining a refund of the room deposits. He cites a policy which would seem to provide for the disallowance of such a case. Descriptive reasons are given under the other category of disallowances and policies are cited.

The Board is of the opinion that the audit report does assign adequate reasons to support the travel disallowances. The grantee has failed to show any inaccuracies in the reasons assigned in the audit report for disallowance of the travel items or that the cited policies were not properly applied. Accordingly, the disallowances of \$1,385.00 for travel should be upheld.

/s/ Bernice L. Bernstein

/s/ Francis D. DeGeorge

/s/ Edwin H. Yourman, Panel Chairman