

DEPARTMENTAL GRANT APPEALS BOARD

The Department of Health, Education, and Welfare

SUBJECT: East Central University
Docket No. 31
Decision No. 31

DATE: January 7, 1977

DECISION

The grantee, East Central University (formerly East Central State College), held an Office of Economic Opportunity award for an Upward Bound project running from March 30, 1969 through June 30, 1970. This was the fourth program period of the project. Effective July 1, 1969, the administration of Upward Bound was transferred by statute from OEO to the Office of Education in the Department of Health, Education, and Welfare. Grants already made continued in effect and continued to be governed by OEO grant terms and conditions and OEO grant issuances. Since this case is concerned with the period during which the OEO rules were applicable to these Upward Bound grants, we shall use OEO terminology in discussing them rather than current HEW terminology which is not altogether the same.

In June, 1970, HEW made an Upward Bound grant for the 1970-71 fiscal year but retroactive to June 1, 1970 to permit expenses in preparation for that program, thus overlapping by one month the OEO grant. During that one-month overlap grantee incurred expenses of \$4,650.25 in preparation for the new HEW grant, in part during the early part of the month when the HEW grant was reasonably expected and in part during the latter part of the month after the HEW grant had been made but when funding was not yet available. Because of the unavailability of HEW funds, grantee utilized available OEO funds. In incurring these expenditures grantee acted prudently, in the best interests of the program, and in good faith. The expenses were authorized expenditures under the OEO grant.

Grantee's external auditor flagged these expenses as applicable to the 1970-71 program year and suggested that guidance be obtained on how to handle them. The grantee responded that these expenses had been incurred using funds left in one year's program to begin the next year's program consistently with OEO rules and practice. It was informed, however, that HEW had not adopted the carry-over principle for Upward Bound and grantee agreed for the future not to engage in carry-over. The Director, Higher Education, Region VI, then recommended allowance of the questioned expenses (August 28, 1972).

Two years later, the Regional Commissioner advised that that recommendation had been rejected on the ground that an impermissible carry-over was involved (October 29, 1974). That decision was appealed to this Board. We sustain the appeal.

The parties were furnished an outline of the facts as they were gathered from the Board's file and reference to legal considerations which appeared to govern the OEO grant and were invited to correct that summary of facts, to comment on the legal principles involved and to brief any issue in the case. Both parties have responded. In one respect the Board's summary of facts was in error and has been corrected by the additional information furnished by the parties. That relates to the effective date of the first HEW Upward Bound grant to this grantee which the Board's summary took to be July 1, 1970. Instead, the HEW award was made June 12, effective June 15 but allowing expenses retroactive from June 1, 1970. Funding, however, was not available under the HEW award prior to July 1, 1970.

The Upward Bound Program

Begun on a national basis in June 1966, Upward Bound programs were supported by OEO. Upward Bound is a precollege preparatory program designed to generate the skills and motivation necessary for success in education beyond high school among young people from low-income backgrounds and inadequate secondary school preparation. The typical Upward Bound program was offered by an educational institution combining secondary school and college teachers as faculty, making use of the physical facilities of a college campus for the students, and utilizing the experience and energies of college and university students as tutors. (OEO, Upward Bound Guidelines 1968-1969 p.1; HEW, Application Information and Program Manual, Talent Search, Upward Bound, Special Services, November 1971, p.32).

The OEO Program Year Concept

In 1966, OEO developed and established a grant concept based upon HEW's multi-year project approval concept but having certain significant differences. This concept applied to all grants awarded under all Sections of Title II-A (and Section 311) of the Economic Opportunity Act of 1964, as amended, and specifically to grants under Section 205 under which the Upward Bound program was established.

Under the program year concept, a grant is defined as the Federal funds provided to the grantee for a single statutory objective represented by separate authorizing provisions of the statute. The central novelty of the program year concept was

that such funds were awarded for an indefinite period of time and with the expectation that funds not expended in the year of award would normally be carried over into the following year. For administrative control purposes, annual reports and approvals of expenditures were called for, but the funds were not awarded for a limited time period. This distinctive grant concept was part of the OEO financial policies and procedures which received GAO approval after review. B-166004, October 31, 1969.

One consequence of this concept is that there was a built-in expectation of renewal of approval and carry-over to the activities of the next year. Another, and for the purposes of this case more important, consequence was that, during the term of the initial approval, expenditures anticipating renewal (in the absence of clear notice to the contrary) are approved expenditures. This is quite different from carry-over.

In the case of Upward Bound, preparatory expenses were so clearly called for that OEO often made overlapping 15 month awards to provide for a summer and academic year project together with the preceding period of recruitment and preparation. Any funds left over towards the end of an academic year project could properly be applied, before the program year was up, to preparation for the next summer's activities without carry-over or, with approval which would normally be forthcoming, could be applied by way of carry-over to the next summer's activities even after the program year had ended.

As a result of these arrangements, there were often multiple sources from which funds could be derived for a particular cost item. OEO required that funds be withdrawn on a "first in, first out" basis (e.g. Community Action Memo No. 20, January 28, 1966, p.6).

The Transfer of Upward Bound From OEO to HEW

Section 105(c)(1) of the Higher Education Amendments of 1968, P.L. 90-575, terminated the authority of the Director of the Office of Economic Opportunity with respect to Upward Bound programs and transferred the functions of the Director to the Commissioner of Education effective July 1, 1969. Consistent with the Congressional intent that this transfer be made smoothly, the Commissioner administered Upward Bound awards made by OEO prior to the July 1, 1969 transfer under the OEO rules (45 CFR Part 155, preamble, 35 Federal Register 7256-7, May 8, 1960).

After July 1, 1969, the Office of Education was authorized to make its own Upward Bound grants. HEW regulations governing its own awards were not published until May 1970 and HEW apparently made its first such grants in June 1970, as is the case here. These grants, like OEO's grants, recognized the need for preparatory expenditures and thus overlapped awards then outstanding. However, where OEO provided a three-month overlap, making its award for the summer and academic year in the previous March, HEW provided only a one-month overlap, making its award effective June 1.

The HEW Upward Bound program was not a new program but a continuation in new hands of the OEO program, as is unmistakable when the successive editions of the OEO guidelines published before the transfer are compared with the successive editions of the HEW guidelines published after the transfer. See for example those cited supra p.2.

Although conscientious efforts were made to achieve a smooth transition, this may not have been wholly successful. Grantee's submission contains the assertion, which appears consistent with the history of the transfer:

"There was complete chaos in obtaining any information and assistance or direction with OEO disbanding and HEW/OE just beginning to tool up to take over. Staff of OEO was quitting to find new jobs and new personnel in OE were unfamiliar with the operations of the program."

The Grantee is Punished for Behaving Responsibly and Legally

In June 1970, prior to the expiration of its year-D OEO grant (award effective March 30, 1969 for the summer of 1969 and the academic year 1969-1970), grantee incurred expenses in preparation for the expected summer project of 1970 and academic year activities 1970-1971 (year-E). Award was made by HEW for these activities June 12, but funding was not yet available.

Grantee had conducted its Upward Bound program for four successive years with evident success. The expenses facing it for the new year's activity were such as were plainly called for by responsible management: Renewal of an accident insurance policy normally renewed on June 12 of each year (as to this item, the Regional Office has agreed that it would approve a prorating which would in effect allow the expense); equipment, school supplies, and testing materials required for the beginning of the summer program; medical expenses for a student arriving for the summer

program; stipends for students arriving on the campus for the summer; and cultural activities expenses such as get acquainted parties for the first week of the program. All of these related to the oncoming project but were valid expenses under the OEO grant and under the OEO grant rules. The OEO year-D grant was the appropriate first source for such expenses. As a practical matter, the OEO grant was the only source for payment of such expenses, since, when they were incurred, HEW funding was not yet available even though, during the course of June, an award was made.

One item of expense challenged involved travel expenses initially described as partially related to obtaining release of the year-E funding but later described by grantee in a correcting submission as wholly related to year-D program concerns. The Regional Commissioner was invited to respond to the most recent statement by the grantee. His response does not challenge the correctness of grantee's factual contention but refers to his previous determination made on the basis of grantee's original statement of facts. As we have seen the Regional Office's original determination is not acceptable and its present position that "this office still maintains that the travel in question is an unallowable grant expense and should be disallowed" is wholly unsupported except perhaps by an implication that the travel justification is too vague in its terms. If that is the meaning of the Regional Office's position, it has had several opportunities to request and obtain more precision including in connection with our latest invitation to comment.

We note, however, that under applicable OEO rules (CAP Memo 53-A, February 5, 1968; cf. OEO Instruction 6910-1, August 12, 1969, Sec. 4), the trip required advance approval. Grantee has not asserted that it requested or obtained such approval, and since, if it had it, this would have been a strong argument in its favor, we may assume that it did not have it. In view of the clear probabilities involved, it would be a disproportionate expenditure of time and effort on the part of the parties as well as of the Board to engage in a further round of briefing on this narrow issue. Accordingly, we decide against the grantee on the travel issue. If, contrary to our assumption, grantee does have written permission for the trip, it may furnish a copy within 20 days and request reconsideration.

If any of these expenses had been incurred in July, 1970, we would have a question of carry-over. Even that should be approved under OEO principles applicable to the OEO grant. But the question of carry-over does not even arise here, for the expenses were incurred during the OEO program year ending June 30, 1970; they were (apart from the travel expenses) appropriate expenses under the grant even though they were

incurred in anticipation of the next program year, and they were properly charged to the OEO grant which remained subject to OEO principles.

CONCLUSION

The determination appealed from treats the expenses involved as impermissible carry-over. The grantee was governed for the program year in question by OEO grant rules which, contrary to the decision appealed from, did indeed permit carry-over. In fact, as noted above, the expenses were incurred for purposes consonant with the OEO grant and within the term of the OEO grant; thus no carry-over was in fact involved.

The disallowance is reversed and the appeal is sustained except with respect to the item of \$434.40 of travel costs.

/s/ Bernard E. Kelly

/s/ Thomas Malone

/s/ Malcolm S. Mason, Panel Chairman