

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Lakota Indian Alcohol and Drug
Abuse Program, Inc.
Salem, Oregon
Docket No. 79-212
Decision No. 196

DATE: June 30, 1981

DECISION

Lakota Indian Alcohol and Drug Abuse Program, Inc. (LIADAP, Grantee) appealed on October 29, 1979 a decision dated September 24, 1979 by the Alcohol, Drug Abuse and Mental Health Administration (ADAMHA) Grant Appeals Committee. The ADAMHA Grant Appeals Committee sustained the decision by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) to terminate the grant for cause.1/

We find that the decision of the ADAMHA Grant Appeals Committee should be sustained for reasons set forth below.

The record on which this decision is based consists of LIADAP's application for review, the Agency's response to the appeal, and the record before the ADAMHA Grant Appeals Committee. On April 7, 1981, the Panel Chair issued an order requesting LIADAP to show cause why NIAAA's decision to terminate the grant should not be sustained. The Grantee declined to respond to the order.2/ The Agency was not required to respond to the order and did not do so. Although LIADAP had earlier requested a hearing to be held at the Oregon State Penitentiary, the Board did not grant this request because it concluded that oral testimony would not materially assist the resolution of any remaining factual disputes or legal questions. The Board, however, advised the Grantee

1/ For purposes of 45 CFR Part 16 the constituent agency in this matter is the Office of the Assistant Secretary for Health, Public Health Service (hereinafter referred to as the Agency) of which ADAMHA and NIAAA are a part.

2/ The Board was informed by the Attorney for the Grantee on May 22, 1981 that the Grantee did not intend to respond to the Order to Show Cause.

that it would accept the testimony of Grantee's Directors in the form of affidavits as well as any other written evidence the Grantee might consider pertinent to the Board's consideration of the case. Grantee, however, chose not to present any additional evidence.

Background

LIADAP was funded for the first budget period of a three year project period. Grantee received \$65,000 on October 1, 1978 for the first budget period, with the same amount recommended for each succeeding budget period. The target population of the program was comprised of Indian inmates of three penal institutions located in Salem, Oregon: Oregon State Penitentiary, Oregon Women's Correctional Center, and Oregon Correctional Institution. The program outlined in the grant application was to focus on alcoholism counseling, education, and cultural identity with inmates and alcoholism prevention work with children of inmates. The program staff included a Program Director and Counselor, two Advocate/Counselors, and a Secretary/Data Coordinator. The Grantee organization, which was founded in 1971, was governed by a nine-member Board of Directors composed of Indian inmates and outside Indian people with the inmate members always in majority.

In February, 1979, the NIAAA Indian desk was informed that the LIADAP Board of Directors had replaced the former Program Director with a new Program Director and had also appointed a new Administrative Assistant. The former Program Director, alleging that she had been wrongfully fired on January 31, 1979 at what she considered an illegal Board of Directors meeting, took all the records and books of the program and the keys to the facilities. It appears that the Board of Directors instituted legal proceedings in order to restrain the former Director from continuing such actions and to regain custody of the records of the program. Based on this information, which was received by the NIAAA Indian desk in February, 1979, NIAAA sent a fact finding team on a site visit to LIADAP in March, 1979. At the same time NIAAA, by memorandum dated March 6, 1979, requested the Chief of the Federal Assistance Financing Branch to suspend all cash payments to the Grantee until all the facts surrounding the allegations could be investigated. Based on the findings contained in the reports of the members of the site visit team, as well as a report from the Alcohol Coordinator, State of Oregon Mental Health Division, concerning a site visit made by him on January 30, 1979, NIAAA, by letter dated May 17, 1979, communicated its decision to terminate the grant effective two weeks from the date LIADAP received the letter. LIADAP, by written request dated June 19, 1979, appealed the NIAAA decision to the ADAMHA Grant Appeals Committee.

The ADAMHA Grant Appeals Committee reviewed five reasons given by NIAAA for terminating the grant and concluded that the NIAAA decision was warranted. The Grant Appeals Committee also determined, however, that the Agency had not properly notified the Grantee of the suspension of the grant and that NIAAA must reimburse the Grantee for allowable expenditures which the Grantee incurred up to the date of termination. The Grantee has not yet been reimbursed for these costs. (Letter from Grantee dated April 17, 1981.)

The major issues presented by the Grantee concern the validity of the termination of the grant. The Grantee raises both substantive and procedural arguments which will be discussed below.

Discussion

Validity of ADAMHA Grant Appeals Committee Decision

The Grantee, in its application for review, questioned the validity of the ADAMHA Grant Appeals Committee decision due to two alleged procedural defects. The first alleged defect was that the decision is vague and fails to address the specific allegations made by NIAAA in its notice of termination. The Grantee was informed of the ADAMHA decision by letter dated September 24, 1979. That letter informed the Grantee of the Committee's decision to uphold NIAAA's determination to terminate the grant. The written record submitted to the Board by the Agency at the Grantee's request indicates that this letter was intended to summarize the written decision of the ADAMHA Grant Appeals Committee and to set forth the Grantee's right to appeal to this Board. The written decision dated September 24, 1979 of the ADAMHA Grant Appeals Committee, submitted with the record in this matter, however, specifically and clearly addressed each of the five reasons for termination of the grant listed in NIAAA's letter of May 17, 1979.^{3/} The ADAMHA Grant Appeals Committee decision fully discussed each of the allegations made by NIAAA. The Grantee's argument of lack of specificity is, therefore, unpersuasive.

The Grantee also argues that the ADAMHA decision was not made in accordance with proper administrative procedures because the Grantee had no advance opportunity to challenge the ADAMHA reasons for sustaining the termination. This argument lacks merit inasmuch as the record indicates that the Grant Appeals Committee made its decision only after it reviewed the materials

^{3/} The record indicates that the Grantee received the September 24, 1979 letter informing the Grantee of the ADAMHA Committee's decision. The Grantee has never alleged that it did not also receive a copy of the written decision of the ADAMHA Grant Appeals Committee.

submitted by the parties in support of their positions. The Grantee was afforded an opportunity to present its position to the Committee. Nothing requires the ADAMHA Grant Appeals Committee to issue a preliminary decision to the Grantee so that the Grantee might have the advance opportunity to challenge the Committee's reasons for sustaining the decision. Furthermore, the Grantee is entitled under the provisions of 45 CFR Part 16, after exhausting the informal review procedures, to further appeal to this Board a determination by the Agency that a grant should be terminated. The Grantee, on appeal to this Board, has been given an opportunity to challenge the ADAMHA decision.

Precedence of a Policy Statement

Grantee questioned the validity of a statement in the ADAMHA decision that a policy statement takes precedence over a regulation, namely 45 CFR Part 74, where ADAMHA based its suspension of grant funds on a policy statement. We do not have to reach that question here inasmuch as the withholding of grant funds and the suspension of the grant are not issues before this Board. The ADAMHA Grant Appeals Committee agreed with the Grantee that the grant funds had been wrongfully withheld and that the grant had not been "officially" suspended. The only issue before this Board is whether the grant has been properly terminated.

The argument that a policy statement cannot take precedence over 45 CFR Part 74 is not relevant as far as the issue of termination of the grant is concerned as there is no conflict between the Public Health Service (PHS) Grants Administration Manual (CAM) and Grants Policy Statement (GPS) provisions on termination and the provisions of Part 74. The Board, therefore, need not determine whether the policy statement can take precedence over the regulation.

Method of Grant Closeout

The Grantee alleges that NIAAA, recognizing Grantee's right to be reimbursed for the four months the grant was improperly suspended, promised to send the forms necessary to recover the questioned funds but instead sent grant closeout forms. The Grantee contends that this was an attempt by the Agency to force grant closeout and thereby deprive Grantee of its right to appeal. Grantee argues that it should have been allowed to recover the funds merely by filling out the forms usually used for monthly expenditure reports, forms DFAFS 27 and 27A.

The Agency did in its termination notice of May 17, 1979, request that the Grantee close out the grant by submitting an expenditure report. Closeout forms were transmitted to the Grantee by letter dated June 12, 1979. Both of these actions were, however, prior to June 19, 1979, the date of Grantee's letter appealing to ADAMHA and are consistent with the termination procedures at 45 CFR Part 74, Subpart M. Grantee has not provided any evidence to indicate that the Agency took any action to require submission of the closeout forms pending the appeal. 4/

In any event, the Grantee has not shown how filling out the closeout forms per se would have affected its appeal rights. Nothing precludes appeal under such circumstances. Grantee here did not fill out the forms, but presumably could have given the required information with respect to costs incurred and funds obligated without prejudicing its right to claim for further allowable costs if successful on appeal. In the circumstances here, where Grantee has been given a full opportunity to present its case and offer evidence, but has not demonstrated that the termination action was improper, we do not think that an unsupported allegation that the Agency tried to foreclose a right to appeal provides any basis on which to overturn the termination. The Agency should, certainly, allow the Grantee to show that it had allowable costs during the four month "suspension" period, but may reasonably require that the Grantee's claim for those costs be supported by adequate documentation in addition to the normal expenditure reports.

Termination of the Grant

"Termination" of a grant is defined in the Public Health Service Supplement to the Grants Administration Manual (PHS) as "withdrawal of support through cancellation of Federal assistance in whole, or in part, under a grant at any time prior to the date of completion." As set forth in PHS 1-500-30, the Agency may terminate a grant if a grantee has failed to comply with the terms and conditions of a grant. This chapter sets forth that PHS policy is to take such action after a grantee has been informed of the deficiencies and given time to correct them.

4/ Such an action might have been contrary to applicable regulations. 42 CFR §50.406(c) and 45 CFR §16.7.

However, this policy, as stated in PHS 1-500-30A.1, "does not preclude... immediate termination when such action is reasonable in the circumstances and necessary to protect the interests of the government." 5/

The Grantee also alleges that the Agency failed to comply with the provisions of 45 CFR 74.115 to notify the Grantee promptly in writing of its determination and reasons for termination of the grant. That section states:

The granting agency may terminate any grant in whole, or in part, at any time before the date of expiration, whenever it determines that the grantee has materially failed to comply with the terms of the grant. The granting agency shall promptly notify the grantee in writing of the determination and the reasons for the termination, together with the effective date.

Although the Agency may have improperly suspended the grant by failing to give the Grantee written notice, this procedural failure of the Agency to notify the Grantee in writing of the suspension does not taint the Agency's actions in terminating the grant. Suspension and termination are procedurally two separate and distinct actions. In suspending a grant, the Agency is preserving the federal government's interest while it determines whether a grantee is complying with the grant. In the present case, however, upon determining that the Grantee had materially failed to comply with the grant, the Agency promptly notified the Grantee in writing of its decision to terminate and gave the Grantee two weeks to close out the grant. The Agency, therefore, complied with the provisions for prompt notice set forth in 45 CFR 74.115.

Inasmuch as the Agency complied with the proper procedure for terminating the grant, both under the Public Health Service Supplement to the Grants Administration Manual and under 45 CFR Part 74, the only question left is whether the decision to terminate the grant was valid. The ADAMHA Grant Appeals Committee, in its decision dated September 24, 1979, reviewed the validity of the NIAAA decision to terminate the grant.

5/ Immediate action is an exception to normal PHS procedures, which allow this action on advice from the Office of General Counsel. The record indicates that the Office of General Counsel cleared the action. Part 74 of 45 CFR, however, provides that the granting agency may terminate a grant "at any time." The regulation, therefore, does not preclude termination with two weeks notice.

ADAMHA examined five points as listed in NIAAA's termination letter as a basis for LIADAP's material failure to comply with the terms of the grant. Although ADAMHA felt that there was not sufficient evidence presented by either party to prove or refute two of the five points, ADAMHA found sufficient proof of the validity of three of the points to conclude that the NIAAA decision was warranted. 6/

After an independent review of the record in this appeal, which includes evidence submitted by both the Grantee and Agency to the ADAMHA Grant Appeals Committee, we agree that Grantee did materially fail to comply with the terms of the grant. The authorizing statute, 42 U.S.C. 4577, requires grant programs awarded under this statute to provide alcohol abuse treatment to persons in need of this treatment. The record indicates that this purpose was not being carried out. On February 9, 1979 the superintendent of the Oregon State Penitentiary terminated operation of LIADAP within the confines of the penitentiary because of the disruptive influence it had produced. (Memorandum dated February 9, 1979 to Dave Francis from H. C. Cupp, Superintendent, Oregon State Penitentiary.) This termination resulted in the providers of the alcohol treatment services being barred from the prison and unable to provide treatment to the clients as required by the grant terms.

Evidence in the record also indicates that rather than providing alcoholism counseling, the program was providing assistance in the form of parole appeals and parole planning. (Site Visit Report prepared by Joseph Weeda, dated April 23, 1979.) Furthermore, based on the job resumes submitted by Grantee to the ADAMHA Grant Appeals Committee, the Board's order indicated that the program staff did not possess alcohol related education or experience and were not qualified to provide the necessary services. The Grantee has not contested the Board's analysis on any of these points. The Grantee's evidence does not contradict the fact that LIADAP was barred from entering the penitentiary, that the staff did not possess related education or experience and that LIADAP's Board of Director's was not exercising

6/ The three points on which ADAMHA found sufficient proof to conclude that the NIAAA decision was warranted were:

1. the Grantee staff was suspended from entering the penitentiary,
2. the program staff did not possess related education or experience,
3. LIADAP's Board of Directors were not exercising adequate management or fiscal control.

adequate management control. Therefore, the evidence in the record justifies the conclusion that the purposes of the grant were not being carried out and that termination in this instance was proper.

Conclusion

For the reasons set forth above, we conclude that the decision of the ADAMHA Grant Appeals Committee to uphold NIAAA's decision to terminate the grant should be sustained.

/s/ Norval D. (John) Settle

/s/ Alexander G. Teitz

/s/ Donald F. Garrett, Panel Chair