

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Health Systems Agency of Western
New York
Docket No. 81-60
Decision No. 221

DATE: October 21, 1981

DECISION

The Health Systems Agency of Western New York (Grantee) appealed from a March 24, 1981 decision of the Public Health Service Grant Appeals Board (PHS) regarding a disallowance under Grant No. 02-P-000111-04. At issue is the amount of severance pay, given to Grantee's former Executive Director, which may be charged to the grant.

Grantee is the successor corporation to the Comprehensive Health Planning Council of Western New York (CHPC). Effective January 1, 1970, CHPC hired a Director of Planning Consultation. In December 1972, this individual became Executive Director of CHPC. Grantee was formed as successor to CHPC on June 10, 1976 and Grantee chose the same individual as its Executive Director.

In 1979 Grantee's Administrative Committee reviewed the Executive Director's performance and recommended his dismissal. Although Grantee's personnel policy provided a six week probationary period prior to the dismissal of most employees, it was Grantee's opinion that placing the Executive Director on probation would be detrimental not only to Grantee's internal operation, but to its public image as well. It was decided, therefore, that he should be terminated as quickly as possible, but on mutually agreeable terms.

Grantee's President entered into negotiations with the Executive Director regarding the conditions of his termination. It was agreed that he would resign May 31, 1980. However, he would effectively be kept on the payroll for an additional four month period receiving his salary and full benefits through September 30, 1980. The agreement was reduced to a memorandum of understanding submitted to, and approved by, Grantee's Executive Committee on April 17, 1980.

Region II officials were informed of the agreement but did not find it, or any alternatives, acceptable. In view of the difficulties encountered at the Regional level, the terminated Executive Director retained counsel. As a result of further negotiations between his attorney and Grantee a new settlement was achieved on May 22, 1980 providing for payment of the lump sum equivalent of four months' salary (\$11,195.15).

On October 14, 1980, the HEW Region II Office of Grants Management (OGM) officially determined that the settlement "... was (1) inappropriate because it was not supported by an established institutional policy and (2) it was not a reasonable charge to the grant." OGM also decided that, due to the awkward circumstances surrounding the termination, payment of one month's salary and fringe benefits would be fair and could be charged to the 04 year grant.

Grantee appealed this determination to PHS, citing the reasonableness of the amount of severance pay and arguing that the memorandum of understanding constituted an employer-employee agreement under the controlling regulation. That regulation, 45 CFR Part 74, Appendix F, G.40. Severance pay., states:

- (a) Severance pay, also commonly referred to as dismissal wages, is a payment in addition to regular salaries and wages, by institutions to workers whose employment is being terminated. Costs of severance pay are allowable only to the extent that, in each case, it is required by (1) law, (2) employer-employee agreement, (3) established policy that constitutes, in effect, an implied agreement on the institution's part, or (4) circumstance of the particular employment.

PHS decided that an employer-employee agreement, as envisioned by the regulation, did not include one initiated in the shadow of imminent dismissal; rather, the regulation was meant to be read in the more conventional sense, i.e., as a contract entered into at the inception of employment. However, PHS also failed to find merit in the arguments of OGM as outlined above. Considering the unique position of an Executive Director as the principal management official, PHS reasoned, some severance pay was appropriate, although four months' was extreme.

PHS looked to CHPC's policy, as carried over by Grantee, as the basis for a determination of the proper severance pay. This policy provided that severance pay was to be given to employees whose dismissal was the result of a reduction or termination of Federal grant support under the Public Health Service Act which caused a mandatory reduction in force (PHS Decision, p. 1). Severance pay was based on the following scale:

1-3 years employment	-	1 month's pay
3-5 years employment	-	2 months' pay
5-9 years employment	-	3 months' pay

PHS applied this policy even though the employee was not terminated due to a reduction in force. PHS determined that the employee began work for Grantee in June 1976 and was entitled to two months' salary as severance pay, based upon the above scale.

The issue before us is the allowability of the additional two months' salary paid to the employee. For reasons stated below, we reverse the PHS disallowance. This decision is based upon Grantee's application for review, filed April 24, 1981; an Order to Show Cause, issued August 26, 1981; and the PHS response to that Order, dated August 17, 1981.

Discussion

The PHS decision was based on the provision in the regulations permitting reimbursement for severance pay when required by the "circumstance of the particular employment."

The focus of Grantee's appeal and our analysis in the Order to Show Cause was whether the amount of severance pay due the terminated Executive Director was correctly calculated. Grantee alleged that the date from which the Executive Director's seniority should have been calculated was January 1, 1970. Throughout this appeal, Grantee has maintained that the similarity between itself and its predecessor, CHPC, is such that the two corporations are indistinguishable and the Executive Director's length of service should be calculated from his first day with CHPC. Accordingly, Grantee argued that the four-month award was proper and the Board, in its Order to Show Cause, tentatively determined that the evidence was sufficient to support Grantee's position on this issue.

Responding to the Order, PHS revealed that at the time of its decision in this case it was unaware of the facts which Grantee has since presented to the Board on this question.

PHS has failed to show good cause why the Board's preliminary finding on the issue of the Executive Director's seniority should not be adopted. Therefore, it is the decision of the Board that the proper date from which to begin calculation of the Executive Director's term of service is January 1, 1970.

Having made the above finding, it becomes necessary to reexamine the award of severance pay in view of the Executive Director's length of employment. In concluding that two months' salary was proper, PHS depended on the severance pay scale used by Grantee to compensate employees who are terminated due to a reduction in force.

The Board's Order to Show Cause directed PHS to demonstrate why payment of four months' salary for 10 1/2 years of service would not be a logical extension of Grantee's scale. That scale provided one month of salary for approximately every three year increment of service. In its response to the Order, PHS stated: "Although ... the same scale conceivably could be viewed as limiting severance pay to

a maximum of 3 months, we find no reason in this case to counter the Board's position of authorizing an award of 4 months severance pay." In view of this response, we adopt the position tentatively taken in the Order.

Conclusion

For the reasons stated above, the disallowance is reversed.

/s/ Norval D. (John) Settle

/s/ Cecilia Sparks Ford

/s/ Donald F. Garrett, Panel Chair