DEPARTMENTAL GRANT APPEALS BOARD

The Department of Health, Education, and Welfare

SUBJECT: United Progress, Inc. (UPI) DATE: December 9, 1976
Grant No. 02-H-000,071-03
Health Services Administration Project Grant
Docket No. 75-8
Decision No. 30

DECISION

Statement of the Facts

This is an appeal from the recommendation made by the HEW Audit Agency, and concurred in by the HSA Review Committee, that appellant be required to recover the sum of $16,849 representing fees received by physician-employees for treating Medicaid patients in violation of their agreement with the grantee's delegate, the Trenton Neighborhood Family Health Center, Inc. (TNFHC). The Review Committee has advised the appellant to return the $16,849 as unauthorized expenditure of grant funds.

United Progress, Inc., was first funded in April, 1969, by HSA of PHS under Section 314(e) of the Public Health Services Act. The award contemplated the operation of a family health center in the impacted area of Trenton.

A new corporation, Trenton Neighborhood Family Health Center, Inc. (TNFHC) was organized in 1969 for the purpose of conducting the operations of the center as a subcontractor of the Grantee or delegate agency. However, organizational problems and disputes between the Grantee and TNFHC delayed the subcontracting until the Summer of 1971.

TNFHC provides general medical and specialized health services (pediatrics, obstetrics, gynecology, and psychiatry) for about 16,000 eligible individuals. For the fiscal grant period June 1, 1975 to May 31, 1972, the health center expended $1.7 million for these services, of which $1,563,329 was pro-

vided from Federal funds. A staff of 106 employees, including physicians, nurses, and other administrative and maintenance personnel are responsible for the operation of the health center.

The DHEW Audit Agency made an audit of the Grantee's operational costs for the fiscal year ended May 31, 1972, and issued an audit report (Control No. 50023-02) on July 19, 1974.

The report states: "Although we found no discrepancies or questionable items during our review of TNFHC grant expenditures, we did find that physician-employees instead of the health center had received the Medicaid payments of $16,849 for treatments provided to TNFHC patients."

The auditors recommended that TNFHC attempt to recover the Medicaid fees collected by the physicians; determine whether similar conditions existed during the 1973 calendar year; and institute procedures to assure collection of all Medicaid fees.

TNFHC entered into contracts with each of its physician-employees providing for their compensation by TNFHC, one provision of which contract states as follows:

> "The Contractor agrees to allow the Agency to collect all fees for all Medicaid patients or all patients under the jurisdiction of the Agency, (or another third party insurance plan) seen by him while he is in the employment of the Agency. In no event, shall the Contractor demand additional payment from the patient for his services." (Underlining Supplied.)

Despite this provision the auditors found that at least four of the physician-employees had billed and received payments from Medicaid. The review by the auditors, on a statistical sampling basis for each of the four physicians is shown below.

		Total Billings Under Medicaid		Health Center Patients Billed Under Medicaid		
		No. of Patients	Payments	Percent of Total Patients	No. of Patients	Payments
1.	Obstetrician	134	$13,494	33%	44	$ 5,265
2.	Obstetrician	493	42,801	10	48	5,916
3.	Pediatrician	333	9,087	28	94	3,666
4.	Psychiatrist	30	3,617	37	11	2,002
		990	$68,999	20	197	$16,849

The examples selected by the auditors and set out in the audit report (p. 4) identify dates of patient visits and amounts for which Medicaid was billed. These services were performed both during the period the appellant - TNFHC delegate contract was in effect and subsequent thereto.

The delegate contract between appellant and TNFHC was terminated by appellant for cause; the effective date of such termination was December 17, 1971.[1] Subsequent to that date, and until June 1, 1973 when the City of Trenton was substituted as grantee, UPI provided the services. The auditors' sample review thus reflects that the improper practices of the physicians in collecting Medicaid fees occurred both when TNFHC was the delegate providing the services and subsequently when UPI provided them. In response to this Board's inquiry, UPI advised that upon termination of its contract with TNFHC UPI continued the employment of the identified physicians under the same terms which were provided at TNFHC.[2]

The sole issue in this appeal, then, is the extent of appellant's responsibility for the misdeeds of the physicians both during the time they were employed by appellant's subcontractor and when directly employed by UPI.

Decision

For the reasons stated below, the Board concludes that the appeal be sustained for we decide that appellant should not be required to refund the $16,849.

In its appeal, appellant concedes the impropriety of the physicians being paid twice for the same services, and the fact that the Medicaid authorities were kept ignorant of the contract agreement prohibiting the physicians from billing Mediciad. There is no dispute concerning the amount of the fees improperly collected by the physicians.

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1. UPI letter of June 17, 1976. But see UPI letter of 9/17/75 in which it was stated that the subcontract was terminated in September, 1971. Minutes of UPI Board meeting of September 19, 1971 indicate decision was made then to terminate the contract with TNFHC.

2. See letter from UPI dated 8/13/76 to Panel Chairman.

UPI bases its appeal on four grounds:

1. There was no mismanagement of grant funds;

2. The audit record does not support the exception even if lost third party claims be assumed;

3. The grantee was under no obligation to save HEW harmless from the wrongful acts of the doctors; and

4. There was, at the time of the grant, no practical way the grantee could have saved HEW harmless.

We now consider these arguments seriatim.

1. We agree that there is absent in this case any element of mismanagement or improper expenditure of grant funds. However, there are involved two aspects of grantee responsibility; namely, the managerial obligations of appellant in respect to overseeing the performance of the delegate TNFHC and, in turn, its oversight of its own employees' compliance with the terms of the employment contract; and UPI's obligations respecting its physician-employees during the period subsequent to termination of the TNFHC contract.

As to the first, it is noted that the Public Health Service Policy Statement of July 1, 1968, in effect during the period of this grant, governing Health Services Development Project Grants under Sec. 314(3) of the Public Health Service Act, states:

> "The grantee assumes responsibility for fiscal, administrative, and program management and fulfillment of all special conditions which may be prescribed for the conduct of the grant."

We do not read such provision to impose upon the grantee an intolerable, if not impossible, burden of that level of surveillance of its delegate agency's activities which would have been effective in ascertaining the physicians-employees' violation of their contractual prohibition against receiving payment for Medicaid patient services. The appeal record contains no information whatever as to the extent, if at all, TNFHC did bill and receive payment from Medicaid for services

provided to such patients.[3/] If no such payments were ever received by TNFHC, that circumstance might have alerted both it and UPI that inquiry should be made, since it would be highly unlikely that not a single Medicaid beneficiary would have sought and received services at the Center. However, it would be manifestly inequitable to reach a decision adverse to the grantee in the absence of relevant information and on the basis of mere speculation. Consequently, we cannot ascribe to appellant any dereliction of duty in oversight of its delegate's administration of its employment contracts.

Nor can we reach a contrary conclusion respecting the period following the termination of the TNFHC contract when appellant was providing the services. Although the physicians' employment directly by UPI was subject to the same proscriptions we find no basis to assert that appellant had a duty to regularly inquire of its physician-employees concerning their filing claims for Medicaid patient services. Even if such duty can be said to have been required by the above quoted policy statement, it is most unlikely that the employees would have disclosed their improprieties.

2. While this point is not clearly stated, we must assume that it argues against justification for the exception by reason of the failure of UPI to assert and collect service charges from Medicaid. Failure to do so, would not in our view, have exposed appellant to liability to repay the grantor the amount due from Medicaid. Whatever other sanctions might be available to the grantor, we can find no basis for requiring payment to the grantor for funds uncollected but due from other sources. In fact, PHS policies suggest the reverse. Sec. 2B of the Policy Statement alluded to above provides, in pertinent part:

> "Anticipated income from fees to be charged for the project services may <u>not</u> be included in the grantee's share of project costs. However, income from fees may be retained by the grantee and used to further the purpose for which the grant award is made in accordance with the policies set forth in Section 8."

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3. By letter of 11/5/76, UPI advised the Board as to the procedure followed by both TNFHC and itself in making Medicaid claims.

And Section 8, after reiterating the quoted policy stated in Section 2 provides that:

> "Fees on hand at the termination of the project period may be retained by the grantee to further the purpose for which the grant was made."

The foregoing policy statements negate any suggestion that grant income must be returned to the grantor. Under these circumstances, we can perceive no obligation upon the grantee to refund to the grantor service fees which it might have but did not collect from Medicaid.

We are not unmindful of the provisions contained in Sec. 51.405(m) of the Public Health Service Regulations which calls for maximum utilization of other Federal resources prior to use of project funds, or the guidelines for projects supported by grants under Section 314(e) of the Public Health Service Act. The latter states that projects should "b. Seek all sources of reimbursements for medical care services, e.g. Titles XVIII and XIX of the Social Security Act..." Neither of the referenced provisions appear to impose a mandate or legal obligation, failure to comply with which subjects the grantee to financial liability; rather, the provisions are hortatory in nature. If it was the intention of the grantor agency to create a clear and firm fiscal responsibility in this regard, neither of the provisions is effective, in our view, to accomplish such a result.

3 & 4. These arguments may be dealt with together since they are really only two facets of a single point. Regardless of whether the acts of the physicians were wrongful because of, or even in the absence of, a prohibition in the employment contract, we are aware of no provision of law or regulation which would mandate the grantee to repay the grantor for the payments received by appellants' employees. Those payments did not derive from the grant funds but from another source, albeit a government instrumentality. Neither the audit report nor the Review Committee have established that the grant funds were not expended in a manner consistent with the requirements of the grant. What is here involved is additional income which should have inured to the benefit

of the grant project and its beneficiaries rather than to the physicians. We agree, as contended by the Review Committee, that the "grantee is accountable for maintaining adequate controls to assure that only appropriate expenditures of grant funds are made." There has been no showing, or even an allegation, that any of the grant funds were not "appropriately" expended. We do not agree that such accountability reaches to the requirement for repayment of funds wrongfully obtained without the knowledge or consent of the grantee.

In so concluding we are not unmindful of the fact that better management controls might have prevented the dual payments here involved and would have enlarged the capacity of the grantee to provide additional services. However, it would appear that that objective can no longer be attained by the recommendation made by the Review Committee, even if legally or equitably meritorious.

Notwithstanding our decision in this case, we are constrained to point out that appellant does not manifest that level of integrity expected of grantees. It persists in its communication to the Board on June 17, 1976, in denying knowledge of the identity of the physicians involved despite the record reflecting that they were informed as to the names of the doctors as long ago as November 28, 1975. Nor are we impressed by the quality of the grantee's discharge of its managerial responsibilities.

Finally, we would emphasize that the decision herein is not to be regarded as a precedent for any future case.

The appeal is sustained.

/s/ David V. Dukes

/s/ Francis D. DeGeorge

/s/ Manuel B. Hiller, Panel Chairman