

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: University of California--
Summer Salaries
Docket No. 79-2
Decision No. 117

DATE: September 29, 1980

DECISION

This case involves a disallowance dated June 20, 1977 by the Financial Advisory Services Branch, Division of Contracts and Grants, National Institutes of Health, subsequently sustained by the NIH Grant Appeals Board (NIH Grant Appeals Board Decision, University of California, NIH-GA-77-3 (DCG), dated October 20, 1978, and transmitted to Grantee by letter dated December 14, 1978). The \$193,596 disallowed represents a portion of costs charged for salaries of faculty members holding federally funded summer research appointments at Grantee's Berkeley and Los Angeles campuses in fiscal years 1972 and 1973. The disallowance was taken based on the Agency's determination that the researchers were paid during the summer quarter at a monthly rate in excess of the rate at which they were paid during the three non-federally funded academic quarters, in violation of Section J.7.j. of Federal Management Circular (FMC) 73-8. We find that, although the researchers were not in fact paid in excess of the monthly rate for their academic year salaries, the disallowance should be sustained on the ground that Grantee violated Section J.7.a. of FMC 73-8 by paying some researchers at a higher rate than others during the summer quarter without any justification for the difference in rates. Since the amount which is not allowable on this basis may differ from the amount disallowed by the Agency, the Agency is directed to recompute the disallowance.

This decision is based on Grantee's application for review, the Agency's response to the appeal, the record made in the course of the proceedings before the NIH Grant Appeals Board, and the parties' responses to an Order to Show Cause issued by the Board Chairman and to a letter from the Board's Executive Secretary requesting further information and briefing. In its response to the latter communication, Grantee requested an opportunity to discuss its position with the Board and the Agency prior to decision. We have determined, however, that an informal conference pursuant to 45 CFR 16.3(b)(1) would not be useful, and, accordingly, have proceeded to decision.

The faculty members in question had academic year appointments covering three quarters for which they were usually paid in equal installments over a twelve-month period. In addition, they were employed during the remaining quarter as researchers on federally funded projects. Grantee regarded the summer quarter as equal in length to an academic quarter, and its policy accordingly called for payment during the summer quarter at a daily rate calculated by dividing one-third of a researcher's academic year salary by 57, which was the average number of "teaching days" in an academic quarter. Thus, the daily rate at which a faculty member whose academic year salary was \$18,000 would be paid during the summer quarter would be determined as follows:

$$\begin{aligned} 1/3 \times \$18,000 &= \$6,000. \\ \$6,000 \div 57 &= \$105.26, \text{ daily rate.} \end{aligned}$$

The Agency took the position, however, that this method of payment violated Section J.7.j. of FMC 73-8, which provides in pertinent part as follows:

Salary rates for periods outside the academic year.
Charges for work performed by faculty members on Government research during the summer months or other periods not included in the base salary period will be determined for each faculty member at a monthly rate not in excess of that which would be applicable under his base salary....

Although the Department's regulations implementing FMC 73-8 (formerly OMB Circular A-21) were not published until after the costs in question were incurred (45 CFR Part 74, Subpart Q, Appendix D, 38 FR 26274, 26292, September 19, 1973), the Agency asserted in response to an inquiry by the Board's Executive Secretary that copies of OMB Circular A-21 were provided to all educational institutions to which grants were awarded and that such institutions were advised of the applicability of that circular in several publications issued prior to one or both of the fiscal years in question here. (Memorandum from Associate Director for Extramural Research and Training, NIH, to Board's Executive Secretary, dated 5/24/79.) No contention was made by Grantee that it was not bound by the provision cited above.

The disallowance was based on a finding of the Department's audit agency that payments to researchers in the months of July and August exceeded in each month one-ninth of their academic year salaries, a situation which the Agency found did not comply with the requirement of FMC 73-8 that the monthly rate at which a researcher is paid during the summer

quarter not exceed that which would be applicable under his base year salary. The Agency determined in addition that the summer quarter was not in fact the same length as each of the three academic quarters, finding that faculty members worked 65 days during an academic quarter--57 teaching days plus eight interquarter days--but only 57 days during the summer quarter. If that were the case, the result would also be that researchers were paid at a higher rate during the summer than during the academic year, in violation of FMC 73-8. Each of the Agency's grounds for disallowance is discussed separately below.

I. Monthly Rate

With respect to the first ground, Grantee asserts that, although the researchers were paid summer salaries which exceeded in some months one-ninth of their academic year salaries, this was offset by the fact that, in other months, they were paid less than one-ninth of their academic year salaries. It contends that since no researcher was paid more than three-ninths of his academic year salary for the entire summer, it complied with the intent of Section J.7.j.

We accept Grantee's argument in this respect. The Order to Show Cause suggested that the intent of Section J.7.j. "is simply that no researcher be paid at a higher rate for Federally sponsored research than he is paid for his services during the regular academic year when no Federal funds are involved," a statement with which neither party has disagreed. Assuming for the moment that the summer quarter was equal in length to an academic quarter, if a researcher's total pay for the summer quarter did not exceed one-third of his academic year salary, then the intent of Section J.7.j. would not be frustrated. (Since the researchers' academic year salaries were paid in twelve monthly installments, their summer salaries cannot be compared with the amount paid in a particular academic quarter.) As long as the rates were comparable, we do not believe that Section J.7.j. requires that the amounts paid actually be expressed in terms of monthly rates.

Moreover, we find improper the Agency's comparison of one-ninth of the academic year salary--or the average monthly salary for the academic year--with the salary paid during a particular calendar month in the summer quarter. It appears from the record that the 57 teaching days in the summer quarter may have been distributed over four calendar months, more or less as follows: 10 days in June, 21 days in July, 22 days in August, and 4 days in September. The teaching days in an academic quarter apparently would have been similarly distributed over more than three calendar months. Even if each quarter covered three full calendar months,

the number of teaching days may have varied from month to month due to the number of calendar days in a particular month as well as the timing of weekends and holidays. Thus, if Section J.7.j. is read as requiring a comparison of salaries on the basis of monthly rates, the only meaningful comparison would be of the average monthly pay during the academic year and the average monthly pay during the summer quarter. In this case, in no instance did the latter exceed the former.

II. Length of Quarter

The Agency's conclusion that an academic quarter was longer than the 57 days used to determine pay for the summer quarter is based on the fact that there were eight days following each quarter during which faculty members were expected to perform activities such as marking exam papers, counseling students, and sitting on administrative committees. In response to Grantee's assertion that there was no reduction in a faculty member's academic year salary if he did not report for duty on interquarter days, the Agency argued that Grantee had done nothing to indicate to faculty members that their services during the interquarter period were merely voluntary.

There is no evidence in the record to show whether or not faculty members were aware that they were not required to report for duty during the interquarter period in order to receive their full academic year salary. We conclude, however, that the interquarter period did not in any event involve the regular, sustained effort of the 57 teaching days, and that Grantee thus had a legitimate basis for excluding the interquarter period from its summer pay calculations. We note also that the activity performed during the summer--research--was so different in nature from teaching that even if the interquarter period were not an issue, it would not be clear that one research day was the precise equivalent of one teaching day. Given these circumstances, the Agency's insistence that a researcher had to work 65 days during the summer quarter to justify payment at the same rate as during an academic quarter seems to us to be without merit. While we find Grantee's policy for payment of summer salaries at a rate based on a 57-day quarter proper, its practice with respect to summer salaries was unacceptable, as discussed below.

III. Difference in Summer Rates

We find no basis in Section J.7.j. for objection to Grantee's payment of its researchers at a rate based on a 57-day quarter. We agree however, with the Agency's position, taken in response to the Order to Show Cause, that because Grantee did not consistently apply that rate, it is not entitled to full Federal funding for payments made at that rate under Section J.7.a. of the same circular. Section J.7.a. requires that total compensation be "reasonable for the services rendered," as well as conform "to the established policy of the institution consistently applied."

As noted previously, Grantee's policy was to pay researchers during the summer quarter at a daily rate calculated by dividing one-third of a researcher's academic year salary by the 57 teaching days in an average quarter. The audit report relied on by the Agency indicated, however, that some researchers at Grantee's Berkeley and Los Angeles campuses were in fact paid at a daily rate which was calculated by dividing one-third of their academic year salaries by 65 (57 teaching days plus eight inter-quarter days), resulting in a daily rate of \$92.30 for a researcher with an \$18,000 academic year salary. According to the audit report, researchers with the same academic year salaries, sometimes in the same department, were paid at different rates during the summer quarter. The Order to Show Cause noted that Grantee "did not explain the difference in rates paid as attributable to differences in researchers' academic year salaries, qualifications, research projects or any other criteria," and directed Grantee to show cause why the appeal should not be denied on that ground.

In its response to the Order, Grantee denied that any summer salaries were paid at a rate based on a 65-day quarter. It admitted, however, that in some instances summer salaries were paid in monthly installments of one-ninth of the academic year base salary, and that if a researcher worked less than the full summer quarter, he might under certain circumstances be paid less under the one-ninth monthly installment method than under the 57-day quarter daily rate method. (Grantee indicated that this lesser amount might be equivalent to the amount which would have been paid under a 65-day quarter daily rate method.) Grantee nevertheless argued that the amount paid under the 57-day quarter daily rate method reflected the amount to which the researcher was actually entitled under University policy and that the University would be obligated to honor any claim for the difference between that amount and any lesser amount paid under the one-ninth monthly installment method. It further argued that any underpayment resulting from the use of the one-ninth monthly installment method was the result of an administrative error and should not be used as a basis for finding a violation of Section J.7.a. Finally, it argued that such errors "would not impact adversely on the Federal government since failure to adjust salary to the 57-day pay entitlement basis would result in lesser charges to Federal projects than would have otherwise been authorized under University policy."

We find Grantee's arguments unpersuasive. Section J.7.a. requires that salaries conform "to the established policy of the institution consistently applied." (Emphasis added.) Grantee's policy regarding summer salaries, however formally promulgated, is not the measure of its compliance with Section J.7.a. The test is, rather, how that policy was applied, or the summer salaries actually paid. Since Grantee has conceded that it paid summer researchers at its Berkeley and Los Angeles campuses at different rates, resulting in some cases in the payment of different amounts for equal periods of work, without any basis other than a failure to adequately monitor the payment practices at those campuses, we are compelled to find that it did not comply with Section J.7.a.

IV. Amount of Disallowance

The Agency indicated that the amount originally disallowed represented the difference, if any, between the amount paid to each researcher in each month of the summer quarter and one-ninth of his academic year salary. That disallowance was based on the finding that Grantee violated Section J.7.j. of FMC 73-8, a finding which we reject. Our finding that Grantee instead failed to comply with Section J.7.a. requires that an amount be disallowed which represents the difference between the total summer salary received by each researcher paid on the basis of a 57-day summer quarter and the lesser amount he would have received had he been paid on a one-ninth monthly installment basis. Asked to indicate what that amount should be, and later to explain how it arrived at that amount, the Agency merely stated that the amount of the disallowance would be the same as the disallowance originally taken, while Grantee professed ignorance regarding how to determine the amount in question.

We are therefore unable to indicate the amount of the disallowance which is upheld. The Agency, however, should recompute the amount of the disallowance in accordance with this Decision No. , and advise Grantee in writing of its determination, including a full explanation of how it arrived at that amount. No time period is set for the Agency's determination since it may have to request additional information from Grantee, although it is encouraged to expedite the matter and act within 60 days. This Board will consider a timely appeal from the Agency's determination should the matter not be resolved to Grantee's satisfaction.

/s/ Clarence M. Coster

/s/ Donald G. Przybylinski

/s/ Norval D. (John) Settle, Panel Chairman