DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Montana Department of Social and Rehabilitation Services

DATE: September 30, 1980

Docket Nos. 80-31-MT-HD
80-78-MT-HD
78-43-MT-HD (partial)
78-93-MT-HD (partial)
79-115-MT-HD (partial)

Decision No. 119

DECISION

The Montana Department of Social and Rehabilitation Services (State) requested reconsideration of the Office of Human Development Services (Agency) disallowance of Federal financial participation (FFP) in various expenditures claimed as training costs under Title XX of the Social Security Act (Act). The sole issue presented by two of the requests (Docket Nos. 80-31-MT-HD and 80-78-MT-HD) involves the disallowance of travel costs and per diem for State agency personnel attending training programs which lasted less than five full work days. This issue is also presented in three other requests for reconsideration. The Board, for purposes of rendering this decision, will sever the common issue from Docket Numbers 79-115-MT-HD, 78-93-MT-HD and 78-43-MT-HD and consider the matter jointly with Docket Numbers 80-78-MT-HD and 80-31-MT-HD.

The Agency's disallowances are summarized below:

Period at Issue	FFP Disallowed	Date of Disallowance	Docket No.
8/1/76-12/31/77 (DDTI Contract)	$23,899	7/3/78	78-93-MT-HD
10/1/76-12/31/76	$5,744	(Undated--after 4/17/80)	80-78-MT-HD
1/1/77-3/31/77	4,592		
4/1/77-6/30/77	7,930		
7/1/77-9/30/77	2,955		
10/1/77-12/31/77 (State and County Employees)	7,783		
1/1/78-3/31/78	$4,327	5/23/78	78-43-MT-HD

4/1/78-6/30/78	$5,010	5/15/79	79-115-MT-HD
7/1/78-9/30/78	3,550		
10/1/78-12/31/78	3,280		
1/1/79-3/31/79	2,728		
4/1/79-7/30/79	$4,116	1/10/80	80-31-MT-HD

Background

Title XX of the Act provides at Section 2002(a)(1) that the states shall be entitled to FFP for services provided to achieve the goals enumerated in the enabling legislation. Services for which reimbursement is available include expenditures for personnel training and retraining. Section 2002(a)(2) of the Act further provides that no payment may be made for expenditures, other than personnel training or retraining, which exceed a state's pro rata share of the appropriations authorized for Title XX expenditures during the fiscal year. Thus, the question of whether an expenditure is an allowable training cost may have a significant effect on the FFP available to a state.

The regulations governing expenditures for training and retraining, 45 CFR 228 Subpart H, were amended on January 31, 1977 (42 FR 5848). The amendment resulted in changes in the organization and terminology of 45 CFR 228.84 - - "Activities and costs matchable as training expenditures." The earlier version of the section had been published on June 27, 1975 (40 FR 27354) and, as pertinent to this case, read as follows:

> Costs matchable as training expenditures include:
>
> . . .
>
> (c) Payment of travel, per diem and educational expenses of employees while they are attending training programs for less than eight consecutive work weeks;
>
> (d) Payment of educational expenses (tuition, books, supplies) for employees on part-time educational leave (part of the working week, evenings, mornings).

As pertinent, the regulations were amended in 1977 as follows:

> Costs matchable as training expenditures include:
>
> (a) State agency employees.
>
> . . .
>
> (2) For State agency employees in full-time training programs of less than eight consecutive work weeks: per diem, travel and educational costs;

> (3) For state agency employees in part-time training programs (part of work week, evenings, mornings): Education costs.

The Agency, in disallowing the amounts in dispute, relied upon 45 CFR 228.84(a)(3) (1977). The Agency found that the disallowed training costs represented expenditures for travel and per diem for employees attending training sessions of less than five full days. Inasmuch as the training programs lasted only "part of [a] work week" (45 CFR 228.84(a)(3)), the Agency determined that the regulations did not allow reimbursement for such costs.

Issues

I. Interpretation of the Regulations

The State argued that the costs in question were allowable under Section 228.84(c) of the 1975 regulations and that publication of the amended regulations in 1977 constituted a substantive change in the Agency's policy which was not explained in the preamble. It argued in particular that the part-time activities were characterized as "part-time training programs" in the 1977 regulations and as "part-time educational leave" in the 1975 regulations. It stated that such activities involved two different concepts and argued that the State's interpretation of the regulations was reasonable in view of the lack of notice of the change in policy.

The Agency stated that its rules governing reimbursement of state training activities have not changed since the inception of the program. The Agency asserted that the duration of the training program has always been determinative of the extent to which FFP was allowable for training costs. According to the Agency, the criteria are and have been that if the training lasted for at least a full work week but less than eight consecutive weeks, the State may claim for travel and per diem as well as education costs.

The Agency denied that it ever drew a distinction between "part-time training programs" and "part-time educational leave." It stated that the regulations were amended in 1977 in order to clarify the Agency's existing policy rather than to establish new policy (see Declaration of Pauline Godwin dated July 29, 1980).

The evidence of record shows that the Agency articulated its policy with respect to reimbursable training costs in an official response to a policy interpretation question (PIQ). The response was issued on September 14, 1977 and was designated PIQ 77-88. Apparently, all of the Agency's regional offices receive copies of PIQs but the regional offices do not necessarily transmit them to the states. The Agency characterized the PIQs as a means of providing uniform guidance to regional offices by furnishing interpretation and clarification of the existing law and regulations.

An Agency's interpretation of a statute or the regulations promulgated to implement a program the Agency is charged with administering is entitled to great deference. Udall v. Tallman, 380 U.S. 1, 17 (1965). In this case, the Board notes that the statutory language which exempts training costs from the ceiling imposed on a state's expenditures for services under Title XX of the Act is extremely broad and requires further definition. In everyday usage, the concept of "training" includes activities ranging from informal on-the-job instruction given by a supervisor to intense classroom instruction given at an institution for higher education. The Agency must make distinctions as to those activities which properly constitute "personnel training or retraining directly related to the provision of [Title XX] services." In this respect, the Board takes notice of the fact that the Agency, through its day-to-day dealings with the states and its evaluations of state program operations, is in a position to determine which activities constitute effective training. The regulations and the Agency's published policy statements represent a valid definition of those training costs eligible for Federal sharing.

II. Effective Date of the Policy Set Forth in PIQ 77-88

The Agency, through the declaration of its Director of the Division of Training and Education, alleged that it has always been Agency policy to disallow travel and per diem costs if the training activity lasted less than one week. The Board finds, however, that even if this was the policy of the Division of Training and Education, it was not the practice of at least some of the Agency's field components. The Board had requested the Agency to provide information in conjunction with an appeal by the State of Oregon (80-76-OR-HD). In answer to a question regarding the working definition of "part-time educational leave", the Agency replied that such leave was considered to be leave which lasted for less than one full day. Also, the Agency stated that Region X, Administration for Public Services (APS), defined "training programs for less than eight consecutive work weeks" as programs which lasted at least one full day but less than eight consecutive work weeks. The Agency acknowledged that Region X did permit FFP in travel costs and per diem if the training program lasted at least one full day (Agency's response dated August 7, 1980 to Board's request in Docket No. 80-76-OR-HD).

In addition, the Board notes that on June 20, 1977, the Director, APS, Region IV, requested the Acting Commissioner, APS, to provide written confirmation of the definition of part-time and short term training (PIQ 77-88). In his submittal, the Director, APS, Region IV, asserted that, "[s]tates in Region IV as well as in other Regions were led [by Regional Office] to give the interpretation to the phrase 'less than eight consecutive work weeks' to accommodate any duration of in-service training programs where employees were engaged strictly in training and not in provision of services with FFP for travel, per diem and educational expenses."

The Director, APS, Region IV, further commented with respect to the amended regulations and their effect on allowable FFP that "the practice had in fact been established which differentiated part-time educational leave activities from in-service training." Also, the Regional Program Director, APS, Region VII, addressed on November 10, 1977 additional questions regarding part-time training to the Acting Commissioner. His comments included the observation that the amended regulations appeared to omit "educational leave," which he distinguished from part-time in-service training. The tenor of the Program Director's presentation was that Region VII allowed FFP for travel and per diem costs even though the training was less than one full week in duration.

Based on the foregoing, the Board finds that even though the Agency's central office may have always had a policy which precluded Federal sharing in travel and per diem costs for training sessions lasting less than one full week, the Agency's field components followed a different practice. The Agency itself apparently realized this fact because on August 23, 1979, the Commissioner, APS, issued Information Memorandum HDS-IM-79-10(APS) which transmitted a complete set of PIQs to the state agencies administering social service programs under Title XX of the Act. The Commissioner stated:

> Since these interpretations have not been available on a routine or uniform basis, states will not be held accountable for administering their programs in accorandance with PIQs issued up to and including September 1, 1979 until receipt of them, unless they have previously been given actual knowledge of the contents.

Accordingly, the Board finds that it was Agency policy not to hold a state accountable for the policy interpretation contained in PIQ 77-88 until such time as the State received actual notice of the interpretation.

Actual knowledge of the Agency's policy interpretation is sufficient to bind the state to their terms. Whelan v. Brinegar, 538 F.2d 927(1976); United States v. Aarons, 310 F.2d 341 (1962); Kessler v. FTC, 326 F.2d 673 (1963). In the instant appeals, a responsible official of the State conceded that the State was informed on December 7, 1977 that under the Agency's interpretation of 45 CFR 228.84, Subpart H, training sessions had to last five full days, including travel time, in order for travel and per diem costs to be reimbursable. (Affidavit of Bill Spivey dated February 22, 1980; memorandum from Bill Spivey to Ben Johns dated December 8, 1977). Therefore, the Board finds that the State had actual notice and knowledge of the terms of the Agency's policy with respect to such allowable training costs on December 7, 1977 and was bound by the policy as of that date.

The State alleged that the training programs for the first calendar quarter of 1978, "... had been set and content providers had been contracted for by the time [it] learned of [the Agency's interpretation and] there was insufficient time to change the State's practice of reimbursement for travel and per diem...." (Affidavit of Bill Spivey dated February 22, 1980). The Board, however, does not find this to be a sufficient reason to excuse the State's noncompliance with Agency requirements. It probably would have been inconvenient to reschedule training for the first month or two following notification of the duration requirement, but there is no obvious reason why it could not have been done.

IV. Travel Time

As noted above, the State said that it was unable to effectuate the five day duration requirement during the first calendar quarter of 1978. The State asserted, however, that it made a good faith effort to comply, effective April 1, 1978, with the five day duration requirement, by scheduling all training sessions for at least three days and allowing one day for travel at the beginning and at the end of the session. The State alleged that it did not learn that the neccesary travel time applied to each trainee individually, rather than to all trainees collectively, until it received on May 15, 1979 a notification of disallowance of travel costs for the period April 1, 1978 through March 31, 1979. Thereafter, it adopted the practice of scheduling training sessions for at least four full days.

The State also argued that because of its rural nature and large size, it was reasonable to assume that the training programs could be planned to include one full day of travel for commuting to and from the sessions. Otherwise, some trainees would either miss part of the training or be required to travel outside the normal work week which would require the State to pay them overtime. The State asserted that it was faced with the dilemma of either paying overtime to those employees who lived a full day's commute from the training site or scheduling shorter training programs which whould result in the loss of FFP in travel and per diem costs for those employees who could travel to the training site in less than one day.

The Board is not convinced that those were the only options available to the State. Although the State would have found it more difficult to schedule training programs which took into account the travel time of the attendees, there is no evidence this could not have been done. Furthermore, the State was put on notice that the Agency considered it necessary for a training session to last a full work week to qualify for Federal sharing in travel and per diem costs. Allowing necessary travel time to be included within the five days was a rational accommodation on the part of the Agency and not a device to permit circumvention of the duration requirement. If the State was able to meet the duration requirement by having in attendance a few trainees who spent one full day in travel status each way, the regulation would become meaningless.

The Board concludes that the Agency acted within its discretion and authority in disallowing FFP for training costs for individual employees when the training sessions did not last five full workdays, including travel for each employee. The Agency's policy with respect to travel time is not unreasonable on its face and the Board will not substitute its judgment for that of the Agency on this matter.

Conclusion

The Agency's disallowances are reversed with respect to reimbursement for training expenditures incurred prior to actual notice on December 7, 1977 of the regulatory requirement regarding the duration requirement for training programs (Docket Nos. 78-93-MT-HD and 80-78-MT-HD). The Agency is sustained in its disallowances of FFP for those training programs instituted subsequent to actual notification on December 7, 1977 of the official Agency interpretation (Docket Nos. 78-43-MT-HD, 79-115-MT-HD and 80-31-MT-HD).

The remaining issues in Docket Nos. 78-93-MT-HD, 78-43-MT-HD and 79-115-MT-HD will be considered and ruled upon in separate decisions which the Board will issue in the future.

/s/ Clarence M. Coster

/s/ Norval D. (John) Settle

/s/ Donald G. Przybylinski, Panel Chair