

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Montana Department of Social and
Rehabilitation Services

DATE: December 16, 1980

Docket Nos. 80-78-MT-HD
80-31-MT-HD
79-115-MT-HD (partial)
78-93-MT-HD (partial)
78-43-MT-HD (partial)
Decision No. 119

RULING ON REQUEST FOR RECONSIDERATION OF BOARD DECISION

The Montana Department of Social and Rehabilitation Services (State) has submitted a request dated October 30, 1980, asking the Board to reconsider Decision No. 119, issued September 30, 1980.

Although the Board's current regulations at 45 CFR Part 16 do not explicitly provide that the Board may rehear its own decisions, the Board Chair has recently ruled that the Board nonetheless has inherent, discretionary authority to reconsider its decisions in exceptional circumstances, considering factors such as the nature of the alleged error or omission prompting the reconsideration request, the length of time which has passed since the original decision was issued, and any harm that might be caused by reliance on that decision. (Ruling of September 11, 1980, Florida Department of Health and Rehabilitative Services, DGAB Docket Nos. 79-68-FL-RC and 80-88-FL-RC.) In the Florida case, HCFA had filed a "Post-Decision Memorandum," revising HCFA's position on interpretation of a regulation. In its original decision upholding the disallowance, the Board had given deference to HCFA's earlier interpretation. Florida's request for reconsideration was granted based on the exceptional circumstances present there. In two subsequent cases, the Board denied States' requests for reconsideration on the ground that no exceptional circumstances were present. (Ruling of November 20, 1980, California Department of Health Services, DGAB Docket No. 80-61-CA-RC; Ruling of November 20, 1980, Community Relations-Social Development Commission in Milwaukee County, DGAB Docket No. 77-12.)

Applying that same standard, we have determined not to grant the State's request here. The basis for the request is that "under federal law and precedent the telephone communication received by the state cannot be considered to be actual knowledge of OHDS policy" regarding the allowability of FFP in travel and per diem costs incurred with respect to training programs lasting less than five full days. (State request, p. 1.) The State contends that reconsideration of the Board's decision is warranted because this issue "was not directly addressed in the briefs of the case." (State request, p. 1). In fact, however, the State argued

at length that written notification of the Agency's policy was required. (Brief of Applicant, State of Montana Department of Social and Rehabilitation Services: Travel Costs, dated February 28, 1980, pp. 13-17; Supplement to Brief: Travel Costs, dated March 7, 1980, p. 2; Response of Montana State Department of Social and Rehabilitation Services to Brief of the Office of Human Development Service (OHDS), dated April 29, 1980, pp. 1-2.)

As the Board has previously indicated, the Board may find in exceptional circumstances that reconsideration is justified, for example, where a Board decision contains a clear error of law or where there is newly discovered material evidence. Reconsideration is not justified here, however, where the State's allegation of error relates to a legal issue which the State had extensively briefed and where the State's post-decision argument on that issue is not substantially new.

The State now argues that Federal case law indicates that actual notice "must be not only specific and factual but also substantially equivalent to that which the government would have given under its rule-making function," (State request, pp. 4-5), and that the notice in this case did not satisfy that test. The Board's decision in this case, however, is not clearly inconsistent with the case law relied on by the State. Although the State claims not to have received actual notice of the Agency's policy until 1979, we note that the State changed its training program effective April 1978, in an effort to comply with the Agency's policy. (Brief of Applicant, State of Montana Department of Social and Rehabilitative Services: Travel Costs, dated February 28, 1980, pp. 17-18, and Exhibit 1, Paragraphs 13 and 14; Supplement to Brief: Travel Costs, dated March 7, 1980, p. 1.) Thus, the State's contention that the December 7, 1977 telephone conversation was insufficient to give actual notice of the Agency's policy is undermined by the fact that, based on that conversation, the State took action to comply with the Agency's policy. The fact that the State believed, incorrectly, that the Agency's policy permitted it to allow one day for travel both at the beginning and at the end of a training program regardless of actual travel time does not reflect any inadequacy with respect to the notice provided by the telephone conversation; rather, as indicated by the decision, the manner in which travel time was to be calculated was so self-evident as not to require special clarification by the Agency.

The State's request for reconsideration is denied.

/s/ Clarence M. Coster

/s/ Norval D. (John) Settle

/s/ Donald G. Przybylinski, Panel Chair