

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Northwest Tennessee DATE: September 25, 2008
 Economic Development
 Council
 Docket No. A-08-77
 Decision No. 2200

DECISION

Northwest Tennessee Economic Development Council (the Council), a Head Start/Early Head Start grantee that operates multiple facilities in 13 counties of northwestern Tennessee, appeals in part the March 12, 2008 determination by the Administration for Children and Families (ACF). The determination disallowed seven groups of expenditures that the Council charged to its Head Start grant in fiscal years 2004-2007. ACF disallowed the expenditures on the grounds that they were not supported by sufficient documentation and/or that the Council failed to ensure that the costs were allowable, reasonable and necessary for the efficient performance of its program.

The Council seeks reversal of ACF's disallowance of the following three groups of expenditures: 1) payments from the Council's social services fund for utilities, rent and other expenses of families in crisis (\$88,063); 2) payment for a plasma television for the Head Start/Early Head Start Director's office (\$4,521); and 3) purchases of gift cards with employee morale funds (\$2,325).

As explained below, we sustain in part, and reverse in part, ACF's disallowance of the contested expenditures. We conclude that the social services fund expenditures are not allowable under the Head Start statute and regulations. We further explain that the Board does not have authority to reverse this part of the disallowance on equitable grounds, as the Council requests. We reverse the disallowance for the payment of the plasma television, concluding that the factual premise for the disallowance is flawed, and that the expenditure was reasonable under relevant cost principles. Finally, we sustain ACF's disallowance of the cost of gift cards purchased with employee

morale funds because the expenditures were not sufficiently documented.

Applicable statutes, regulations, and policies

Head Start is a national program that provides comprehensive developmental services, including health, nutritional, educational, social and other services, to economically disadvantaged preschool children and their families. 42 U.S.C. § 9831. The Department of Health and Human Services (HHS), through ACF, provides funds to grantees to serve as Head Start agencies within designated communities. ACF periodically reviews grantees' performance in meeting program standards and fiscal requirements. See generally 42 U.S.C. § 9836.

Under governing cost principles, a Head Start grantee's costs must be reasonable for the performance of the grant award and allocable thereto. Office of Management and Budget Circular A-122 (OMB A-122), Attachment A, ¶ A.2.a. OMB A-122, "Cost Principles for Nonprofit Organizations," is codified at 2 C.F.R. Part 230, and Attachments A and B are designated "Appendix A" and "Appendix B," respectively. OMB A-122 is made applicable to HHS grants to non-profit organizations, including Head Start grantees, by 45 C.F.R. §§ 74.27(a) and 1301.10(a). Under OMB A-122, "[a] cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the costs." 2 C.F.R. Part 230, App. A, ¶ A.3. Consideration also must be given to "[w]hether the cost is of a type generally recognized as ordinary and necessary for the operation of the organization or performance of the award," and allocable to the grant or award "in accordance with the relative benefits received." Id. ¶¶ A.3.a, A.4.

A grantee's costs also must be adequately documented. Id. at ¶ A.2.g. The grantee must have a financial management system in place that provides "[r]ecords that identify adequately the source and application of funds for HHS-sponsored activities" as well as "[a]ccounting records, including cost accounting records, that are supported by source documentation." 45 C.F.R. §§ 74.21(b)(2), 74.21(b)(7). Based on these principles, a grantee must document its costs and bears the burden of demonstrating the allowability and allocability of costs for which it received federal funding. See, e.g., Marie Detty Youth and Family Services Center, Inc., DAB No. 2024, at 3 (2006), citing Council of the Southern Mountains, DAB No. 1861, at 3 (2003); Texas Migrant Council, Inc., DAB No. 1743, at 4 (2000), and decisions cited therein.

Background

ACF conducted on-site reviews of the Council in March and August 2007. Based on those reviews, ACF issued a letter to the Council on January 7, 2008, questioning seven groups of costs that the Council charged to its Head Start grant between 2004 and 2007. Council Ex. 1; see also ACF Ex. 1 (November 9, 2007 Overview of Findings). The questioned expenditures included the following three groups of costs:

- \$88,063 in social services funds used to pay utilities, rent and other expenses of families in crisis;
- \$4,521 used to purchase a 50-inch plasma television for the Head Start/Early Head Start Director's office; and
- \$2,325 of employee morale funds used to purchase 93 gift cards (valued at \$25 each) distributed to parents and staff to recognize their work toward accreditation of their centers by the National Association for the Education of Young Children (NAEYC).

Council Ex. 1, at 2-3; Council Ex. 17 (purchase order and store receipt for television). ACF stated in the January 7, 2008 letter that to prevent the disallowance of the questioned expenditures, the Council "must provide appropriate documentation, if necessary, and adequately address reasons for the expenditure of these funds that consistently conform to Federal regulations and guidelines." Id. at 3.

On February 14, 2008, the Council submitted to ACF narrative explanations and documentation in an effort to support its charges for all seven groups of questioned costs, including the three groups listed above. ACF Ex. 2.

By letter dated March 12, 2008, ACF issued a determination disallowing all seven groups of costs identified in the January 7, 2008 letter. ACF stated that it had reviewed the additional information that the Council submitted and concluded that the Council "did not provide sufficient supporting and justifiable documentation that consistently conforms to the requirements of Federal regulations." Council Ex. 2, at 2. Further, ACF wrote, the Council "did not ensure that all Head Start costs were allowable, reasonable and necessary for the efficient performance of the program." Id.

By letter dated April 4, 2008, the Council appealed ACF's determination to disallow three groups of claimed costs: the

social services expenditures, the cost of the plasma television, and the gift certificate expenses. The Council stated, and provided documentation to show, that it had reimbursed HHS for the costs of the remaining four categories of expenditures disallowed under the March 12, 2008 determination.

Discussion

1. *Social services expenditures used to pay utilities, rent and other expenses of families in crisis*

The Council concedes that \$88,063 in social services funds used to pay for utilities, rent and other expenses of families in crisis is "not an allowable cost today," but asserts that at the time the expenditures were made, the Council was "operating honestly and openly in good faith." Council Reply at 1. The Council states that it believed the expenditures were allowable because a federal Head Start employee told the Council in the mid-1980's that it could use grant funds "to address social service needs of parents." Council Brief and Appeal File (Council Br. and AF) at 2. Further, the Council contends, since that time it has received federal approval of its grant applications and budgets, which included a line item for "social service funds to meet documented emergency or crisis assistance when no other resources can be found." Id. at 1-2. The line item, the Council contends, "was never [before] questioned by Council auditors or federal program reviews." Id. at 1.

The Council's arguments are unavailing. As noted above, under 2 C.F.R. Part 230, App. A, ¶ A.2.a, costs must be reasonable for the performance of the grant in order to be allowable. The purpose of the Head Start program and grants awarded thereunder is to--

promote the school readiness of low-income children by enhancing their cognitive, social, and emotional development--

(1) in a learning environment that supports children's growth in language, literacy, mathematics, science, social and emotional functioning, creative arts, physical skills, and approaches to learning; and

(2) through the provision to low-income children and their families of health, educational, nutritional, social, and other **services** that are determined, based on family needs assessments, to be necessary.

42 U.S.C. § 9831 (emphasis added).¹ The Secretary has issued program performance standards that establish the range of services that Head Start grantees must provide for children and families under the program. 45 C.F.R. Part 1304. The performance standards include the following:

(b) Accessing community services and resources.

(1) Grantee and delegate agencies must work collaboratively with all participating parents to identify and continually access, either directly or through referrals, services and resources that are responsive to each family's interests and goals, including:

(i) Emergency or crisis assistance in areas such as food, housing, clothing, and transportation . . .

45 C.F.R. § 1304.40(b)(1)(i). Thus, the Head Start statute refers to the provision of *services*, not cash assistance, to meet the goals of the program. The plain language of the regulations, in turn, makes clear that the Head Start grantee must help families *identify* and *access* services and resources to meet their food, housing, clothing, transportation and other needs in times of emergency or crisis. Neither these provisions nor any other sections of the statute or regulations authorize a grantee to use federal Head Start funds as direct cash assistance to pay for rent, utilities or other costs of families in crisis.

Furthermore, the Board does not have the authority to reverse the disallowance based on what is in effect a claim of equitable estoppel -- the Council's contention that in good faith it reasonably, and to its detriment, relied on the representations of a Head Start employee that the claimed costs were allowable. The Council has not presented any evidence of the alleged representation. But even assuming such a statement was made, the Board is bound by applicable laws and regulations, and has no authority to waive a disallowance based on equitable principles.

¹ The 2007 Amendments to the Head Start Act, Pub. L. 110-134, §2, rewrote this section, which formerly read: "It is the purpose of this subchapter to promote school readiness by enhancing the social and cognitive development of low-income children through the provision, to low-income children and their families, of health, educational, nutritional, social, and other services that are determined, based on family needs assessments, to be necessary." The amendment was not a significant change for purposes of this case.

45 C.F.R. § 16.14; See, e.g., Arlington Community Action Program, Inc., DAB No. 2141, at 4 (2008), citing Bedford Stuyvesant Restoration Corp., DAB No. 1404, at 20 (1993) (the Board is "empowered to resolve legal and factual disputes" and "cannot provide equitable relief"); see also Huron Potawatomi, Inc., DAB No. 1889, at 9 (2003) (the Board does not have authority to forgive a disallowance where the grantee does not contest the legal or factual basis of the disallowance but merely seeks equitable relief), citing Harambee Child Development Council, Inc., DAB No. 1697 (1999).

Moreover, it is questionable whether equitable estoppel can ever lie against the federal government. See, e.g., Babyland Family Services, Inc., DAB No. 2109 (2007), citing Northstar Youth Services, Inc., DAB No. 1884 (2003) and cases cited therein, including Office of Personnel Management v. Richmond, 496 U.S. 414 (1990) and Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984). As the Board has previously observed, even when government agents have given private individuals advice that directly contradicts federal regulations, the Supreme Court has not permitted estoppel. Lower Brule Sioux Tribe, DAB No. 1758 (2000); Enterprise for Progress in the Community, DAB No. 1558 (1996); Texas Dept. of Human Services, DAB No. 1344 at 9 (1992) (and cases cited therein, including Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947)).

In any event, estoppel against the government, if available at all, is presumably unavailable absent "affirmative misconduct" by the federal government. Northstar at n.4, citing Schweiker v. Hansen, 450 U.S. 785 (1981). There is no allegation or evidence of affirmative misconduct here. The Council submits that it believed that the expenditures for families in crisis was an allowable Head Start expense because in the mid-1980's a federal employee allegedly stated that "Head Start grant funds could be used to address social service needs of parents." Council Br. and AF at 2; see also ACF Ex. 2. Even if this representation was made as described, however, it does not show that the federal employee intentionally misled the Council. Indeed, since the performance standard requiring grantees to help families identify and access resources to meet their food, housing and other expenses in times of emergency or crisis in effect requires grantees to address "social service needs of parents," on its face the alleged statement is not inconsistent with the Act or regulations.

Similarly, ACF's approval of the Council's earlier Head Start budgets does not provide a basis to estop ACF from disallowing these expenses. We note that it is unclear whether the Council's

prior annual budget documentation described the social services fund with sufficient specificity for a reviewer to understand that the Council was using Head Start funds as cash assistance to pay for utilities, rent, and other costs of families in crisis. According to ACF, "only the budget narrative now submitted for program year 2005-2006 unambiguously describes costs contrary to the regulation." ACF Response Br. at 8, n.3; ACF Ex. 3. Even assuming (which we do not) that the Council's earlier budget documentation clearly described the social services fund as a source of emergency cash assistance to pay for utilities, rent, food, clothing, and other needs of families in crisis, however, the approval by ACF of the budgets does not rise to the level of "affirmative misconduct" by a federal agency or employee. Moreover, a federal agency's failure to disallow unallowable costs in a prior period does not preclude it from doing so later. Cf. Alabama Department of Human Resources, DAB No. 1621 (1997), citing Texas Office of the Governor, DAB No. 1608 at 14 (1997) (an agency's failure to disallow costs previously made to the same pension fund, where such costs were unallowable for substantially similar reasons, is not a bar to upholding the current disallowance); New York State Department of Social Services, DAB No. 1577, at 10 (1996), citing Mississippi Division of Medicaid, DAB No. 1305, at 4 (1992).

Accordingly, we sustain ACF's disallowance of the claimed social services expenses.

2. *Plasma television*

ACF stated in its March 12, 2008 determination that it was disallowing "approximately \$4,500"² in Head Start funds that the Council used to purchase a plasma television that was installed in the Head Start/Early Head Start Director's office. Council Ex. 2, at 2. The sole basis asserted for the disallowance was that "[o]bservation of the central office building found that it included another similarly equipped training area" and that the television "duplicated capacity already available." Council Ex. 2, at 2; ACF Response at 9. Consequently, ACF concluded, "the purchase was not reasonable because it 'exceed[ed] that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the costs.'" ACF Response at 9, quoting 2 C.F.R. Part 230, App. A ¶ A.3.

² The purchase order and store receipt submitted by the Council show that the cost of the television and installation equipment was \$4,521. Council Ex. 17.

We reverse the disallowance for the cost of the television because the Council has established that the disallowance rests on a flawed factual premise, i.e., that the television's properties and functions replicated those of equipment to which the Council already had access. The Council has provided detailed information, not specifically refuted by ACF, regarding the properties and functions of the purchased television. The Council states that the television is used as a "monitor screen with multiple input devices" (including a computer and cable service). Council Br. and AF at 9. The Council further asserts that even though the television and attached equipment are located in the Director's office rather than the large training room, they are used to access/provide a wide array of necessary training classes, orientation programs, workshops, meetings, and webinar presentations for management and staff that benefit the Head Start program. Council Notice of Appeal, Item II; Council Br. and AF at 9-13. Additionally, the Council alleges that prior to its purchase of the television, it "lacked a monitor with multiple input capabilities, e.g. computer, cable, webinars, DVDs and tapes." Council Br. and AF at 10, 13. Thus, while it already had some training equipment and access to training programs, the Council submits, it did not have equipment with all of the properties and functions of its new technology system. Id.

Notably, neither ACF's disallowance determination nor its response brief describe the equipment observed during the on-site review which was allegedly similar to the plasma television and the system of which it is a part. Of particular significance, ACF's response brief does not refute the Council's characterization of the specific capabilities and functions of the new plasma television or say that the existing system had exactly the same properties and capabilities. Thus, we conclude that the Council has provided sufficient information to establish that the television did not duplicate capacity already available and that, consequently, the nature of the cost did not exceed that which would be incurred by a prudent person under the circumstances at the time of the purchase. Furthermore, we note that the Council has provided source documentation supporting the specific amount of the cost (\$4,521) and a detailed description of how the equipment has been used to support the Council's Head Start operations. Council Ex. 17; Council Br. and AF at 9-13.³

³ The Council writes in its brief and appeal file that "[i]f funds permit and approval is provided, the program would
(continued...)

Accordingly, we reverse ACF's disallowance of \$4,521.13 for the purchase of the plasma television.

3. *Gift cards*

The Council argues on appeal that it properly used employee morale funds to purchase 96 Wal-Mart gift cards valued at \$25 each (a total cost of \$2,400)⁴ which it distributed "to recognize the dedication and commitment of staff . . . from the six . . . facilities which received and/or worked toward accreditation status from . . . [NAEYC]." Council Br. and AF at 14, 17. The Council states that it purchased and presented four additional gift cards to parents in 2006, and concedes that the use of employee morale funds to purchase those four cards was not allowable. *Id.* The Council also states, without further explanation, that "93 gift certificates were not awarded to staff and parents." *Id.* at 15. The Council argues, however, that "the remaining 96 gift cards, valued at \$2,400, were a legitimate use of the Employee Morale funds." *Id.* at 14.

It is a fundamental principle of grants management that a grantee is required to document its costs, and the burden of demonstrating the allowability of costs for which funding was received under a grant rests with the grantee. See, e.g., Texas Migrant Council and decisions cited therein; see also 45 C.F.R. §§ 74.50-74.53; 2 C.F.R. Part 230, App. A, ¶ A.2(g). The Board has consistently held that documentation must consist of records which adequately identify information pertaining to grant awards, authorizations, obligations, unobligated balances, assets, outlays and income; records must be supported by source documentation such as canceled checks, paid bills, and payrolls. See, e.g., Action for a Better Community, DAB No. 2104 (2007); 45 C.F.R. § 74.21(b)(2), (b)(7).

³(...continued)

entertain the purchase of a large monitoring screen for [the large] conference room which would enhance presentations and training sessions for larger groups." Council Br. and AF at 13. The Board's decision here should not be read as expressing any opinion as to whether such a purchase would be allowable, reasonable and necessary under governing cost principles.

⁴ ACF's March 12, 2008 determination disallowed the cost of 93 gift cards valued at \$25 each (a total cost of \$2325). Council Ex. 2, at 2 (emphasis added).

Applying these principles to the Council's gift card expenditures, we conclude that the explanation of the expenditures and the documentation that the Council has provided are insufficient to support any of the gift card costs. The Council states on appeal that "[a] careful search of the records for the program years of 2004-05, 2005-06, and 2006-07 documented that \$25 gift certificates were awarded to 96 staff members and totaled \$2,400." Council Br. and AF at 17. Together with the four gift cards that were given to parents, the Council writes, "[t]he program accounted for \$2,500, or one hundred (100) \$25 gift certificates, awarded during that three year period." Id.

To support these statements, the Council includes in its brief and appeal file what it alleges to be "a complete listing" of the names and program positions of the 96 employees who received the gift cards, the month they received the cards, and, in all but one case, the locations where they worked. Council Br. and AF at 18-22, Item 3). The listing specifically represents that the following groups received gift cards: 12 employees from the Paris Central and Paris Vernon Head Start Centers (July 2004); 15 Center Coordinators and Managers (December 2005); 21 employees from the Lauderdale Center (December 2005); 22 employees from the Tipton County Center (October 2006); 17 employees from the McKenzie Head Start/Early Head Start Center (December 2006); and 9 employees from the Lake County Center (December 2006). Notably, however, the Council does not provide with its brief and appeal file any store receipts, cancelled checks, credit card receipts, statements, or any other source documentation to show that the purchases were in fact made. Similarly, the Council provides no source documentation or other evidence to support its assertion that the employees named in the Council's brief and appeal file in fact received the cards.

Furthermore, the Council's representations before the Board about the number of gift cards distributed and the centers whose employees received the cards are inconsistent with the documentation and explanation of the costs that the Council provided to ACF on February 14, 2008, in response to ACF's proposed disallowance of gift card expenses. In its February 14, 2008 submissions, the Council provided copies of three purchase orders (not submitted by the Council on appeal) for the requisition of a total of 186 gift cards between July 15, 2005 and October 5, 2006. ACF Ex. 2. The Council's narrative accompanying the purchase orders indicated that 10 cards were used as door prizes at a pre-service program, and that the remaining were distributed to employees, to recognize their work towards NAEYC accreditation, at the following centers: Lake, Washington Douglass, Miles, Fayette, Lauderdale, Tipton, and McKenzie. Id. Notably, the Council provided no receipts to

show the purchases were made or that the cards were distributed/received by the employees, as alleged.

Thus, the Council's February 14, 2008 submissions indicated that the number of cards purchased for, and distributed to, employees (186) and the amount of allowable expenditures for gift cards (\$4,650) were, respectively, more than and nearly twice the amounts the Council claims before us (96 purchased, with a total cost of \$2,400). In addition, the group of centers whose employees received cards according to the Council's February 2008 submission is not the same group identified in the Council's brief and appeal file. Specifically, the purchase orders and February 2008 narrative identify Washington Douglass and Miles as two centers whose employees received gift cards, yet these centers are not included in the list of centers identified in the Council's brief and appeal file. Likewise, the Paris Central and Paris Vernon Head Start centers, listed in the Council's brief and appeal file, are not cited in the documentation provided on February 14, 2008. The Council has wholly failed to address or explain these inconsistencies.

Also relevant, notations on two of the three purchase orders submitted by the Council below evidence the Council's insufficient record-keeping for the claimed gift card expenditures. Specifically, the purchase order dated December, 13, 2005 includes the following notation:

I have not been accustomed to second guessing my supervisor until recently. I was instructed to fill out this purchase request for gift cards. I could not remember requesting gift cards for the same reason at the very same centers. I ran across these requests after reviewing my file. Can Ms. Castleman account for all gift cards?

Id. The purchase order dated October 5, 2006 includes the notation "Receipt Lost." Id. Thus, on the face of these documents, it is clear that the Council did not have a sufficient financial management system to account for the claimed costs.

In light of the Council's failure to provide any source documentation or reliable records to support the claimed expenses, the discrepancies in the Council's submissions, and the patent insufficiencies of the Council's recordkeeping, we uphold ACF's disallowance for the total claimed costs of the gift cards.

Conclusion

For the reasons described above we sustain ACF's disallowance of \$88,063 that the Council charged against its Head Start grant to pay utilities, rent and other expenses of families in crisis. We further sustain the disallowance of \$2,325 claimed for the purchase of gift cards to support employee morale. Finally, we reverse the disallowance of \$4,521 for the purchase of a plasma television for the Head Start/Early Head Start Director's office.

_____/s/
Leslie A. Sussan

_____/s/
Constance B. Tobias

_____/s/
Sheila Ann Hegy
Presiding Board Member