

DEPARTMENTAL GRANT APPEALS BOARD

The Department of Health, Education and Welfare

SUBJECT: United States International
University
Docket No. 76-12
Decision No. 42

Date: October 19, 1977

DECISION

Grantee appeals from disallowances of expenses claimed under two grants made to it by the Office of Education in June, 1971, for an Institute for Training in Librarianship and a Center for the Advanced Study of Technology Library, and Information Services under Title II-B of the Higher Education Act of 1965. Grantee relies on approvals of the expenses involved by the Associate Commissioner (Bureau of Libraries and Educational Technology). The central and most troubling aspect of this case is that it stems from the misconduct of a federal official. As a result of the Associate Commissioner's actions in related matters, he was prosecuted, pleaded guilty, and was sentenced. The issue is the extent to which the grantee should be held financially accountable for what it did pursuant to his instructions.

This case presents troubling alternatives. On each of the issues there is a reasonable case for the grantee. The agency (Office of Education), having been specifically directed to brief these difficult issues, and warned that the burden of going forward rested on it, failed or studiously avoided discharging that burden. This is not the first time in a case in the education field we have had to comment on such inadequate responses. In part because the agency has not

addressed these issues and for the additional reasons stated below, we rule for the grantee on each of the disallowances involved.

We have received and considered grantee's statement of its appeal and the agency's response. The facts and issues as gathered from the file were outlined in an Order to Show Cause and both parties were directed to respond, correcting any inaccuracy or material omission, clarifying certain questions specified in the Order and discussing any other issues the parties believed material. Both parties responded, correcting in some details the outline of facts as gathered from the file. Although representation by counsel is not required, both parties appear, from the tenor of their submissions, not to have consulted counsel and have accordingly submitted responses that were less helpful to their position and to the Board than the Board had hoped.

Neither response is satisfactory. The government response is particularly disappointing. A government official may fairly be expected to meet a higher standard of responsiveness and cooperativeness than was shown here. See Point Park College, Docket No. 75-12, Decision No. 16, May 20, 1976, pp. 3, 6.

Consultant Contract

Under Grant No. OEG-0-71-8527, grantee paid to a firm known as Infonetics, Inc., \$12,691 for consultants, \$1,903 for instructional supplies, and \$8,752 for instructional materials, making a total direct cost of \$23,346, on which indirect cost was charged in the amount of \$1,868 for a total charge of \$25,214. Grantee asserts that it made these payments under oral instructions of Mr. Burton Lamkin, the Associate Commissioner. The Audit Report states that Mr. Lamkin

was also a principal in the Infonetics firm (Audit Report, Exh. B, p.3). The agreements with Infonetics, Inc. had not been submitted to the grants officer and approved by him in writing. The grantee asserts without apparent challenge that the Associate Commissioner's normal course of conduct, not only in this grant but generally, was to give instructions orally without written confirmation. (Appeal, 6/4/76, p. 5-6).

The facts as set forth by the agency are that the Policies and Procedures Manual containing grant terms and conditions was promulgated by Mr. Lamkin and that Mr. Lamkin caused to be included in the proposed budget funds for his specific use and caused to be included in the proposal provisions which require the grantee to perform "in cooperation with," "in consultation with," "as directed by," and "as requested by" the Associate Commissioner (BLET). Pursuant to such provisions grantee made the payments in question to Infonetics, Inc., with the understanding that this was a means for Mr. Lamkin to handle the money and to keep it separate from his personal account.

Grantee states that it persistently requested receipts for expenditures and reports of accomplishments and received some with an indication that more would be forthcoming. While the reports were incomplete, grantee was satisfied that the funds were used for proper grant purposes, and worthwhile accomplishments were being achieved (id. p. 14): contribution to the publication of "Black Information Index", a relevant resource for Black Libraries, and meetings of Black Library leaders held by Mr. Lamkin in Washington, D.C. for the "purpose of working out better organizational patterns of sharing sources and effecting stronger library services" (grantee letter 10/26/73, p. 15).

It might be possible to argue that written approval of the agreement with Infonetics and inclusion in the contract of provisions assuring grantee control are required by the Policies and Procedures Manual, assuming it to be effective notwithstanding the Pucinski amendment (see below), and by 45 CFR 132.32 promulgated after the award of the grant. The agency, however, has expressly conceded (Response to appeal, 12/6/76, pages 3-4) that Mr. Lamkin was supervisor of the grants officer (Mr. Ray N. Fry) and did in fact approve all project work before it was undertaken (id. p. 3 par. (e)) and, moreover, that approval of the contract was in fact not required: "The question of approval of contract by the Government is a non-issue.... Lack of approval of contracts is not considered a basis for disallowing this cost." This is sufficient to distinguish this case from Southern University, our Docket No. 29, Decision No. 24, June 29, 1976, which turned on grantee's failure to obtain required written approval. The agency relies on a concept of the grantee's responsibility as total, neither divisible nor assignable. In another context this view would be persuasive. A grantee will not readily be permitted to shed responsibility by passing it downstream to a subgrantee. But that is not what the grantee claims here. Here the responsibility was raised upstream by the grantor, a very different matter.

The grant award expressly incorporates a budget which provides \$11,250 under the heading "Lecturers and Consultants: ... Assoc. Comm.'s Spec. Proj." and an additional \$11,000 under the heading "Instructional Supplies: ... *Assoc. Comm. Sp. Projects" (footnote: "*Reviewing BLET objectives and developing projections to meet future needs"). This accounts for \$22,250 out of the \$23,346 direct cost disallowances under this grant. The remaining \$1,096 is less than 5% of the

amount involved and is justified by the grantee on grounds of permissible budget flexibility. That some excess in a line item might be justified under flexibility rules was expressly noted by the Board's Order to Show Cause and not questioned by the agency's response. The Policies and Procedures Manual, while calling for line items to be computed as precisely as possible, acknowledges that "the budget is always an estimated budget made in advance" (p. 22). Material changes require a written request but "[m]inor deviations of specific amounts of expenditures among categories from those estimated in the budget set forth in the grant award document will not require revision of such application." (p. 40; cf. 45 CFR 132.11, August 14, 1971, after the date of the grant award, but to the same effect, and General Provisions for OE Programs, 45 CFR 100a.29(b), still later, but reflecting continuation of a persistent and reasonable policy). We conclude that no disallowance is justified by the minor deviation involved if the expenses are otherwise warranted.

In paying the funds on Mr. Lamkin's direction to Infonetics for the Associate Commissioner's Special Projects, grantee complied with the express terms and apparent intent of the grant.

The plan of operation incorporated in the grant award specified, in addition to other similar provisions, that:

(10) Evaluation. The project will be evaluated ultimately by the Associate Commissioner, BLET. To the degree that the project satisfies the requirements of the Library Institutes Program as specified and interpreted by the Associate Commissioner, BLET, objectives will be considered satisfactorily under attainment....

It is certainly bad practice for an agency to infringe so strongly as this grant does on the autonomy and hence the responsibility of the grantee. This is a grant award that should not have been made and presumably would not have been made by a professional trained grant staff such as is contemplated in the Secretary's announcement of May 18, 1977 of a program to improve the level of grant administration. The impropriety, however, although real, was engaged in by the Associate Commissioner and by the agency and should not be visited on the grantee who appears to have conducted itself in good faith, if somewhat in-cautiously. While the grant was improvident in its terms, it does not appear that grantee by performing the grant according to its terms acted irresponsibly. Cf. County of Alameda v. Weinberger, 520 F. 2d 344, 351 (C.A. 9, 1975).

It appears that Mr. Lamkin acted improperly in this case and criminally in related matters. There is, however, nothing in the file to support any actual notice by the grantee of impropriety by Mr. Lamkin. It is understandable that the agency feels defensive about what occurred here but this effort to shift the blame to grantee is unwarranted. It may be that the grantee acted with less caution than it should have exercised. Nevertheless, it appears to be a fact that the grantee in so acting complied with the terms of the grant and relied on the instructions of an official of high rank in the Department authorized to make the grant, dictate its terms and evaluate grantee's performance.

"Even though the courts commonly assert without qualification that equitable estoppel does not apply to governmental units, and even though numerous holdings are based upon such assertions, still the number of holdings in which governmental units are estopped is substantial and growing, both in the federal courts and in the state courts." Davis, Administrative Law Treatise, §17.09.

Having in mind the general doctrine (and its qualifications) that a federal officer can act only within the scope of his actual authority, we asked the agency to brief the scope of Mr. Lamkin's authority, but it declined to do so. We are therefore constrained in this case (without prejudice to other cases where the issue may be briefed) to rule against the agency on this branch of the case.

The agency sought to base its disallowance on provisions of the Policies and Procedures Manual, later codified in 45 CFR 132. (Response to Show Cause Order, April 18, 1977). The relevance of the provisions referred to is not clear and is not articulated although we had asked for briefing, nor is there any explanation of the effect of the Pucinski amendment on which we also asked for briefing (see below). Because we find that grantee complied with the requirements of the grant and nothing in the policies or regulations appears to override the grant terms, it is not necessary for us to decide the question of the extent to which these provisions would otherwise be binding.

Foreign Travel

Under Grant No. OEG-0-71-8401, grantee has appealed an item of foreign travel, direct cost \$708, indirect cost \$57, total \$765, out of a total disallowance of \$1,716, part of which grantee has accepted.

Grantee's employee traveled to Europe at his own expense. While there, he traveled within Europe to visit various experts in the field in which he was working. The costs for the travel within Europe were charged to the grant. Grantee claims that the travel had been orally approved by Mr. Burton Lamkin, then Associate Commissioner (BLET). (Response to Order to Show Cause, 4/15/77, pp. 7, 8).

The disallowance is based on the failure of the grantee to obtain prior written approval for the foreign travel. Audit Report, Exhibit A, p. 4. This position is based, however, on OMB circular A-21, ¶J.44, which does not in its terms require prior written approval, but specific prior approval. A-21, moreover, is not directly binding on the grantee. It is an admonition to the agency. Cf. Opinion of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel (to Harold S. Trimmer, General Counsel, GSA) May 6, 1975, p. 4.

It was incumbent on the agency to show the basis for attributing a binding effect to this rule (whether simply on the ground of knowledge in fact, for which the agency should show the evidence, or on the ground of a published statement of policy or regulation known to have been actually communicated to the university prior to the grant or made binding by Federal Register publication or otherwise). Cf. Decision of the Hearing Examiner, Appeal of City of Arnold, Michigan, Environmental Protection Agency, Grant Appeal, Docket No. 76-1, June 30, 1977, esp. 7-8, 10.

Because an Office of Education grant is involved, it was particularly incumbent on the agency to show whether reliance on A-21 is consistent with the Pucinski amendment (one version of which is PL 91-230, Title IV, sec. 401(a) (10), enacted April 13, 1970). The Pucinski amendment has been interpreted as barring agency reliance on rules not published in the Federal Register even when actual notice is shown. See Sky, Rulemaking in the Office of Education, 26 Admin. L. R. 129, 131 (1974); Sky, Rulemaking and the Federal Grant Process in the United State Office of Education, 62 Va. L.R. 1017, 1019

n.7 (1976). L.R. 1017, 1019 n.7 (1976). Further, it was incumbent on the agency to show whether the requirement of A-21, if binding at all, is not met by an oral communication.

The agency also contended that the established policy at OE had been that authority to approve rests with the grant officer, who was Mr. Albert Riskin, or with his superiors in the organization, which did not include Mr. Lamkin (p. 2, Response to Appeal, 12/6/76). Mr. Riskin is reported as stating that he did not provide clearance for this foreign travel and the grantee does not claim the contrary. It is, however, incumbent on the agency to show whether its "policy" as to the officer authorized to give such approval was merely an internal policy or was made binding on grantees either by publication in the Federal Register or specific communication to the grantee or otherwise.

The Order to Show Cause pointed out, without there deciding the appropriate ultimate outcome, that the burden of going forward on these issues is with the agency and that, failing a satisfactory explanation by the agency of the matters just noted, a decision in favor of the grantee on this item appeared to be called for. Since no adequate response has been received from the agency we are now constrained to hold for the grantee on this disallowance.

Costs Incurred After the Grants Expired

In its appeal (6/4/76), grantee asserts, apparently by way of set-off, three items of costs occurring after termination of the grants. The agency asserts that these costs are not allowable because incurred after the expiration of the grant and not at the request of the government and also because some of these costs

may already be included in the indirect cost pool. The Board requested clarification by the government of its statement of position. The agency chose not to clarify. Nevertheless we note that these items had not been claimed by grantee for reimbursement and were not among the items disallowed by the determination appealed from (Appeal, Attachment B, 8/8/76). We rule that these items are not properly before us, without any indication as to how we would have ruled had they been claimed, disallowed and properly included in the appeal.

Conclusion

With respect to the Infonetics contract and the foreign travel, grantee has complied with the requirements of its grants and these items are allowed. There were clear improprieties in the making and administration of the awards but these are substantially on the part of the government rather than on the part of grantee. The government has not sustained the burden, of which it was explicitly put on notice, of showing violations of binding requirements especially in the face of the improper action of its own senior official. We do not pass on the items of costs incurred after the grants expired.

/s/ Bernice L. Bernstein

/s/ Thomas E. Malone

/s/ Malcolm S. Mason, Panel Chairman