

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education, and Welfare

SUBJECT: Seattle Model Cities Program
Docket No. 77-14
Decision No. 50

DATE: November 7, 1978

DECISION

Facts

The Seattle Model Cities Program ("SMCP"; "grantee"), a subdivision of the City of Seattle and now a part of the City's Department of Human Resources, received a grant from the Public Health Service under P.L. 89-105, which authorizes funding to pay a portion of the costs of professional and technical personnel in Community Mental Health Centers (CMHC). Such grants are commonly referred to as "staffing grants" (see grantee's appeal, pp. 1-2; Catalog of Federal Domestic Assistance, §13,240). The program was to be implemented by the SMCP and a subcontractor, Harborview Medical Center. On January 1, 1974, the Harborview Medical Center became the sole grantee, and funding for the SMCP apparently ended at that time (see p. 3, grantee appeal). The SMCP as a separate agency apparently no longer exists.

In July 1976, the Alcohol, Drug Abuse, and Mental Health Administration ("ADAMHA"; "the agency") informed grantee that certain costs were ineligible (see p. 3, grantee appeal), but a copy of this communication is not in the record. Under the provisions of 42 CFR Part 50, Subpart D, grantee appealed the disallowance to the ADAMHA Grant Appeals Committee which, after reviewing audit findings, upheld the disallowance of \$179,801 in salary and other costs. It is this determination that grantee is now appealing. A copy of the ADAMHA Grant Appeals Committee decision, but not the audit findings on which it was apparently based, is in the record.

Although there were apparently two classes of costs disallowed by the agency, one involving salaries and the other involving indirect costs, grantee's appeal letter expressly accepts the disallowance of salary costs, appealing only the indirect costs issue (pp. 3-4). However, in its response to the Order to Show Cause, grantee states "the amount in dispute is \$170,306." This suggests that grantee is pressing its claim for salary costs in the amount of \$139,713. Such costs were disallowed by the agency because the audit found no records to support the salary payments claimed (letter dated August 1, 1977, from ADAMHA Grant Appeals Committee).

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Grantee's response to the Order to Show Cause totally fails to furnish any documentation or otherwise address the issue of salary costs. Consequently, this panel must conclude that the reference to the total amount of \$170,306 as the amount in dispute was gratuitous and that, in fact, grantee has abandoned its appeal with respect to the salary claims. We, therefore, consider the only issue before us for decision is the allowability of the claimed indirect costs.

In support of its finding that indirect costs of the type claimed by grantee are ineligible for reimbursement under the staffing grant, the ADAMHA Grant Appeals Board cited the applicable statute and regulations (P.L. 89-104, section 220, and P.L. 91-211; 42 CFR Part 54) as allowing only compensation of professional and technical personnel. The relevant statutory provision states:

. . . for the purpose of assisting in the establishment and initial operation of community mental health centers. . . the Secretary may . . . make grants to meet . . . a portion of the costs (determined pursuant to regulations [promulgated by the Secretary]) of compensation of professional and technical personnel . . . (P.L. 89-105, 42 U.S.C. 2688(a)).

(P.L. 91-211 added amendments not relevant to this appeal.)

The agency also cited 45 CFR 54.303, which provides in part:

Eligible Costs

- (a) Personnel covered. For purposes of section 220(a) of the Act and of this subpart, professional and technical personnel shall be those persons who participate in the provision of an element or elements of service . . . and who are found by the Surgeon General to be appropriately qualified under the circumstances to occupy positions which require professional or special mental health training or experience.
- (b) Allowable compensation. . . . "[C]ompensation" shall include remuneration for services, vacation, holiday and severance pay, sick leave, workmen's compensation and employee insurance, social security taxes and retirement plan costs, and such other benefits in return for services performed . . .

Grantee, on the other hand, contends that the provisions of OMB Circular A-87 (FMC 74-4) and the HEW Grants Administration Manual allow indirect costs to be charged unless specifically excluded by the enabling legislation, and that the Mental Health Program contains no such specific exclusion (Appeal, pp. 1-2).

Grantee cited the language in 45 CFR Part 74 indicating that regulations therein are applicable except to the extent inconsistent with applicable Federal statutes and regulations, and apparently argues that the Part 74 provisions should be superseded by general language contained in OMB Circular A-102 and FMC 74-4, and general language of the HEW Grants Administration Manual (Section 5-60-40) stating that use of OMB A-102 and A-87 would enlarge the pool of allowable costs (Appeal, pp. 1, 5). Grantee also, however, concedes that 45 CFR Part 74 is essentially identical to OMB Circulars A-87 and A-102 (FMC 74-4 and 74-7) (Appeal, p. 5) and that Part 74 was not published until 1973, near the end of the grant period, and, thus, was not applicable as such to the grant.

Grantee questions the agency citation of 42 CFR 54.303, stating that the cited provision relates to the evaluation of applications and is irrelevant to the issue at hand (Appeal, p. 5). In support of this, grantee encloses a copy of the provision printed in the Federal Register of February 10, 1972, as a Notice of Proposed Rulemaking. Official published versions of the regulations covering the period of the grant, however, show Section 54.303 as entitled "Eligible Costs" and reading as quoted above.

Although grantee consistently refers to costs claimed as "indirect costs," it appears that grantee has, in fact, charged certain support costs (audit services, maintenance and repair, facilities costs--see Appeal, p. 2) directly to the grant. This does not, however, appear to affect the analysis of their allowability. Grantee did not apparently have an approved indirect cost rate for the period in question and is not basing its argument on the existence of such a rate.

It is not clear from the record whether OMB Circulars A-87 and A-102 were made applicable to this grant either by incorporation in the grant terms or through applicable PHS Policy Statements. Even if PHS had adopted the OMB Circular, the applicability of specific provisions of the Circulars would clearly be limited by the existence of statutory and regulatory provisions specifying the costs allowable under the grant. OMB Circular A-87 by itself does not create a right to reimbursement for costs not allowed by the program statute and regulations (see ¶3, parts A.1 and C.1.c of OMB A-87). The statutory provisions and supporting regulations quoted above, although not expressed in terms of limitation, nevertheless restrict allowable costs to compensation of professional and technical personnel and do not affirmatively allow payment of support costs. Grantee has not shown any other regulations pertaining to this program which do allow such costs.

As thus framed, the issue appears to be uncomplicated: Do the OMB Circulars, Federal Management Circulars, and HEW regulations implementing them (45 CFR Part 74) enlarge the costs eligible for grant support? We think not, for the reasons set out below.

Grantee contends, and not without merit, that the Circulars cited reflect the Federal Government's policy that "federally-assisted programs bear their fair share of costs under these principles except where restricted or prohibited by law" (FMC 74-4, Par. 3; HEW Grants Administration OMB Manual, Chap. 5, Sec. 5-6-30A; OMB Circular A-87, Attachment A, ¶A.) Although expressed in terms of restriction or prohibition, the limitations upon the applicability of the issuances are, necessarily, prescribed by the basic authorizations contained in the grant program legislation. It is too well established to require extensive citation that grant authority can only be conferred by Congress and only to the extent authorized by its enactments. We are constrained to read the Circulars as providing standards and methods for determining which of, and to what extent, a grantee's costs, if otherwise eligible for Federal support, are allocable to a grant such as to merit Federal funding. This reading is firmly buttressed by Attachment A to Circular A-87 which specifically states the "principles [therein] are for the purpose of cost determination and are not intended to identify the circumstances or dictate the extent of Federal and State or local participation in the financing of a particular grant (emphasis supplied). See, also, Sec. 1, General Information, HEW Guide for Local Agencies: 45 CFR Part 74, Appendix C, A.1; FMC 74-4 ¶3, reiterated in haec verba. "Allowable costs must, inter alia, conform to any limitations or exclusions set forth in these principles, Federal laws, or other governing limitations as to types or amounts of cost items." (C.l.c, Attachment A, A-87). Whether indirect costs, as a class, are cognizable requires a consideration of the applicable statutes and regulations. We now examine the scope and extent of the authority conferred by the grant program statute, both in respect to its explicit terms and, to the extent amplified or clarified thereby, its legislative history.

A review of the several successive enactments in aid of the Community Health Center (CMHC) Program, impels the conclusion that the staffing grants amendments were intended to be just that and no more.

As indicated by the above-quoted language of the CMHC Amendments of 1965, the Secretary of HEW was authorized to make grants to meet a portion of the costs "of compensation of professional and technical personnel." This language specifically identifies the kinds of costs, and the purposes for which incurred, eligible for grant support. Unlike other grant legislation, it does not authorize the making of grants for the general conduct or operation of a program or activity such as a CMHC; rather, the grant authority is limited to providing support to pay the compensation of selected personnel. No authority is provided for grant support beyond limited designated personnel costs. If any doubt persists concerning the narrowness of the Congressional authorization, it is dispelled by a consideration of the legislative development of the entire CMHC program.

As originally enacted, Title II of the Mental Retardation Facilities and the CMHC Act of 1963 conferred authority to make grants only for construction of CMHC (P.L. 88-164; 42 USC 2688). The bill, (S. 1576), which became the CMHC Act, as passed by the Senate, authorized "initial staffing grants for technical and professional personnel" at health centers. The House version did not contain any such provision and, as finally enacted, the 1963 legislation contained no provision for grants for initial staffing support. That support was provided subsequently by an amendment which was introduced in the House as H.R. 2985. It is worthy of note that the Senate Report (S. Rpt. 89-366) on H.R. 2985 referred to the provision in question, as did the provision in the earlier Senate bill, as one authorizing "staffing grants." Nowhere is found any suggestion that such grants would encompass related operational, general administrative support, or indirect costs. That the thrust of H.R. 2985, which became P.L. 89-105, the CMHC Act Amendments of 1965, was directed toward assisting in the financing of services furnished patients by qualified professional personnel is further reflected in the following statement in the Senate Report on H.R. 2985:

"There is no intent in any way in this bill to discriminate against any mental health professional group from carrying out its full potential within the realm of its recognized competence. Even further it is hoped that new and innovative tasks and roles will evolve from the broadly based concept of the community mental health services. Specifically, overall leadership of a community mental health center program may be carried out by any one of the major mental health professions. Many professions have vital roles to play in the prevention, treatment, and rehabilitation of patients with mental illnesses." (S. Rpt. 89-366)

Subsequently, in 1969, a bill (S. 2523) introduced in the Senate and reported out by the Committee (S. Rpt. 91-583) would have amended the legislation to authorize grants for operation and maintenance of CMHC. This was proposed by deleting the reference to "compensation of professional and technical personnel for the initial operation" of CMHC and substituting in lieu thereof "operation, staffing, and maintenance" of CMHC. The House version of the bill contained no such provision, and the Conference Report (91-856) retained the earlier limited language. The report stated (p. 12):

The Senate bill changed the scope of the program of grants for the initial operation of community mental health centers from grants for initial costs of compensation of professional and technical personnel of the centers to grants for

operating, staffing, and maintaining the centers. The Senate bill also made a corresponding change in the programs for facilities for alcoholics, narcotic addicts, and the mental health of children.

The House amendment contained no corresponding provision. The conference substitute does not make any corresponding change in the scope of any of those programs.

The rejection of the Senate effort to enlarge the scope of eligibility of activity for grant support lends further weight to the soundness of the narrower interpretation of the grant authority. Not even the definition of "technical personnel" enacted in the 1970 Amendments (found in Sec. 502 of the Conference Committee report on S. 2523) would encompass the maintenance and repair, audit services and facilities costs which appellant claims as allowable "indirect costs." That definition, it should be observed, explicitly excluded the classes of personnel whose costs appellant here claims are proper costs eligible for Federal grant support. That section provides:

"For purposes of this title, the term "technical personnel" includes accountants, financial counselors, medical transcribers, allied health professions personnel, dietary and culinary personnel, and any other personnel whose background and education would indicate that they are to perform technical functions in the operation of centers or facilities for which assistance is provided under this title; but such term does not include minor clerical personnel or maintenance or housekeeping personnel."

In explaining the House attitude toward the Senate's proposal to expand the scope of the grant, Congressman Staggers, speaking for the managers of the House, stated, during House consideration of the Conference Report:

When the Subcommittee on Public Health held hearings last year on this legislation, testimony was received urging that the present staffing grants be expanded to cover the cost of all operations of the community mental health centers.

The committee did not feel that we should, at this time, adopt such a broad approach to the staffing of these centers, principally because to do so would offer less encouragement to the States and local areas to support these facilities.

However, the committee did recognize the need for an expansion of the definition of staffing personnel in order to assist the centers in becoming effective quickly.

To that end, the conference report represents, I believe, a realistic approach to the problem of staffing assistance. (Cong. Rec., Feb. 26, 1970, pp. H. 1321, 2.)

Ultimately, Congress enacted the CMHC Amendments of 1975 (subsequent to the grant period here in question) which repealed the CMHC Act, as amended, and for the first time authorized grants for initial operating costs (P.L. 94-63; 42 USC 2689(b).)

During consideration of H.R. 4925, which upon enactment became P.L. 94-63, the House Report (H. Rpt. 94-192) on the bill summarized the situation above described (p. 111):

"Present law provides assistance to CMHCs only for the costs of staffing. The Committee has broadened this support to include all of the operating costs of a center since it is recognized that the present limitation to staffing costs has often created inappropriate incentives and pressure on the centers to increase their staffing in an artificial manner."

One further observation: Section 220(a) of the CMHC Act under which this grant was made provided for issuance of regulations by the Secretary. In implementing the Act, the Secretary, in fact, issued regulations which, inter alia, identified those personnel whose costs of compensation were eligible for grant support. That regulation (42 CFR 54.303) limited eligibility of personnel costs to the compensation of "professional or technical persons or personnel . . . who participate in the provision of an element or elements of service. . . and who are found by the Surgeon General to be appropriately qualified under the circumstances to occupy positions which require professional or special mental health training or experience." The support costs claimed, whether considered as technical personnel costs or indirect costs, clearly do not come within the quoted definition. The validity of the regulation in its competence to so specify requirements of eligibility, in our opinion, is not open to question. The regulation, having been duly issued under statutory authority, has the full force and effect of law.

Conclusion

For the foregoing reasons, it is our decision that the disallowances determined by the agency were justified by the facts and circumstances of this case. The appeal is denied.

/s/ Francis D. DeGeorge

/s/ Edward T. York, Jr.

/s/ Manuel B. Hiller, Panel Chairman