DEPARTMENTAL GRANT APPEALS BOARD

THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SUBJECT: Eunice Kennedy Shriver Center for Mental Retardation, Inc.
Docket No. 75-1
Decision No. 18

DATE: June 4, 1976

DECISION

This is a case with a unique set of facts not likely to be repeated and this decision is therefore not intended to set any general precedent.

Grantee seeks a use allowance for the use of property to which it does not have legal title but which it constructively owns. On the basis of this constructive ownership we hold that the use allowance is a permissible element in grantee's indirect cost proposal.

The case arises out of a partnership arrangement between Commonwealth of Massachusetts and the grantee for the operation of a research center for mental retardation and related aspects of human development pursuant to Federal grants under Public Law 88-164 and other authority. To accomplish this national project the Commonwealth of Massachusetts provided both land and matching monies and agreed to vest complete operational responsibility in the grantee.

Under the terms of an earlier construction grant the Commonwealth is committed to use the building and equipment in question for at least 20 years for the current project and for 50 years in similar projects.

The grantee thus has long term responsibility and control over these assets. The grantee pays to the Commonwealth an annual charge determined by a formula to cover maintenance costs but does not pay rent for the use of this property which is committed to its use.

The grantee has claimed in its indirect cost proposal for the fiscal year ending May 31, 1973 a use allowance on the building owned by the Commonwealth but occupied by the grantee under the operating grants. The grantee claims a use allowance

only on that portion of the assets funded by the Commonwealth and not on the portion funded by Federal monies. The basic rule (promulgated September 19, 1973 as 45 CFR Part 74 Appendix F, G.10, but reflecting earlier HEW practice) is that non-profit institutions may be compensated for the use of buildings and equipment through use allowances when depreciation or other equivalent costs are not considered. Computation of the use allowance must exclude any portion of the cost borne by or donated by the Federal Government, irrespective of where title was originally vested or where it presently resides and must also exclude the cost of grounds. Nothing in these rules expressly precludes a use allowance where the use of the space furnished is donated by a third party, particularly where, as here, the third party is, in a substantial sense, a continuing partner in the venture.

It is of course clear that the grantee may count the use of the property toward its matching or non-Federal share of the cost of the grant program. In addition, if the operating grant had been made jointly to the Commonwealth and the Center there would be no doubt about the right to the allowance. (Grant Administration Manual Chapter 1-75 (5-3-68) now GAM 6-120-20.A.2 (12-18-74)). Although the reality of the partnership arrangement seems clear, the fact that the grant was applied for in the name of the Center and made to the Center rather than to the Commonwealth and the Center jointly, is the cause of the grantee's difficulty in obtaining recognition of the use allowance.

In the case of the equipment owned by the Commonwealth and made available for the use of the Center, a use allowance was accepted because the equipment was treated as "constructively donated." On exactly parallel facts it would appear that the real property should also be treated for this grant purpose as constructively owned by the grantee.

The Regional Director has concluded, however, that in the case of the real property the fact that legal title remains in the Commonwealth precludes recognition of a use allowance. He considered that the shorter useful life of the personal property and the lesser formalities customarily attending transfer of personal property required that distinction. The Regional Director had requested the views of the Regional Counsel's Office and has furnished us with the opinion of the Assistant Regional Counsel, who supports this view.

The Assistant Regional Attorney also commented, however, that, practically, the grantee could be said to "constructively own the property." He noted that the Commonwealth has a commitment to HEW that the property be used for the stated purposes and that, since the Center appears to be the only suitable agency to carry out this purpose, the Center's use of the property essentially enhances title of the Commonwealth, noting that it is questionable whether a replacement could be found if the Center was to terminate its operation and consequently whether a complete title to the building would remain with the Commonwealth if no replacement were found.

The Assistant Regional Attorney commented that these considerations would be justification for granting a use allowance, observing that the project and the State-grantee relationship are unique.

We concur in this view and believe that this practical analysis is the one that should be applied, particularly since only a formalistic change in the form of a grant would have been necessary to achieve, with undoubted legal propriety, a result which is recognized to be equitable.

In response to our Order to Show Cause dated January 13, 1976, the Regional Director expressed the view that a grantee must own the buildings and equipment to be compensated for use allowance. He adds that the cost principles [45 CFR Part 74] would be violated if the grantee is compensated for the costs of a third party. We do not believe that the cost principles contain any such requirement explicitly or that their underlying purpose would be offended by recognition of a use allowance for the donated use of property in the unusual context of the partnership arrangement here involved.

In any event, if ownership is required this must not be taken in any formalistic sense. It should be enough that in a practical sense the grantee may be considered to "constructively own the property" which the Regional Attorney's Office found to be a fair construction of this unusual situation, just as in the case of the personal property constructive ownership was found and was considered an adequate basis for a use allowance under the same provision of the cost principles.

The grantee considers that the commitment made to it by the Commonwealth amounts to a 20 year estate in the property and

that a use allowance based on the fair market value of the interest contributed by the Commonwealth at the time of its donation is appropriate. This analysis, consistent with the comments cited above of the Regional Attorney's Office appears unopposed since no adverse comment was received in response to our direct invitation to comment (Order to Show Cause; Response of Regional Director).

The grantee advises us that to the best of its knowledge recognition of a use allowance would not violate the matching requirements of any prior grant to the Commonwealth or constitute a double use of the same item. Although invited to comment on this aspect also, the Regional Director has furnished no suggestion that it is not accurate and we accept it as true.

To avoid misunderstanding, we note that the Grants Administration Manual provides a special rule concerning use allowance in the cases of foundations established by universities. The establishment of such foundations affiliated with universities, to receive grants for which the university itself may be ineligible or which may subject the grantee to requirements from which the university wishes to be free, presents special problems and has given rise to special rules which appear to have been made deliberately sharp to prevent confusion, administrative uncertainty, or abuse. Under the rule there applicable (Grants Administration Manual former Chapter 1-75 now Chapter 6-120), the university and the foundation must file a joint application unless the foundation is actually charged and is legally obligated to pay for the benefits conferred by the university. If these strict tests are not met, use allowance is not permitted although the value of the use would nevertheless be acceptable for cost sharing or matching purposes. The reasons for this rule are not articulated and must be gathered from the history of the problem involved. In the present case as noted above, a joint application was not made and the foundation is not actually charged for use of the property. The affiliated organization rule however, is not applicable to this situation and, although it has an obvious analogy, the present situation is sufficiently special that a decision in this case will not undercut the treatment of university-affiliated research organizations which are governed by Chapter 6-120.

CONCLUSION

We therefore conclude that the grantee constructively owns the property to the extent of a 20 year estate; that the equities of the situation favor the grantee; that the formalistic absence of the Commonwealth as a joint grantee should not affect the substance of the relationship; and that the uniqueness of the situation makes the decision in this case one which will not establish a precedent that might undercut other related policies.

The grantee should be permitted a use allowance based upon the fair value of its 20 year estate in the property. The determination of this use allowance will necessarily require negotiation in good faith between the indirect cost negotiators of the Department and the grantee. To this extent, the appeal is allowed.

/s/ Francis D. DeGeorge

/s/ Thomas Malone

/s/ Malcolm S. Mason, Panel Chair