

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education, and Welfare

SUBJECT: Yakima Public Schools
Docket No. 79-3
Decision No. 81

DATE: FEB. 6, 1980

DECISION

I. Procedural Background.

Yakima Public Schools (Grantee) appealed by letter dated January 25, 1979, from a determination dated November 30, 1978 of the Chief, Policy, Procedures, and Planning Branch, Grant and Procurement Management Division, Office of Education, requiring the refund of \$13,895 in unexpended funds awarded to Grantee for a Follow-Through grant. Grantee's earlier request for an extension of time to file an application for review was granted for good cause shown. The basis of the appeal was that the funds were properly used to cover expenditures in excess of the amount budgeted for a Follow-Through grant in the preceding year. Since the amount of the prior year's overexpenditure was \$12,196.76, that amount and not the full \$13,895 required to be refunded is in dispute.

On November 8, 1979, an Order setting forth the facts and issues as they appeared from the record and directing Grantee to show cause why the appeal should not be denied on certain grounds (set forth below) was issued by the Board Chairman. The Order was based on the application for review, the Agency's response to the appeal, dated March 26, 1979, and an additional submission by the Agency supplementing its response to the appeal, dated June 21, 1979. The Agency, which was invited but not required to submit briefing in response to the Order, chose not to do so. Grantee stated in response to the Order that there appeared to be no additional material facts that would strengthen its appeal. We therefore adopt the tentative conclusions stated in the Order and rule against Grantee.

II. Statement of the Case.

Grantee received Grant No. OEG-9-70-0047 for the period 6/15/73 through 8/31/74 in the amount of \$374,603. It was permitted to carry over to that grant an additional \$24,739 in unexpended funds from the previous budget period, for available funding totalling \$399,342. Grantee's actual costs for this period, however, totalled \$411,533.76, or \$12,191.76 in excess of the amount authorized in the notification of grant award.

Grantee asserts that an unexpended balance under the subsequent grant, Grant No. OEG-0-70-0047, awarded for the period 9/1/74 through 8/31/75, was properly used to cover the overexpenditures, which it attributes to "a computer change-over and the resultant inadequate bookkeeping records of our Follow Through program." In support of its position, Grantee

asserts that it was advised by "the Follow Through officer in USOE" to submit a request for a supplemental grant to cover the overexpenditures. Over three months later, however, OE denied Grantee's request on the ground that it was made after the expiration of the grant under which the overexpenditures were incurred. Grantee further asserts that after its request for a supplemental award was denied, it was advised by both its program (or project) officer in OE, Mr. John Smith, and an employee in the Fiscal Services Branch of OE (not better identified) that it would be permitted to charge the overexpenditure to the succeeding year's grant. Grantee states that "[i]n light of the fact that we feel we had misleading, inappropriate and untimely information from USOE, we are making this application for review."

III. Discussion.

To the extent that the appeal rests on the contention that a supplemental award should have been made, we conclude that the appeal should be denied. This Board is not vested with the authority to make an award of grant funds. With respect to Grantee's contention that the unexpended balance under Grant No. OEG-0-70-0047 can properly be applied to the previous year's overexpenditures, we note that the Office of Education General Grant Terms and Conditions provide that "[e]xpenditures of the grantee may be charged to this grant only if they: (1) Are in payment of an obligation incurred during the grant period...." 45 CFR Part 100, Appendix A, Section 4.a. The term "grant period" is defined in Section 1.f. of Appendix A as "the period specified in the notification of grant award during which costs may be charged against the grant." The notice of grant award for Grant No. OEG-0-70-0047 shows as the "period of grant" the dates 9/01/74 to 8/31/75. Thus, the use of funds awarded for this grant to cover costs incurred prior to 9/1/74 would be improper under these regulations.

OE also cited in support of its position Clause No. 3 of the terms and conditions applicable to Grant No. OEG-9-70-0047 (the grant under which the overexpenditures were incurred) which provided that "[t]he Government shall not be obligated to reimburse the grantee for costs incurred in excess of [the amount set forth in the Notification of Grant Award] unless or until the Grants Officer has notified the grantee in writing that such amount has been increased and has specified such increased amount in a revised Notification of Grant Award." This appears to bar the use of the unexpended balance under Grant No. OEG-0-70-0047 to cover the overexpenditures incurred under Grant No. OEG-9-70-0047, since the effect would be to increase the amount available for the latter grant. There is a serious question, however, as to whether this provision is legally enforceable, since it was not published in the Federal Register until after the effective date of Grant No. OEG-9-70-0047 and thus apparently did not comply with 20 U.S.C 1232(b)(1), which prior to its amendment in 1976 provided that "[n]o standard, rule, regulation, or

requirement of general applicability prescribed for the administration of any applicable program may take effect until thirty days after it is published in the Federal Register." (Cf. Knox County Economic Opportunity Council, Inc., DGAB Docket No. 78-14, Decision No. 68, October 29, 1979, p.2; Head Start of New Hanover County, DGAB Docket No. 78-94, Decision No. 65, September 26, 1979, p. 3; Ohio University, DGAB Docket No. 75-10, Interlocutory Decision, August 16, 1977, pp. 4-6.) Nevertheless, even without this provision, Section 4.a. of Appendix A of 45 CFR Part 100 constitutes ample authority for the Agency's position.

There is still the further question, however, whether the project officer or Fiscal Services Branch employee could waive Section 4.a. of Appendix A and make a commitment binding on OE to permit the use of the unexpended balance to cover the previous year's overexpenditures. OE does not dispute Grantee's allegations that it was advised that it could use the funds in this manner. It asserts, however, that in making these representations, the project officer and Fiscal Services Branch employee exceeded their authority and therefore did not make a binding commitment. The Agency notes that the Special Grant Terms and Conditions for Grant No. OEG-0-70-0047 provided that "[t]he Project Officer is not authorized to make any commitments or changes which affect the grant price, terms or conditions; any such changes shall be referred to the Grants Officer for action," and asserts that Grantee was on notice by virtue of this provision that "only the Grants Officer was vested with the power to authorize the expenditure of public funds." As indicated previously, there may be some question as to whether a provision not published in the Federal Register is binding on Grantee. The Agency also cited in support of its position, however, 45 CFR 100a.483, which clearly provides that no official, agent or employee of the Office of Education may waive or alter any applicable statute or regulation. Thus, we conclude that Grantee was not justified in relying on the advice of either the project officer or the Fiscal Services Branch employee.

The Order noted that the audit report for Grant No. OEG-9-70-0047 showed that Grantee exceeded the required non-Federal share by \$22,642 (\$127,642 - \$105,000) and stated that if any of Grantee's contribution was cash rather than in-kind, it would be necessary to consider whether the excess cash contribution could have been used to offset the excess expenditures incurred under that grant. Grantee's response to the Order states that it made a cash contribution of \$20,171; documentation provided by Grantee indicates, however, that that amount represented specific services provided to the grant program for which the school system assumed the cost. Thus, the contribution would not be available to offset the excess expenditures.

IV. Conclusion.

The Order directed Grantee to show cause why the appeal should not be denied on the ground that Section 4.a. of Appendix A of 45 CFR Part 100, which could not be waived by the project officer or the Fiscal Services Branch employee, barred the application of the unexpended balance under Grant No. OEG-0-70-0047 to overexpenditures incurred under Grant No. OEG-9-70-0047. No such showing has been made. Grantee's response gave no basis for the suggested possibility of an offset to the excess expenditures. No briefing was requested on the question whether a supplemental award should have been made, since this Board has no authority to award grant funds. Accordingly, the appeal is denied.

/s/ Bernard E. Kelly

/s/ Thomas Malone

/s/ Malcolm S. Mason, Panel Chairman