

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education, and Welfare

SUBJECT: State of Wyoming
Docket No. 76-16
Decision No. 53

DATE: DEC. 1, 1978

DECISION

The only issue in this case is whether the Board should postpone decision pending a possible change in the cost principles applicable to state government agencies contained in 45 CFR Part 74, FMC 74-4 (OMB Circular A-87) and in OASC-6, A Guide for State Government Agencies.

Grantee, the State of Wyoming, appealed the June 23, 1976 decision of the HEW Regional Office, Region VIII, to disallow \$347,024.79 as building use charges in its statewide allocation plan for the 1975 fiscal year.

The State of Wyoming completed a state office building in 1974, in which space was allocated to several Federally supported projects administered by the State. In 1975 the HEW Audit Agency conducted an audit to determine if the space usage rate charged to projects in the statewide allocation plan for use of the State building was reasonable.

The audit determined that during the 1975 fiscal year the State was charging the Federally funded projects a rate of \$4.22 per square foot for use of the building. The Audit Agency, following guidelines set forth in Federal Management Circular (FMC) 74-4 authorizing Federal compensation for the use of buildings when related to the administration of Federally funded projects, determined that the proper use allowance for the office building should be \$.705 per square foot. The audit recommended that there be a disallowance of \$347,024.79 for the 1975 fiscal year for the use of the building. The HEW Regional Office, Region VIII, adopted the recommendations of the Audit Agency.

On May 26, 1976 the State appealed this decision to the Regional Director for reconsideration. The Regional Director notified the State on June 23, 1976 that he was sustaining the original decision, citing FMC 73-1(4) as the basis for the Department's mandatory observance of the cost principles set forth in FMC 74-4.

In a July 26, 1976 letter addressed to the Executive Secretary of the Board, Grantee requested that the Board reconsider the amount of building use charges which may be assessed to the Federally funded projects using the State building. No copy of the disallowance letter was included with Grantee's submission. In a letter dated August 18, 1976, the Executive Secretary responded that Grantee must comply with the requirements of 45 CFR 16 in filing its appeal. Grantee was provided with a

15 day extension of time to file properly. In an August 30, 1976 letter the Grantee appealed to the Board, enclosing a copy of the letter of disallowance. Jurisdiction over determinations with respect to statewide allocation plans is given to the Board under 45 CFR 16.5(a)(5).

The appeal is limited to the 1975 and 1976 fiscal years as the State has expressly agreed to a depreciation/use allowance of \$.705 per square foot in negotiation agreements for the subsequent years. (May 8, 1978 letter from Wellington E. Webb, Principal Regional Official, DHEW, Region VIII)

In appealing to this Board, the Grantee expressly concedes that the space usage rates which it has charged to federal grants violate the applicable rules. The State's Director of the Department of Administration and Fiscal Control has stated, "There is no doubt in our mind that any hearing authority would uphold the fact that Region VIII has correctly interpreted the applicable regulations." (April 12, 1978 letter to this Board). Under these circumstances it would appear appropriate that the Board clear its docket by ruling against the appeal. Oregon Statewide Cost Allocation Plan, Docket No. 75-7, Decision No. 22, June 25, 1976.

Grantee has argued, however, with some plausibility that the FMC 74-4 guidelines are an unrealistic means of determining usage rates in that the guidelines fail to take into account such items as land acquisition costs and bond interest construction costs in establishing usage rates. The Grantee has pointed out that the Federal Government itself in determining use rates for federally owned real estate uses approximately the same system the State was seeking to apply. (July 26, 1976 letter to the Board). It has been proposed that the Office of Management and Budget (OMB) reconsider its cost principles and that the Office of the Assistant Secretary for Management and Budget of the Department similarly reconsider its applicable cost principles in light of any change that might be made by OMB. In view of the possible reconsideration of these cost principles, the Board did not immediately proceed to rule on the case and did not, as it ordinarily does, require the agency involved to respond.

After a period of 18 months with no indication of OMB action, however, the Board in a letter dated 2-10-78 requested the agency to respond to Grantee's appeal. The Board then received copies of communication from Grantee to one of the Senators of its State and from the Senator arguing that it was a denial of due process for the Board to request from the agency whose decision is being appealed a response to the appeal. It is normal procedure of the Board to hear both parties to an appeal, not just one, and by requesting the agency to respond to the appeal the Board does not abdicate its responsibility to make an independent and objective judgment of the merits of the dispute before it. The rules governing the Board do not permit it to entertain

ex parte communication, and it has therefore forwarded this correspondence to the agency involved to provide an opportunity to comment.

The Regional Office responded on 5-8-78 and cited a similar case involving FMC 74-4 that arose in Chattanooga, Tennessee in 1974. In that case OMB was asked to revise its cost principles pertaining to building use charges, but declined to do so. The General Services Administration (GSA), also petitioned by the grantee in that case, stated that FMC 74-4 should not be revised so as to allow commercial rates to be applied for the use of municipal buildings. The Comptroller General of the United States, upholding the GSA's interpretation of FMC 74-4, stated that "the provisions of FMC 74-4 are not inconsistent with generally accepted accounting principles although, certainly, the methods authorized by the circular are not the only reasonable ones that could be prescribed by GSA. We also note that administratively the methods prescribed by FMC 74-4 are probably the simplest to apply and the least subject to judgmental misinterpretations and errors. Hence, we cannot say that the method adopted by FMC 74-4 is unreasonable as a matter of law."

On the state of the record, the case appeared ripe for decision.

The Board therefore directed the appellant to show cause why the Board should not proceed to decision forthwith on the record already made and the reasons, if any, why the appeal should not be rejected for failure of the State to conform to explicit and mandatory guidelines for the determination of space usage rates, accompanied by any briefing on any aspect of the case the appellant wished to submit. No cause has been shown.

Two years have passed since the date of the appeal. There is no present indication that any change in the cost principles will be forthcoming at any time. Neither does it appear likely that if there were a change in cost principles, it would be a retroactive one in view of the large number of complex matters that would thereby be reopened; nor is there any showing that if there were to be a change in cost principles and if it were to be retroactive, the State would be in any way prejudiced by a decision that the charges now at issue are improper under the cost principles applicable when the State received its grant and still applicable.

The appeal is therefore denied.

/s/ Francis D. DeGeorge

/s/ Thomas Malone

/s/ Malcolm S. Mason, Panel Chairman