DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Mary Holmes College, Inc.
Community Education Extension (CEE)
Docket No. 77-5
Decision No. 102

DATE: June 2, 1980

DECISION

Community Education Extension (CEE), Mary Holmes College, Inc. ("Grantee") of Westpoint, Mississippi, was organized to operate a Head Start-Community Development program in accordance with the Economic Opportunity Act of 1964. It has been a recipient of grant assistance from the Office of Economic Opportunity and, since 1969, from the Office of Child Development (OCD), HEW. Grantee is currently benefiting from a continuing grant administered by OCD, renewable annually on November 1.

On April 23, 1977, the Assistant Regional Director (ARD), Office of Human Development, Region IV, forwarded to Grantee a Determination disallowing, for the program year ended October 31, 1975, an obligation of Federal funds in excess of the grant award in the sum of $38,383,* and directing that it be made up from non-Federal sources. It also determined a shortage in preceding years in the matching, non-Federal, contribution in the amount of $112,348**, and ordered that the same be added to Grantee's obligation for the current year. Grantee appeals.

I

Excess Cost Over Grant Award.

Grantee does not deny the factual correctness of the Determination concerning this item. What it argues is that the excess cost should be allowed as "a one-time-only expenditure," since the amount involved is said to be negligible in comparison with the annual budget of the program which is well in excess of $7,000,000. It contends that the overexpenditure was occasioned by increased costs of operation due to inflation and to more exacting performance standards. Grantee complains about what it regards as inherent inequity in the OCD accounting procedures which require a year-to-year cut off of the fund balance while permitting carry-over of non-federal shortages from one year to the next. It further argues by way of avoidance the failure of OCD to provide annual funding increments to approximate the cost-of-living index.

* Reduced by agreement of the parties to $34,645
** Reduced by agreement of the parties to $112,013

Clearly, allowance by us of the excess cost unauthorized in the budget would constitute an award of a supplemental grant - and that for a program year long past - a power which we do not possess. Yakima Public Schools, DGAB Docket No. 79-3, Decision No. 81, February 6, 1980; Pinellas Opportunity Council, Inc., Docket No. 79-58, Decision No. 80, February 6, 1980. Nor can economic hardship to a grantee, per se, operate to enlarge the jurisdiction of this Board. It is obvious that the extent of Federal grant funding is governed by demographic, political and economic factors, and that authority to make determinations in these areas is the peculiar prerogative of the operating agencies concerned. This is also true in respect to accounting procedures adopted pursuant to statutory or valid regulatory authorization.

Lastly, appellant urges in the alternative that, if not allowable as "a one-time-only expenditure", the excess cost under review be offset against the amount of $106,828 carried on the balance sheet of the private audit for the program year which ended October 31, 1974, as a "reserve for unapplied U.S.D.A. milk and luncheon funds."

It appears that this fund was remitted to the grantee by the U.S.D.A. as reimbursement for costs incurred by the grantee for its nutritional activities with OCD funds. It is the OCD position that in view of this circumstance the sum held by the grantee as a "reserve" is not available to it to cover costs unauthorized by the grant but should be used to reduce the grant obligation of OCD.

The ARD cites certain Statements of Policy and Instructions concerning the treatment of U.S.D.A. grant assistance in support of the OCD position. The difficulty is that most of the documents relied upon have issuance dates which are subsequent to the transaction under consideration, and OHD/CD Instruction No. 11, April 9, 1974, while not open to this objection, is of somewhat questionable authority because it does not appear that it had been published in the Federal Register. Pinellas Opportunity Council, Inc., supra.

As a practical matter, however, there is no doubt that OCD has applied its view of what may be considered a form of administrative subrogation, in substituting itself for the U.S.D.A. by virtue of having advanced the costs for the nutrition program which the U.S.D.A. had set out to fund by "reimbursing" the grantee.

Accordingly, it promptly reprogrammed the unexpended U.S.D.A. fund in the Statement of Grant Award for the "J" year commencing November 1, 1974, with the effect of reducing the amount of the Federal grant. Grantee appealed that action sometime prior to July 1, 1975 "on the National level" and, for all that appears, the National office of OCD has not reached a

decision on that appeal to this date. Grantee asserts that it had received "verbal responses" that the fund would be restored during the 1975 grant year and that, relying upon those assurances, it did not reduce its level of operations.

We can not give effect to alleged unauthenticated and unidentified verbal assurance of favorable adjustments on an administrative level, especially in view of the express disavowal by OCD of any knowledge of such assurances. See, Southern University, Baton Rouge, La., DGAB Docket No. 29, Decision No. 24, June 29, 1976, at p. 3. On the other hand, we do not feel called upon to decide the basic question of entitlement to the U.S.D.A. fund in the absence of a sufficiently developed record of pertinent facts, and for the more cogent reason that the record on appeal does not disclose the existence of a formal Determination concerning this issue. We note that under date of July 29, 1977, the ARD informed this Board of the pendency of Grantee's appeal before the Director of OCD, and of its view that if "OCD Headquarters finds in favor of the grantee, the overexpenditure that was questioned would be reduced by the amount the region would be required to restore funds."

Regrettably, the Director of OCD has not communicated a decision in the matter nearly five years after its filing. But, since Grantee admits the overexpenditure and since the matter of the U.S.D.A. funds is not a fact directly in issue in the instant proceeding, but is invoked only collaterally as a basis for set-off, we have no alternative but to affirm the disallowance of the costs in excess of the grant award.

II

The Non-Federal Share Shortage

Grantee admits the fact of the shortage, but objects to the Order requiring it to add the stipulated amount to the non-Federal share contribution for the ensuing year, for alleged untimely official notice of the remedial action to be taken. It asserts that the notice directing it to make up the shortage came in July 1975 "with just two months of operation remaining", thus not affording it adequate time for corrective action. It also complains that increases on July 9, 1975 in the amount of Federal grants entailed an increase in the required non-Federal matching contribution, thus imposing upon it a burden greater than it could bear.

Much of what we said earlier relative to the effect of economic hardship is applicable here. As for the argument based upon allegedly inadequate notice, Grantee's position is not supported by the record. The deficiency

in the amount of $112,013 in the non-Federal share represents an administrative adjustment of a previously identified shortage in the amount of $176,947 as set forth in Grantee's private auditor's report for the year ended October 31, 1974, copy of which was mailed to grantee on January 25, 1975. Also, on May 22, 1975, the Regional Audit Director, HEW Audit Agency, Region IV, called the attention of Grantee to Federal expenditures questioned by Grantee's Auditor in his report for program year 1974, requesting comments.

Grantee's obligation to meet a share of the costs of the Head Start budget from non-Federal sources does not, of course, derive from official notice of its default but from the terms and conditions of the grant pursuant to statutory mandate. P.L. 93-644, Sec. 513(b), 42 USC 2928b. In the instant case, the amount due from Grantee was fully stated in the Notice of Award for the 1974 grant year. Grantee thus had full knowledge of the nature and scope of its obligation for about a year. Even as far as notice of default is concerned, we are satisfied from the evidence that Grantee had notice for more than six months prior to the expiration of the grant year in which to make such adjustments in its operations as it deemed necessary.

In view of the foregoing we dismiss the Appeal and sustain the Determination of April 23, 1977, subject to the modification of relevant amounts in accordance with the opinion.

/s/ Frank L. Dell'Acqua

/s/ Robert R. Woodruff

/s/ Irving Wilner, Panel Chairman