DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Community Action Agency of Memphis and Shelby County
Docket No. 78-44
Decision No. 103

DATE: June 9, 1980

DECISION

The Community Action Agency of Memphis and Shelby County ("grantee") appealed by letter dated June 9, 1978, from the May 16, 1978, determination of the Director, Grants Administration Division, Office of Human Development Services (OHDS), Region IV, disallowing $32,548 expended in excess of the authorized budget for its program year I Head Start grant. The appeal was accepted after grantee in a corrective filing submitted a copy of the notification of disallowance as well as several other documents requested by the Board's Executive Secretary. This decision is based on grantee's application for review as supplemented by this later submission, the relevant audit report (Audit Control No. 04-76194) and OHDS's response to the appeal and to a subsequent request for additional information made by the Board's Executive Secretary as well as to an Order to Develop Record issued by the Panel Chairman. Although the Order was addressed to both parties, grantee did not file any response.

I

The major issue in this appeal is whether grant funds awarded for grantee's program year J (calendar year 1977) may be used to pay for excess costs incurred during the preceding program year I (calendar year 1976). Grantee was awarded $1,273,442 in Federal funds for program year I. These funds were to be spent in accordance with separate budgets for each of three program accounts: PA 23 (full-year, full-day program), PA 22 (full-year, variable program), and PA 26 (handicapped children's program). $985,884 in Federal funds was allocated for PA 23, but grantee expended $67,423 in excess of that amount (actually $70,803 with a $3,380 set-off for underexpenditures in various budget categories), with overexpenditures for the following budget line items:

	amount budgeted	costs incurred	over budget
personnel	$761,304	$824,938	$63,634
travel	3,535	3,631	96
space cost and rentals	8,700	13,140	4,440
consumable supplies	15,118	17,751	2,633

At grantee's request, OHDS permitted grantee to set off against the $67,432 of overexpenditures in PA 23 an unexpended balance of $34,875 in PA 22 in program year I. It denied grantee's request to offset the remaining deficit of $32,548 with a surplus of $34,670.29 which grantee projected for PA 22 and PA 23 in program year J, however.

The notification of disallowance stated that the determination of OHDS "that the $32,548 overexpenditure of Federal funds remain a disallowed cost" was based on "45 CFR Part 1301.2-5" and "45 CFR Part 74.101" (corrected in the OHDS response to the appeal to read "45 CFR Part 74.102(b)(2)" and on OHDS "Terms and Conditions" (later specifically identified as sections 3 and 5 of the program year I grant terms and conditions.)

Hoping to stimulate informative advocacy, the Order to Develop Record raised several questions regarding whether OHDS could properly rely on these provisions. It noted that 45 CFR 1301.2-5 was published as part of a proposed rule but never promulgated as a final rule, that 45 CFR 74.102(b)(2), which requires that prior approval be obtained for budget revisions resulting in the need for additional Federal funding, was, arguably, not violated here since grantee asked not for additional funding for program year I but rather to charge the amount of the overexpenditure to the next year's grant, and that during the time in question, this provision was applicable only to State and local government grantees. The Order also suggested that the terms and conditions might not be controlling with respect to the question whether grantee could properly charge certain costs to the program year J grant since the terms and conditions were included only with the program year I grant award, and since they were not published in the Federal Register. Section 2928f(d) of 42 U.S.C. requires the publication of all rules, regulations, guidelines, and instructions for the Head Start program in the Federal Register at least 30 days prior to their effective date. Although these questions were included in the Order's request for briefing, we do not decide them since the appeal can be disposed of on other grounds, also suggested in the Order, as indicated below.

II

The Order suggested that a provision of the cost principles applicable to nonprofit institutions, published at 45 CFR Part 74, Appendix F, several years before the grants in question were awarded, might support the disallowance. Paragraph B.2 of Appendix F provides that a cost in order to be allowable must be allocable to a grant, and Paragraph B.4(a) provides, in pertinent part, that a cost is allocable to a grant if it "[i]s incurred specifically for the grant...." The Order noted that in its decision in

Southern Methodist University, DGAB Docket No. 76-8, Decision No. 41, October 19, 1977, the Board found, based on an identical provision applicable to an Upward Bound grant, that the grantee had improperly charged room and board costs incurred under one year's grant to the succeeding year's grant, since "[no] benefit from incurrence of such cost could inure to [the succeeding year's grant]." (In a more recent decision, the Board cited the same provision in rejecting grantee's contention that funds expended in excess of the authorized budget should be offset by funds from a subsequent year's grant. Pinellas Opportunity Council, Inc., DGAB Docket No. 79-58, Decision No. 80, February 6, 1980, at p. 3.) In the instant case, accordingly, the Order requested that grantee indicate whether (and explain why) any of the expenditures in question were of benefit (and therefore allocable) to the program year J grant. Since grantee has chosen not to respond to the Order, we must assume that none of the costs were allocable to program year J. Thus, the cited provision would preclude grantee from applying its unexpended program year J funds to the excess costs incurred in program year I.

In its response to the Order, however, OHDS asserted that grantee was not in fact a nonprofit organization but was instead a local government agency, and that Appendix F was therefore not binding on grantee. In support of its position, OHDS submitted an Office of Child Development form captioned "Eligibility of Applicant" which is signed by an Assistant County Attorney and indicates that grantee was a public agency. Grantee, having neither responded to the Order nor availed itself of the opportunity afforded by the Order to reply to OHDS's response, has provided no indication as to whether this document correctly represents its status.

We note, nevertheless, that 45 CFR 74, Appendix C, which is applicable to State and local governments (published in the Federal Register prior to 1976), provides, like Appendix F, that to be allowable under a grant program, costs must be allocable to it. Appendix C, Part I, paragraph C.1.a. It further provides that "[a] cost is allocable to a particular cost objective to the extent of benefits received by such objective," Appendix C, Part I, paragraph C.2.a. Thus, regardless of whether grantee was a nonprofit organization or a local public agency, the use of program year J funds to offset the overexpenditure in program year I is prohibited by the applicable regulations.

This case is distinguishable from that presented in Knox County Economic Opportunity Council, Inc., DGAB Docket No. 78-14, Decision No. 68, October 29, 1979, in which the Board, granting the appeal, found that costs disallowed as in excess of grantee's program year I grant were allocable to its program year J grant as well.

III

The audit report for grantee's program year I indicated that at the end of that year grantee had $22,820 in unexpended funds in PA 26 (handicappe children's program). OHDS was therefore asked in a letter from the Executive Secretary "why these funds were not set off against the excess in expenditures for PA 23 in the same manner that the $34,875 in unexpended funds for PA 22 were set off against the excess expenditures." The reply from OHDS was that such use of these funds was "prohibited by legislation." No such legislative prohibition was identified by OHDS, and none was apparent from our own perusal of the Head Start - Follow Through Act (42 U.S.C. 2921 et seq.).

This Board has previously stated that it "will not engage in grant administration by transferring authorizations from one account to another, at least in the absence of a showing that the administering officials arbitrarily refused to make such a transfer." Community Action Agency of Memphis and Shelby County, DGAB Docket No. 76-9, Decision No. 38, p. 2, July 5, 1977 (Emphasis supplied). Since refusal to permit such a transfer or offset because of an erroneous belief by the administering agency that it is precluded by law from effecting such a transfer could have the effect of arbitrary action against a grantee, the Order requested documentation as to the alleged legislative prohibition. In its response to the Order, OHDS conceded that there was no legislative prohibition, but argued that the offset should not be allowed since the Handicapped program was intended to be a separate and distinct part of the Head Start program. It noted (amoung other things) that the program years I and J grant awards contained special conditions relating solely to the Handicapped program and the administration of PA 26 and that the Handicapped program was funded for a different period of time than the normal grant program year. OHDS's position that the offset should not be permitted appears, therefore, not to be arbitrary, and it is consistent with the Board's decision in a recent case involving another grantee not to direct such an offset on the ground that it would constitute an inappropriate exercise of grant administration by this Board. Anderson-Oconee Headstart Project, Inc., DGAB Docket No. 79-80, Decision No. 90, April, 28, 1980.

The Order also noted that grantee had attributed the bulk of its overexpenditures to the fact that, during the period in question, it had no control over the fringe benefits paid to permanent Head Start employees, who were employees of the City of Memphis. This situation was in contravention of Office of Child Development Instructions which

required that a grantee's personnel policies be approved by the Head Start Policy Council whose membership includes parents of enrollees. The Order noted further that OHDS's response to the appeal cited this violation of the OCD Instructions, and questioned whether an improper personnel arrangement would be an appropriate basis for a cost disallowance. In its response to the Order, however, OHDS indicated that this was not a basis for the disallowance.

Conclusion

Applicable regulations prohibit grantee from using grant funds awarded for program year J to pay for excess costs incurred during the preceding program year I, since none of the excess costs are shown to be allocable to program year J. Further, the Board will not direct that unexpended funds in the Handicapped program account for program year I be used to offset the excess costs. Accordingly, the appeal is denied.

/s/ Frank L. Dell'Acqua

/s/ Donald G. Przybylinski

/s/ Harry J. Chernock, Panel Chairman