

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Florida Farmworkers Council, Inc.  
Docket No. 80-127  
Decision No. 202

DATE: October 7, 1981

RULING ON REQUEST FOR RECONSIDERATION OF BOARD DECISION

The United States Department of Health and Human Services, Region IV (Agency) has submitted a request dated August 19, 1981, asking the Board to review the Agency's exceptions to one portion of Board Decision No. 202, issued August 1, 1981.

Although the Board's former regulations at 45 CFR Part 16 did not explicitly provide that the Board might rehear its own determinations, the Board Chair ruled that the Board nonetheless had inherent, discretionary authority to reconsider its decisions in exceptional circumstances, considering factors such as the nature of the alleged error or omission prompting the reconsideration request, the length of time which had passed since the original decision was issued, and any harm that might be caused by reliance on that decision. Ruling of September 11, 1980, Florida Department of Health and Rehabilitative Services, DGAB Docket Nos. 79-68-FL-HC and 80-88-FL-HC. The Board's new regulations explicitly provide that the Board has discretion to reconsider a decision where a party promptly alleges a clear error of fact or law. See, Section 16 - 13, 46 Fed. Reg. 43820 (August 31, 1981).

We have determined not to grant the Agency's request here. The Agency's request challenges the Board's finding in that portion of its July 31, 1981 decision which reversed the Agency's determination that \$22,325 in salaries and fringe benefits are direct costs. The Agency presents three arguments in support of its challenge: (1) that the Memorandum of Negotiation (Tab 20 of the administrative file, p. 3) reflects that these costs were excluded from the indirect cost pool; (2) that the Negotiation Agreement (Tab 1 of the administrative file) upon which FFC relies for support of its position was never signed or accepted by FFC and is, therefore, invalid and meaningless; and, (3) that there was an error in identifying the salaries of the three employees in the Addendum to the Negotiation Agreement. The Agency reiterates the position it has previously taken before the Board on this issue, i.e., that FFC has presented no valid documentation indicating the indirect nature of these costs, has shown no evidence of a labor distribution system, and has shown no benefit to other grants from the services of these individuals, and that, therefore, the Board should reverse its findings that these costs were indirect.

The Agency's arguments center on two documents submitted by the Agency in its September 15, 1980 response to the Florida Farmworkers Council's (FFC) appeal. One, the Negotiation Agreement, is a formal document representing a unilateral determination of a final rate acceptable to the Department of Health and Human Services (DHHS) as determined by the Director, Division of Cost Allocation (DCA). See, Tab 1 of the administrative file; Transcript, January 14, 1981, p. 16. The other document, a Negotiation Memorandum, appears to be an informal, internal memorandum written for the Agency's file. It is unclear, even after the Agency's Post-Decision filing, what the exact nature of the Negotiation Memorandum is. In any event, both documents reflect the results of the July 15, 1980 indirect cost rate negotiation session between the Agency and FFC and were signed by the Director, DCA.

The record in this case consists of numerous briefings, conference calls, and ultimately the transcript of a full evidentiary hearing. The Agency's Post-Decision filing represents the first allegation by the Agency that the figures contained within the Negotiation Agreement are incorrect or contradicted by another Agency document. In fact, the Director, DCA testified at the hearing that the pertinent data in the Negotiation Agreement was correct. See, Transcript, January 14, 1981, p. 228. In addition, FFC's counsel cited the Addendum to the Negotiation Agreement as evidence in support of its position, without prompting a contrary response by the Agency. See, FFC's Post-Hearing Brief, p. 29.

As previously indicated, the Board may find in exceptional circumstances that reconsideration is justified, for example, where a Board decision contains a clear error of law or where there is newly discovered material evidence. Reconsideration is not justified here, however, where the Agency's allegation relates to a factual issue which the Agency has extensively briefed and where the Agency's post-decision argument on that issue is essentially the same argument presented by the Agency throughout the appeal.

Even if the Board were to grant the Agency's request for reconsideration, the Board's decision on this issue would remain the same. The Director, DCA is responsible for the negotiation and approval of indirect cost rates. See, Transcript, January 14, 1981, pp. 9, 15. The Director, DCA in the Negotiation Agreement identified the administrative people and the percentages of their time determined to be appropriately chargeable as indirect costs. See, Transcript, January 14, 1981, p. 228. Based on presentations in briefs and at the hearing, the Board determined that the Agency had presented no persuasive evidence that the DCA Director's determination was in error. The Agency has failed once again to provide any substantial evidence showing how or why the Director, DCA, determination is incorrect. The mere citation to an apparently informal, internal memorandum,

signed by the same Director, DCA, with no supporting explanation of what the document is, how it was constructed, and what the meaning is of its reference to the Negotiation Agreement as reflecting a unilateral rate determined to be acceptable to DHHS, does not constitute evidence sufficient to outweigh the Negotiation Agreement itself and oral testimony of the Director, DCA. Likewise, mere assertions that the Negotiation Agreement is invalid or in error does not explain how the determination by the Director, DCA in the Negotiation Agreement and testified to at the hearing is incorrect or inaccurate.

The Agency's request for reconsideration is denied.

/s/ Cecilia Sparks Ford

/s/ Donald F. Garrett

/s/ Norval D. (John) Settle, Panel Chair