

We next discuss alleged flaws in NCRR's recovery action. We conclude that, notwithstanding some procedural failures by NCRR, the relief requested by TB is unavailable since NCRR did in fact treat the funds it recovered from TB as an unobligated balance, which NCRR carried forward to the subsequent budget year. Under its discretionary authority, however, NCRR offset the funds against a supplemental award to TB for the subsequent budget year. TB accepted the supplemental award, which increased TB's funding well beyond the originally approved amount for the project, and the Board has no authority to amend the award.

Next, we sustain NCRR's determination that TB improperly charged to its SBIR award salary and associated costs for an employee who was ineligible to receive funding from the award. We reject TB's argument that the charges merely reflected a "bookkeeping error," and we find that NCRR properly determined that the costs were unallowable at the time TB drew down funds to cover them. Finally, we deny NCRR's request to remand this matter to the agency so that it may develop and address questions raised by new evidence submitted by TB. We see no need to remand since our decision resolves the specific issues presented on appeal.

Legal Background

The SBIR Program

The SBIR program promotes, among other things, the role of small businesses in federally-funded research and development. 15 U.S.C. § 638; <http://grants.nih.gov/grants/funding/sbir.htm>. There are three phases of SBIR project development. 15 U.S.C. § 638(e)(4); see also NIH Grants Policy Statement (GPS)¹ at 240. The first phase is to establish the "scientific and technical merit and feasibility" of an idea that appears "to have commercial potential." *Id.* The second phase is to continue to develop projects that meet particular program needs, "in which awards [are] based on the scientific and technical merit and feasibility of the proposals, as evidenced by the first phase." *Id.* In the third phase, a grantee may pursue, with non-federal funds, the commercialization of the results of the work. *Id.*

¹ The GPS is available at http://grants.nih.gov/grants/policy/nihgps_2003/nihgps_2003.pdf.

NIH SBIR Award Administrative Requirements

NIH SBIR award funds must "be expended solely for the purposes for which the funds were granted in accordance with the approved application and budget . . . the terms and conditions of the award and the applicable cost principles" 42 C.F.R. § 52.6(a). The general administrative requirements applicable to TB's awards are at 45 C.F.R. Part 74. 45 C.F.R. 74.27(a); see also GPS at 79; NCCR Exs. 2, 13, 20, 24, 25, 27. The general cost principles that establish standards for the allowability and accounting treatment of costs of commercial organizations such as TB are at 48 C.F.R. Part 31. Id. The GPS, incorporated by reference in TB's award notices, sets forth the specific administrative standards and cost principles that pertain to NIH SBIR grants. NCCR Exs. 2, 13, 20, 24, 25, 27.

NIH grantees are "allowed a certain degree of latitude to rebudget within and between budget categories to meet unanticipated needs and to make [some] other types of post-award changes." GPS at 102. The GPS describes the limits of a grantee's authority to rebudget award funds, and identifies which post-award changes require prior written approval from an NIH grants management officer (GMO). Specifically, a grantee must obtain prior approval for "significant rebudgeting," defined as a "threshold that is reached when expenditures in a single direct cost budget category deviate (increase or decrease) from the categorical commitment level established for the budget period by more than 25 percent of the total costs awarded." Id. at 14, 107.

Further, unless precluded by the specific terms of an award, a grantee may carry over unobligated balances from one budget period to the next without obtaining prior approval. Id. at 102-104; see also 42 C.F.R. § 52.6(e). Awards issued under the streamlined non-competing award process (SNAP) "are automatically carried over to the subsequent budget period." GPS at 103. In addition, if a GMO "determines that some or all of the unobligated funds are not necessary to complete the project, the GMO may restrict the grantee's authority to automatically carry over unobligated balances in the future, use the balance to reduce or offset NIH funding for a subsequent budget period, or use a combination of these actions." Id.

Post-award actions requiring prior approval include a change in project scope, defined as a significant change in the direction, type of research or training, or the aims, objectives or purposes of the approved project. Id. A grantee also must

obtain prior approval for a "deviation" from an award's terms and conditions, including undertaking activities disapproved or restricted as a condition of the award; a change in status, including the replacement of key personnel; and additional NIH funding, including an extension of a project's final budget period with additional funds. Id. at 105-112.

Reimbursement of SBIR Phase II F&A Costs

F&A costs (formerly called "indirect costs") are costs incurred by a grantee for common or joint objectives that may be allocated in part to a particular project by application of an F&A rate. In general, NIH "will not reimburse F&A costs unless the grantee has established an F&A cost rate covering the applicable activities and period" Id. at 81. The negotiated F&A rate "in effect at the beginning of the competitive segment will be used to determine the amount budgeted for F&A costs for each year of the competitive segment." Id. at 82. If a Phase II SBIR applicant "does not have a currently effective negotiated indirect cost rate with a federal agency, the applicant should propose an estimated F&A rate in [its] application." Id. at 244.

Prior to January 21, 2009, if a Phase II SBIR applicant proposed an F&A rate exceeding 25 percent of direct costs, it was required to negotiate its F&A rate with the Division of Financial Advisory Services (DFAS). GPS at 244; NIH Manual Section 4301-201, June 15, 2006; NIH Policy Change on Threshold for Negotiation of F&A/Indirect Costs for Phase II SBIR/STTR Grants, NOT-OD-09-038, January 21, 2009, Background. On request, an SBIR applicant must "provide DFAS with an indirect cost proposal and supporting financial data for its most recently completed fiscal year." GPS at 244. If data are "not available for the most recently completed fiscal year," the applicant "must submit a proposal showing estimated rates with supporting documentation." Id.

If a Phase II SBIR applicant does not have an established F&A rate at the time NIH issues the award, "the GMO may provide and authorize reimbursement at a temporary amount equaling one-half of the F&A costs requested by the grantee, up to a maximum of 10 percent of direct salaries and wages (exclusive of fringe benefits)." NIH Manual Sections 4301-201.C.1.d.(5).

In general, NIH does not award additional F&A costs beyond those calculated in the approved budget, and "[o]nce NIH awards a grant, it is not obligated to make any supplemental or other

award for additional F&A costs or for any other purpose." GPS at 82. Nevertheless, "grantees may rebudget between direct and F&A costs (in either direction) without NIH prior approval, provided there is no change in the scope of the approved project." Id. The GPS states that "if an award does not include an amount for F&A costs because the . . . grantee did not submit a timely F&A cost proposal and the grantee subsequently establishes a rate," NIH may supplement the award "to provide an appropriate amount for F&A costs if the amendment can be made using funds from the same Federal fiscal year in which the award was made." Id. The supplemental award amount, however, "will be limited to the F&A costs applicable to the period after the date of the grantee's F&A cost proposal submission." Id.

SBIR Fees

In addition to funding direct and F&A costs, NIH may award a "reasonable profit or fee" to an SBIR grantee. GPS at 243. The SBIR fee "is intended to provide a reasonable profit consistent with normal profit margins for for-profit organizations for R&D work; however, the amount of the profit or fee normally will not exceed seven (7) percent of total costs (direct and F&A) for each phase of the project." Id. The SBIR fee "should be drawn [down] in increments proportional to the drawdown of funds for direct and F&A costs." Id.

Financial Management and Payment Standards

An NIH SBIR grantee must meet the standards and requirements for financial management systems, financial reporting and record-keeping set forth at 45 C.F.R. Part 74 and in the GPS. Grantees must maintain accounting and control systems that enable NIH to monitor grant accounts and "ensure that obligations and expenditures are reasonable, allocable, and allowable." GPS at 121; see also 45 C.F.R. § 74.21. These "systems must be able to identify large unobligated balances, accelerated expenditures, inappropriate cost transfers, and other inappropriate obligation and expenditure of funds." Id.

When funds are available only for a specified period, the grantee "may charge to the award only allowable costs resulting from obligations incurred during the funding period" and allowable pre-award costs. 45 C.F.R. § 74.28.

NIH pays grantees on either an advance or a reimbursement basis. 45 C.F.R. § 74.22; GPS at 76-77. Grantees are paid in advance

"provided they maintain or demonstrate the willingness to maintain" appropriate procedures and management systems. 45 C.F.R. § 74.22(b). Payments generally are made by electronic transfer through the Department's Division of Payment Management (DPM), Payment Management System (PMS), pursuant to a request by the grantee to draw down federal funds to the grantee's account. GPS at 76-78. Grantees paid on an advance basis must minimize the amount of time between drawdown of federal funds and actual disbursement of funds to cover allowable costs. 45 C.F.R. § 74.22; GPS at 76-77. "Therefore," the GPS provides, "although the grant may be financed by advance payments, the intent is that grantees draw funds on an as-needed basis – specifically, no more than 3 days before the funds are needed." GPS at 76. The grantee also must determine when federal funds "have been deposited into its bank account" and must ensure "that the funds are fully disbursed by the close of business the next workday after they are received." Id. The grantee must "immediately return all undisbursed Federal funds to PMS." Id.

A grantee that is not eligible to receive unrestricted advances of funds "must submit a cash request, usually monthly." Id. at 77. Cash payments are made on an advance or reimbursement basis. A grantee may request advance funding based on "expected disbursements during the succeeding month and the amount of federal funds already on hand." Id. NIH may convert a grantee eligible for unrestricted advance payments to a cash request basis if, "during post-award administration, the GMO determines that a grantee is not complying with the cash management requirements or other requirements of the award" Id. Additionally, a GMO "may review grantee cash drawdowns to determine whether they indicate any pattern of accelerated or delayed expenditures," and in such cases, the GMO "may make any necessary and appropriate adjustments." Id. at 84.

NIH Enforcement Actions

NIH may take an enforcement action when "a grantee materially fails to comply with the terms and conditions of an award." 45 C.F.R. §§ 74.60-74.62; GPS at 136-139. Among those actions, NIH "may administratively recover funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms and conditions of the award, including misspent funds or unallowable costs." GPS at 138.

Case Background

In April 2006, TB applied to NCRP for a Phase II SBIR grant. NCRP indexed list of exhibits; NCRP Ex. 1, at 1. (Phase I, Year 1, of TB's SBIR project had ended January 31, 2006. Notice of Appeal at 1.) TB's proposed budget requested F&A costs at a rate exceeding 25% of base costs. Id. By letter dated April 25, 2007, DFAS directed TB to submit an F&A cost rate proposal and data to establish an F&A cost rate. NCRP Ex. 1, at 2-3.

On May 22, 2007, NCRP issued a notice of award (NOA) to TB for the June 1, 2007 - May 31, 2008 budget period (Year 2) in the amount of \$650,666. NCRP Ex. 2. The approved budget for Year 2 included \$157,655 in F&A costs. The NOA also showed recommended Year 3 support, "subject to the availability of funds and satisfactory progress of the project," to be \$668,320. Id. The NOA stated that the award was subject to, among other things, the grant program legislation and regulations cited in the notice; the regulations at 45 C.F.R. Part 74; the GPS; and the specific terms and conditions of the notice itself. Id.

Since TB had not yet submitted its F&A cost rate proposal and supporting data, the "Special Terms and Conditions" of the Year 2 NOA included the following restriction:

ALL FACILITIES AND ADMINISTRATIVE (F&A) COSTS IN EXCESS OF TEN PERCENT OF SALARIES AND WAGES, \$130,230, ARE RESTRICTED PENDING NEGOTIATION OF A NEW F&A RATE AGREEMENT AND APPROVAL BY THE [NCRP].

Id. (underlining added). The NOA also restricted \$141,600 for direct and F&A costs for Dr. Reid Alisch "pending administrative confirmation of current employment." Id. The NOA listed Dr. Alisch under "key personnel" and stated that "[w]ritten prior approval is required if [he] withdraws from the project" Id. The NOA further stated that the grant was subject to SNAP and that an "unobligated balance may be carried over into the next budget period without Grants Management Officer prior approval." Id. The NOA also stated that TB should draw down its SBIR fee "in increment[s] proportionate to the draw down of costs" Id.

On March 3, 2008, DFAS sent a second letter directing TB to submit its F&A rate proposal and supporting data. NCRP Ex. 3.

TB thereafter applied for a non-competing Year 3 award. On review of the Year 3 application, Grants Management Specialist

Tiffany Walker e-mailed TB's President, Dr. Eric Ostertag, requesting the "status and/or approved [F&A] negotiated rate." NCCR Ex. 15 at 12. Ms. Walker stated that she had found on review of the Year 3 application that Dr. Alisch "will be replaced by Blair B. Madison." Id. Ms. Walker noted that written prior approval was required for the change, and she asked for justification for the replacement. Id.

On April 22, 2008, Dr. Ostertag responded to Ms. Walker, stating that TB was "in the process of filing our 2007 indirects and negotiating our new indirect rate with [DFAS]." Id. Dr. Ostertag also stated that "Dr. Alisch was not available for hire at the time the project commenced" and that, consequently, TB "replaced Dr. Alisch with Dr. Madison" Id.

TB mailed its F&A rate proposal and supporting materials to DFAS on April 24, 2008. NCCR Exs. 6-8.

On May 31, 2008, Year 2 ended, but no award had yet been made for Year 3.

In a July 23, 2008 e-mail to TB, Joshua Murray of NCCR, who had replaced Ms. Walker as the Grants Management Specialist, stated that documents received from TB showed that Dr. Madison was overcommitted to the SBIR project due to his commitment to a National Cancer Institute (NCI) award. NCCR Ex. 4. TB thereafter provided NCCR with revised documentation for Dr. Madison, "reflecting the maximum change in percent effort without triggering [an NCI] reporting requirement . . . a total of 3.9 calendar months for the Phase II grant." Id.

In early August 2008, NCCR advised TB that DFAS had lost TB's April 2008 F&A rate submission. NCCR Exs. 6-7. TB resubmitted the materials on August 6, 2008. NCCR Exs. 6, 30.

On August 7, 2008, Mr. Murray e-mailed Dr. Ostertag that it appeared TB had "drawn down at least \$57,614 of the \$130,230 restricted [Year 2] F&A funds." NCCR Ex. 9. "Since it appear[ed] that [TB had] failed to comply with the terms and conditions of the award," Mr. Murray stated, TB was "ordered to Cease and Desist drawing down funds against the . . . award." Id. Mr. Murray stated that once NCCR had further information, it would provide TB "with details on the measures necessary to correct the situation." Id.

In a September 10, 2008 letter, NCCR informed TB of NCCR's findings on review of TB's accounts, and "initiat[ed] action to

recover costs found to be expended in violation of the terms and conditions of the award." NCCR Ex. 10. First, NCCR found that TB had improperly expended \$141,600 in restricted funds relating to Dr. Alisch because TB "did not notify [NCCR] of his non-availability, nor did it seek or receive NCCR approval for his replacement prior to expending the funds." Id. Next, NCCR found, TB had drawn down \$130,230 in F&A funds that "were restricted pending negotiation of a new indirect cost agreement and approval by NCCR." Id. Accordingly, NCCR wrote, TB was "in material violation of the terms and conditions" of the Year 2 award. Id. NCCR directed TB to "remit \$271,830," stating that the decision would become final unless TB timely appealed. Id.

In response, TB filed an appeal and immediately returned \$130,230 to the PMS. TB later stated that the money had been "drawn down in July of 2007 and was going to be used to continue to fund the research project while [TB] waited for Year 3 funds to be released." NCCR Ex. 17, at 3. TB also represented that the funds "had not yet been spent" and that it was paying for ongoing "expenses using an alternative source of funds." Id.

To assess the merits of the appeal, NCCR asked TB for an itemized accounting of expenditures for Year 2. NCCR Ex. 18, at 9. In its submissions of September 30, 2008 and October 6, 2008, TB reported the following expenditures for Year 2: \$167,526 in F&A costs; \$91,424 in total salaries and wages, including \$21,017 in salaries, wages and fringe benefits for Dr. Madison; total grant expenditures of \$465,305; and \$32,571 in SBIR fees. NCCR Exs. 17, 18, at 3. "We expect," Dr. Ostertag wrote, "that we will have higher research expenditures in the current year [3] and we had planned on carrying over [the] unobligated balance [from Year 2] into the next budget period as allowed in the award notice." NCCR Ex. 17, at 3.

Meanwhile, on September 12, 2008, NCCR issued an NOA for the June 1, 2008 - May 31, 2009 period (Year 3) in the amount of \$668,320. NCCR Ex. 13. The special terms and conditions of the NOA provided, however, that "[n]o funds may be expended prior to the resolution of issues detailed in the [September 10, 2008 letter]." Id. at 4.

Further, on September 18, 2008, DFAS issued a proposed cost rate agreement, which Dr. Ostertag signed on September 23, 2008. NCCR Ex. 14. The agreement established the final negotiated rates for TB's "fringe benefit" and "overhead costs" for the period January 1, 2007 - December 31, 2007; and provisional and

ceiling rates for "fringe benefit" and "overhead costs" for the period January 1, 2008 - June 30, 2009. Id.

On September 23, 2008, TB submitted a request to NCCR to increase the Year 2 award to fully reimburse TB's "approved actual indirect costs." NCCR Ex. 15, at 6. TB also requested NCCR to adjust the indirect cost award for Year 3 to "equal the negotiated indirect rate" Id. at 5.

On November 3, 2008, NCCR issued a revised Year 3 NOA, partially lifting the restrictions on Year 3 funds to permit TB to "disburse up to \$278,467 of year 3 funds to cover expenditures chargeable to this award made during the period of June 1, 2008 through October 31, 2008." NCCR Ex. 20. The award stated, however, that "[n]one of these funds may be allocated to salary, wage or fringe benefit costs for Dr. Blair Madison, due to the restrictions imposed by [the NCI] grant." The NOA further stated that \$389,852 remained restricted pending resolution of the appeal from NCCR's September 10, 2008 action. Id.

On November 21, 2008, NCCR issued a determination on TB's appeal of the September 10, 2008 action. NCCR Ex. 21. NCCR found first that the "expenditure of restricted Year 2 [F&A] costs was inappropriate given the unresolved status of [TB's] rate negotiations during that period." Id. NCCR directed TB "to remit \$149,907, which equals the amount stated in [the] recovery letter of September 10, 2008, plus the associated SBIR fee, which [TB's] September 30, 2008 accounting of expenditures shows was drawn in proportion to the misspent funds." Id.

Further, NCCR found, TB had "misspent" \$30,360 for salary, fringe benefits, associated F&A costs and corresponding SBIR fees for Dr. Madison, who was "ineligible to receive salary support" from the SBIR grant due to his NCI fellowship. Id. At the same time, NCCR found, there was "insufficient evidence to conclusively determine that funds restricted pending the confirmation of Dr. Reid Alisch's employment were rebudgeted and/or misspent." Id. NCCR concluded that the "total amount of misspent funds [was] \$180,267," of which TB had already "repaid \$130,230." Id. Accordingly, the letter stated, "the total now owed to NCCR is \$50,037." Id. NCCR also advised TB that it could appeal the determination to this Board. Id. On December 1, 2008, TB transmitted to NCCR \$50,037. NCCR Ex. 22.

By letter dated December 2, 2008, NCCR responded to TB's request to increase the F&A awards for Years 2 and 3. NCCR Ex. 23. The letter noted that under the GPS, the amount of any additional

award for Year 2 was "limited to the F&A costs applicable to the period *after* the date of the grantee's cost proposal submission." Id. (emphasis in original). Thus, NCRRC stated, it would award an additional \$37,477 in F&A costs for Year 2 "using the 4/24/2008 submission date of [TB's] original F&A proposal package," the negotiated "effective rate during this period," and prorated, budgeted direct base costs. Id. For Year 3, NCRRC stated it would award an additional \$370,132 for F&A costs. Id.

The December 2, 2008 letter stated, however, that "[a]ction to make these funds available" would not begin until "the remaining \$50,037 in misspent Year 2 funds post to [TB's PMS] account." Id. Further, the letter provided, "[t]hese funds, as well as earlier remittances, will be used to offset the additional F&A costs . . . [i]n other words, the total amount of 'new money' available for both years will be \$227,342, with the remaining \$180,267 coming from the recovered funds." Id. (emphasis added). NCRRC thereafter issued revised and supplemental NOAs which increased the awarded F&A costs for both years and offset the "recovered" Year 2 funds against the supplemental award for Year 3. NCRRC Exs. 24, 27.

On December 18, 2008, TB appealed NCRRC's November 21, 2008 determination to the Departmental Appeals Board. Notice of Appeal, Departmental Appeals Board Docket No. A-09-28. NCRRC thereafter advised the Board that it had rescinded its initial recovery notification, having determined that it had used the wrong appeals procedures. January 14, 2009, Notice of Case Closing, Docket No. A-09-28. NCRRC also stated that it had issued a revised notification of adverse determination on December 19, 2008, which informed TB of the proper procedures for initiating an NIH preliminary appeal under 42 C.F.R. Part 50, subpart D. Id.

The Board therefore closed the December 18, 2008 appeal on its docket, and on January 12, 2009, TB appealed NCRRC's December 19, 2008 determination to NIH, pursuant to the preliminary appeals process at 42 C.F.R. Part 50. NCRRC Ex. 28.

In a March 25, 2009 letter, NIH Extramural Program Policy Officer, Henry Khachaturian, Ph.D., advised TB that he had "convened an [NIH] Appeals Board to consider the case and make recommendations." NCRRC Ex. 31. The letter "compiled the [NIH Appeals Board's] responses" to TB's appeal. Id. With respect to the \$149,907 in restricted F&A costs and related SBIR fees, the March 25 letter rejected TB's claim that the drawdown of restricted funds was due to NCRRC's loss of TB's F&A rate

proposal, NCRRC's delay in processing the proposal, and NCRRC's recommendation to postpone the Year 3 award. The letter stated that the delay in processing the negotiated F&A rate agreement was in part because TB "did not begin to develop a rate proposal for eleven months" and that the delay in issuing Year 3 funding "was not at the suggestion of NCRRC." Id.

The March 2009 letter also rejected TB's argument that TB could carry forward to Year 3 the unobligated funds that NIH had recovered, stating that "the automatic carryover authority does not apply to funds previously restricted by Terms and Conditions of the award." Id. The letter refuted TB's claim that once the negotiated F&A rate was in place, the restriction on Year 2 F&A funds became moot. According to NIH, the drawdown of funds took place before the negotiations were complete, and only NCRRC had the authority to revise the terms and conditions of the award.

The March 25 letter further stated that TB misspent \$30,360 in salary and fringe benefits for Dr. Madison, and related F&A costs and SBIR fees, since TB "stipulate[d] that it charged salary and related costs for Dr. Blair Madison" to the award. Id. Thus, the letter provided, NCRRC was required to recover the misspent funds under governing debt and claims collection statutes and regulations.

TB timely appealed the March 25, 2009 decision to the Board.

Analysis

- I. TB failed to comply with the F&A cost restriction of its Year 2 award.

TB argues that it made an "inadvertent draw down of funds that were still considered restricted by the NIH" when it "continued to draw down funds (\$233,750) during [the June 1, 2008 to August 1, 2008 period] to pay for accumulating operat[ing] costs." Notice of Appeal at 2. TB argues, however, that if NCRRC had timely processed TB's April 2007 F&A rate proposal, the Year 2 F&A fund restriction would have been removed earlier, the Year 3 funds would have been available earlier, any unobligated balance from Year 2 could have been carried over to Year 3, and "this entire situation would have never occurred." Notice of Appeal at 1; TB Appendix A; TB June 29, 2009 Response to Board Questions; TB Reply at 1. Further, TB contends, it "immediately paid back" \$130,230 to the PMS when notified by NCRRC to do so, the funds that were inadvertently withdrawn "were never spent," and it "actually paid" for the "costs that had accumulated

during this time" with "non-NIH" funds. Notice of Appeal at 2; NCCR Ex. 28. Under these circumstances, TB requests that the funds "recovered by the NCCR be returned to the company's DPM account as an unobligated balance and be available for withdrawal without restriction." Notice of Appeal at 2.

TB also alleges that NCCR's brief relies on "obscure laws and regulations" and "unsubstantiated 'supporting evidence,' such as memos created and circulated by [NCCR] months after actual conversations had taken place" to justify NCCR's recovery action. TB Reply at 1. TB offers "to provide sworn statements refuting the claims of the memos." Id.

The delayed issuance of TB's negotiated F&A rate agreement does not excuse TB's failure to comply with a condition of its award.

On review of the record, applicable regulations and program standards, we reject TB's central argument that the Board should grant the relief TB requests because "the entire situation" was caused by DFAS's delay in processing TB's F&A rate proposal. Notice of Appeal at 1. The record shows that approximately three months passed from the date TB submitted its original F&A rate proposal on April 24, 2008, until NCCR notified TB that the submission had been lost and TB resubmitted the materials in early August 2008. NCCR Exs. 6-8. Thus, DFAS's loss of TB's first F&A rate submission arguably delayed the rate negotiation process for at most three months.

The record also shows, however, that TB did not submit its proposed F&A rate data to DFAS until a year after DFAS first requested the F&A rate materials from TB, and 11 months after NCCR awarded TB the Year 2 grant. NCCR Exs. 1, 2, 8. Thus, TB itself bears substantial responsibility for the delay. While TB contends that it submitted its F&A rate proposal at the "first possible reasonable opportunity" and that it could not have made a submission earlier because it had "no track record of indirect costs," we find no merit in this argument. Notice of Appeal at 1. The GPS advises SBIR Phase II grantees that if "financial data are not available for the most recently completed fiscal year," the applicant should "submit a proposal showing estimated rates with supporting documentation." GPS at 244.

In any event, TB's argument that this dispute would not have arisen had DFAS not lost TB's April 2008 F&A rate submission is based on speculation and, even if accepted as true, is not a sufficient ground to excuse TB's improper drawdown of federal

funds. Under the applicable regulations and NOA, TB was required to comply with all of the terms and conditions of its award. 42 C.F.R. § 52.6(a); 45 C.F.R. §§ 74.60-74.62; NCR Ex. 2. Those terms and conditions included the Year 2 restriction on "all . . . F&A costs in excess of ten percent of salaries and wages," which remained in effect "pending negotiation of a new F&A rate agreement and approval by the [NCR]." NCR Ex. 2 at 3 (emphasis added). TB's September 2008 categorical accounting of Year 2 expenditures and a July 2009 report of TB's PMS account disbursements show that TB used indirect costs in excess of ten percent of reported salaries and wages to justify drawdowns made by June 30, 2008, before TB had an approved F&A rate and before NCR had removed the restriction. NCR Exs. 17, 34.

Thus, we conclude that regardless of whether the Year 2 F&A restriction *might have* been removed earlier had DFAS not lost TB's April 2008 F&A rate submission, TB failed to comply with a condition of its Year 2 award.

TB's subsidiary arguments have no merit.

We further reject TB's suggestion that its improper drawdown of federal funds should be excused since it was "inadvertent," and we find no merit in TB's claim that NCR relied on "obscure laws and regulations" to support the recovery action. Notice of Appeal at 1. TB's NOA clearly stated that the award was "subject to" the "restrictions on the expenditure of federal funds in appropriations acts," the regulations at 45 C.F.R. Part 74, the GPS, and the specific terms and conditions of the NOA itself. NCR Ex. 2, at 2. Thus, TB was on notice that its drawdowns, expenditures and financial management systems had to comply with the financial management and payment standards of the regulations and GPS. Those standards, discussed above, required TB to ensure that it would not inadvertently draw down funds inconsistent with the terms of its award and that it would charge to the award only allowable costs. 45 C.F.R. §§ 74.21, 74.27, 74.28; GPS at 121. Here, the evidence shows, TB plainly failed to meet these fundamental requirements.

TB states that it drew down the excess funds during the June 1, 2008 to August 1, 2008 period "to pay for accumulating operat[ing] costs." Notice of Appeal at 2. TB's Year 2 NOA explicitly stated that an "unobligated balance may be carried over into the next budget period without Grants Management Officer Approval." NCR Ex. 2. Also, the GPS provides that unless precluded by the specific terms of an award, a grantee may carry over unobligated balances from one budget period to

the next without obtaining prior approval, and SNAP awards such as TB's grant "are automatically carried over to the subsequent budget period." GPS at 103-104. Thus, TB reasonably thought that funds that had not yet been obligated for allowable costs in Year 2 could be carried over. NCCR nonetheless refused to allow TB to carry over the "recovered funds" to year 3 of the project as unobligated funds, stating that "automatic carryover authority does not apply to funds previously restricted by Terms and Conditions of the award." NCCR Ex. 31; see also NCCR Br. at 6-7. NCCR cited, and we find, no support for this position in the language of TB's award notice, the applicable regulations or the GPS.

While TB thus may have been able to justify some drawdowns after the end of Year 2 with allowable expenditures in Year 3, TB's September 2008 submission to NCCR sought to justify the amounts drawn down by June 30, 2008 based on F&A costs in excess of the 10 percent, not by Year 3 expenditures. Moreover, TB has provided no evidence that would indicate that by June 30, 2008, it had adequate allowable expenditures in Year 3 (which started June 1) to justify the amounts drawn down in excess of allowable expenditures in Year 2.

We also note that TB asserts it never spent the funds drawn down in anticipation of Year 3 expenditures and returned the funds to the PMS in September. Yet, TB was required to minimize the time between the transfer of funds from the U.S. Treasury and disbursements to cover allowable costs. NCCR Exs. 17, at 3; 28; 45 C.F.R. § 74.22; GPS at 76-77.

Finally, we conclude that the sworn statements TB offers to provide to refute representations in NCCR's internal memoranda about the conversations between the parties' employees would have no bearing on the outcome of this appeal. The memoranda to which TB appears to allude principally involved the decision to delay the release of TB's Year 3 award pending the resolution of TB's negotiated F&A rate. The content of these conversations is immaterial to our decision for the reasons discussed above.

II. NCCR's response to TB's action was procedurally flawed.

TB also challenged the procedures that NCCR used to review TB's actions. See, e.g., NCCR Ex. 28, at 2; December 18, 2008 Notice of Appeal, Docket No. A-09-28, at 2. On appeal to the Board, TB argues that it has acted in good faith, while NCCR was "determined to escalate this issue from the beginning, as

opposed to finding out the facts of the situation and working towards a reasonable solution." TB Reply at 1-2.

Though we conclude that TB drew down federal funds in violation of the F&A cost restriction of its Year 2 award, we also note multiple procedural errors in NCR's response to TB's improper drawdown. First, as NCR has acknowledged, its review of TB's request to appeal the September 10, 2008 determination failed to follow the required procedures for resolving postaward grant disputes under 42 C.F.R. Part 50, subpart D. Consequently, NCR rescinded the September 10, 2008 action and issued revised findings in December 2008, which TB properly appealed to NIH.

Even after TB appealed the revised findings, however, the agency did not follow all of the applicable appeals requirements. For example, NIH was required to appoint a review committee of at least three employees, to give TB an opportunity to provide additional statements and documentation, and to issue a written decision signed by all committee members. 42 C.F.R. §§ 50.405; 50.406(d)-(h). The March 25, 2009 letter from NIH's Extramural Program Policy Officer, which "summar[ized]" the convened NIH "Appeals Board's" responses to TB's claims, was not signed by (and failed to identify) the "Appeals Board" members, nor does it appear to have been prepared by the "Appeals Board" members. Further, it appears that TB was not given an adequate opportunity by the review committee to provide additional statements and documents to the convened "Appeals Board."

In addition, NCR implemented its determination prematurely. After initially finding that TB had drawn down award funds in violation of the Year 2 F&A cost restriction,² NCR had the authority, which it exercised, to "temporarily withhold cash payments pending correction of the deficiency by the recipient," and to treat TB as a high risk grantee pending TB's appeal. 45 C.F.R. §§ 74.14; 74.62(a)(1); GPS at 77. NCR, however, took additional action it viewed as recovering misspent funds prior to the time TB had exhausted its administrative appeal rights. The regulations, however, provide that the agency not take any action to implement the decision appealed until the appeal has been disposed of. 45 C.F.R. §§ 50.406(c), 16.22(a).

² NIH's March 25, 2009 letter states that NCR's review "indicated that TB had in fact spent funds in excess of those that would have been allowable, given the F&A restrictions." NCR Ex. 31. A grantee necessarily incurs F&A costs on an ongoing basis, however, even though it may be restricted in what amount of F&A costs may be charged to an award.

Notwithstanding the flaws in the agency's administrative review of TB's actions, however, we see no need to remand this case to NIH since TB has been given ample opportunity to present its case before the Board. Further, as we explain below, the relief requested by TB (to return the funds "recovered" by NCRF to TB's account as an unobligated balance) is unavailable since NCRF did treat the "recovered" funds as an unobligated balance, which it then offset against TB's supplemental award for Year 3. TB has not specifically alleged that the unobligated balance available for carryover was less than the amount used by NCRF.³

III. The relief requested by TB is unavailable.

Notwithstanding procedural flaws in the agency reviews, we conclude that the relief requested by TB -- to return the recovered funds to TB's account as an unobligated balance, without restriction -- is unavailable in light of NCRF's decision to increase TB's federal funding for Year 2 and Year 3 of the project, NCRF's treatment of the recovered funds in the supplemental award to TB for Year 3, and TB's acceptance of that award.

As provided under the GPS, once NCRF issued the original Year 2 and Year 3 awards to TB, NCRF was "not obligated to make any supplemental or other award for additional F&A costs." GPS at 82. Nevertheless, in response to TB's September 23, 2008 request to increase F&A funding for both Years 2 and 3, NCRF issued supplemental awards to TB for both years. NCRF Exs. 23, 24, 27. According to NCRF, the supplemental awards were based on NCRF's determination "that it was necessary to allow the grantee to draw F&A at the recently negotiated rate . . . without rebudgeting funds away from the direct costs needed to do the science." NCRF Br. at 23. "To make this happen," NCRF states, "a total cost reconsideration was necessary." *Id.* Accordingly, following NCRF's December 2, 2008 letter advising TB of its decision, NCRF awarded an additional \$37,477 in F&A costs for Year 2 and an additional amount of \$370,132 for Year 3 F&A costs. NCRF Exs. 24, 27.

³ In any event, if TB had allowable costs in Year 3 to justify claims for the full amount of the Year 3 award (as supplemented) plus the amount carried over, it would not matter if TB also had sufficient allowable costs in Year 2 to reduce the carryover amount. Ultimately, the total costs charged to the awards may not exceed the total amounts awarded.

As NCRR further advised TB, however, the agency used the funds previously returned to the PMS by TB "as part of this total cost increase." NCRR Br. at 23; NCRR Ex. 27. Specifically, the January 10, 2009 supplemental award for Year 3 expressly provided that the "unobligated balance of \$180,267, as recovered pursuant to NCRR's [prior] communications . . . has been used as an offset to this award." NCRR Ex. 27. Thus, NCRR did treat the Year 2 funds recovered from TB as an unobligated balance, carried forward to Year 3. Further, while NCRR then offset these funds against the supplemental award for Year 3, this action was within NCRR's discretionary authority, as provided under the GPS. GPS at 103.

Moreover, TB was on notice of NCRR's decision to carry over and then offset the recovered funds against the supplemental award for Year 3. GPS at 103. In sum, as the March 25, 2009 letter from NIH to TB explained, "the funds are currently in the account as an offset against NCRR's supplemental award to provide additional, discretionary Year 3 funds in light of T.B.'s negotiated F&A rate." (Emphasis added.) Furthermore, even though the carryover amount was budgeted for F&A costs, TB had some authority under the GPS to rebudget the funds to cover direct costs.

Since the Board has no authority to change the terms of the supplemental Year 3 award, we therefore conclude that the relief requested by TB is unavailable.

IV. NCRR properly disallowed salary and related costs for Dr. Blair Madison that TB charged to its SBIR award.

TB acknowledges that Dr. Madison was the recipient of an NCI fellowship that precluded him from receiving funding from other federal sources for his work. TB contends that at "one point during the investigation, [it] erroneously submitted data showing that Dr. Madison had been paid from the Phase II grant." Notice of Appeal at 2. TB argues, however, that the improper charges were the result of "a simple bookkeeping error" which, once found, was corrected. TB Reply at 2.

To support its argument, TB submitted a letter from its auditors dated June 24, 2009, which states that "there was a bookkeeping error in the amount of \$15,309.80 which incorrectly charged this amount of [Dr. Madison's] salary to Phase II grant funds." TB Ex. 9. The letter further states that after the error was discovered, "during the audit process, an adjusting entry was proposed to reclassify the charge into the Kentucky Matching

Grant." Id. According to TB's auditor, "when the audit is complete, it will show that 100% of Dr. Madison's salary is charged to the [NCI fellowship] and Kentucky grants." Id. Thus, TB argues, "[n]o SBIR Phase II funds were used to pay Dr. Madison." Notice of Appeal at 2.

In light of the record evidence, we reject TB's contention that the unallowable salary and related charges for Dr. Madison were merely the result of a bookkeeping error. The July 2008 e-mail exchange between TB and NCRP, noted above, shows that both parties initially (incorrectly) believed that the NCI fellowship permitted some charges to the SBIR grant for Dr. Madison's salary and fringe benefits. NCRP Ex. 4. Further, TB's October 6, 2008 e-mail to NCRP responding to the agency's request for a breakdown of Year 2 payroll and fringe benefits costs for each staff member reported that TB had charged to the grant \$17,946.60 in salary costs and \$3,070 in fringe benefit costs for Dr. Madison. NCRP Ex. 18, at 3. The e-mail stated: "Please note that Dr. Madison's salary attributed to the grant was less than originally proposed because of the adjustment for the [NCI fellowship]." Id. Thus, based on the documentation that TB itself provided to NCRP, we find that the salary and related charges did not result from a mere bookkeeping error. Hence, we conclude that NCRP properly initiated recovery efforts for the unallowable costs when it became aware of the full extent of the NCI fellowship's restriction.

We also reject TB's argument that NCRP's recovery action should be reversed since TB was able to correct the error "during its end of year accounting review." NCRP Ex. 28, at 2. Under the administrative requirements of the regulations, GPS, and NOA, TB was responsible for ensuring that it would draw down federal award funds based only on allowable project costs. GPS at 121; 45 C.F.R. § 74.21. Further, the GMO is responsible for monitoring grantee cash drawdowns within budget periods and making any necessary and appropriate adjustments. GPS at 10, 76-78. Since the documentation that TB itself provided to NCRP in September and October 2008 showed that TB had drawn down award funds based on unallowable personnel costs, NCRP correctly determined that the funds should be returned to the PMS.

Furthermore, the information provided in the auditor's letter about the amount subject to the correction, \$15,309, differs from the amount TB reported in October 2008 that it had charged to the grant for Dr. Madison's salary and related costs, \$21,017. TB has provided no explanation for this difference in

amount, nor has it submitted sufficient information to reconcile the figures.

In any event, even if we were to accept TB's contention that the erroneous charges to the grant for Dr. Madison's salary and related costs were sufficiently corrected, the relief TB seeks with respect to the disallowed costs is unavailable. As discussed above, NCCR treated the funds it recovered in connection with the disallowed salary and associated costs, together with the F&A costs NCCR determined TB had "misspent," as an unobligated balance, which NCCR then carried over to the subsequent budget year. NCCR then properly offset the funds carried over against the supplemental award Year 3 award. TB accepted that award, and we have no authority to amend it.

Finally, we deny NCCR's request to remand this matter so that questions raised by the June 24, 2009 letter from TB's auditor may be developed and addressed by NCCR. We agree that this evidence raises some issues, such as whether TB improperly drew down SBIR fees at an accelerated rate, but these issues do not impact our findings above. Hence, we see no need to remand this matter since our decision resolves the narrow issues raised on appeal. Our decision does not, however, preclude NCCR from conducting further review of the grantee's accounts and taking additional action with respect to matters outside the scope of this decision. Nor does it preclude TB from showing that it had allowable expenditures under the awards for which it has not yet received federal funds.

Conclusion

For the reasons discussed above, we deny TB's request to return the total amount of \$180,267 to TB as an unobligated balance, available for withdrawal without restriction to support its SBIR project.

_____/s/_____
Leslie A. Sussan

_____/s/_____
Constance B. Tobias

_____/s/_____
Judith A. Ballard
Presiding Board Member