

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Native Village of Kotzebue  
Kotzebue  
Docket No. A-08-97  
Decision No. 2207

DATE: November 6, 2008

DECISION

The Native Village of Kotzebue (Kotzebue), an Indian tribal government, appeals the decision by the Administration for Native Americans (ANA), Administration for Children and Families, terminating discretionary Grant No. 90NL0362 in the third and final year of Kotzebue's project under the ANA Native Language Preservation and Maintenance Program. ANA terminated the grant for nonperformance.

For the reasons discussed below, we uphold ANA's decision. First, we conclude that Kotzebue received adequate notice of the background of and bases for ANA's decision. Second, we find that the record supports the conclusion that Kotzebue materially failed to comply with the terms of the award and that ANA was not required to engage in further negotiations with Kotzebue before issuing the decision.

Background

*Statute and Regulations*

The Native American Languages Act of 1992 (NALA) established a grant program, to be administered by the Secretary of the Department of Health and Human Services (HHS), "to assist Native Americans in ensuring the survival and continuing vitality of Native American languages." Pub. L. No. 102-524, October 26, 1992, 106 Stat. 3434, 42 U.S.C. 2991b-3(a). Pursuant to the statute, ANA operates the Native Language Preservation and Maintenance Program, which provides financial assistance through a competitive process to assist Native Americans in meeting the objectives of the statute. 70 Fed. Reg. 5864 (2005).

The regulations at 45 C.F.R. Part 92 set forth uniform administrative rules for HHS grants to state, local and tribal governments. Under the regulations, grantees must manage and monitor the daily operations of activities supported by a grant to ensure that "performance goals are being achieved." 45 C.F.R. § 92.40(a). Grantees must "submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports." 45 C.F.R. § 92.40(b)(1). Performance reports must contain information comparing actual accomplishments to the objectives established for the period and "the reasons for slippage if established objectives were not met." 45 C.F.R. § 92.40(b)(2)(i)-(ii). Grantees are required to report to the awarding agency "significant developments," including "problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award," as soon as they become known. 45 C.F.R. § 92.40(d).

A grantee "must obtain the prior approval of the awarding agency" when it wishes to revise the scope or objectives of the project or it "[n]eed[s] to extend the period of availability of funds." 45 C.F.R. § 92.30(d)(1)-(2).

Section 92.43(a) of the regulations establishes remedies for a grantee's noncompliance with the terms of its award:

If a grantee . . . materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

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(3) wholly or partly suspend or terminate the current award for the grantee's . . . program, . . . .

Subsection 92.43(b) states that when an agency takes an enforcement action, it must provide the grantee "an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee . . . is entitled under any statute or regulation applicable to the action involved."

*The Program Announcement*

On February 3, 2005 ANA issued a notice of availability of fiscal year 2005 funds to support community-based Native Language projects. 70 Fed. Reg. 5864. The notice described two types of grants that ANA awarded under the Native Language Program: "Category I Assessment Grants," used to determine the current status of the languages to be addressed and to establish long-term community language goals; and "Category II Design and/or Implementation Grants," used to develop or implement a language preservation project to achieve the community's long-term goals.<sup>1</sup> Id. In either case, ANA stated, funds would be provided for "short term projects, not programs," and the "[p]rojects must have definitive goals and objectives that will be achieved by the end of the project period." Id. at 5865.

The February 3, 2005 announcement directed applicants to submit an objective work plan (OWP) with their proposals. The notice defined an OWP as "the project plan the applicant will use in meeting the results and benefits expected for the project." Id. at 5866. Further, the OWP was to "provide[] detailed descriptions of how, when, where, by whom and why activities [were] proposed for the project . . . ." Id. ANA stated in the *Federal Register* notice that before funding the second or third year of a multi-year grant, ANA would require verification and documentation showing that the objectives and outcomes proposed in the preceding year were accomplished. Id. at 5865.

*Kotzebue's Grant Application*

By application dated March 25, 2005, Kotzebue sought funding for a three-year, Category II grant project titled "Capacity Building for Nikaitchuat Ilisagviat Immersion School." Kotzebue Ex. 2. Kotzebue noted that it had previously received a Category I assessment grant and had established long-term community language preservation goals. Id. at 18, 26-27, 30-31. The proposed Category II project was designed to be consistent with those goals. Id. at 15-75.

At the time of the March 2005 application, Nikaitchuat Ilisagviat, the Inupiaq language immersion school, had been

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1. ANA currently awards grants under the following four categories: 1) Language Assessment; 2) Project Planning; 3) Project Implementation; and 4) Native Immersion Projects. ANA Program Information, [http://www.acf.hhs.gov/programs/ana/programs/program\\_information.html](http://www.acf.hhs.gov/programs/ana/programs/program_information.html).

operating for over six years and was "providing a full curriculum for 17 students between the ages of 2 and 7, and providing one hour a day of language instruction for six older students . . . ." Id. at 15-16; see also Kotzebue Ex. 43, ¶ 4. Kotzebue intended to expand the school, and its proposed project was to develop curricula, a formalized teacher training program, and a teacher intern program to ensure that the school would be able "to meet all of the [educational] needs of older students" in full-time programs. Kotzebue Ex. 2, at 28. Specifically, Kotzebue intended to provide a "comprehensive curriculum that would meet the Alaska State education standards for age-appropriate language and math learning, while still teaching in an environment that emphasizes Inupiaq language, culture, and values." Kotzebue Ex. 19, at 15.

The OWP developed and submitted by Kotzebue established five objectives for the three-year project. During the first year of the project, Kotzebue would complete the first two objectives: 1) "finalize[] curriculum standards and . . . teaching materials for students of 7 to 9 years of age [Level III];"<sup>2</sup> and 2) establish a "formalized program for teacher training . . . and teacher training materials . . . including a book on Inupiaq grammar." Kotzebue Ex. 2, at 33, 39-42. During the second year, the plan called for achievement of the third and fourth objectives: 3) "finalize[] curriculum standards and . . . teaching materials for students of 9 to 11 years of age [Level IV]. Students age 7 and up will work with local artists to improve their [traditional arts] skills;" and 4) develop a teacher intern training program. Id. at 35, 43-46. In the third year, Kotzebue would meet the fifth objective: 5) "finalize[]

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2. The documents in the record allude to the different curriculum groups variously by the age ranges of the students for whom the materials were developed, corresponding grades, and levels assigned by the grantee. The curriculum levels and corresponding age groups and grades can be found by cross-referencing numerous documents, including Kotzebue Exhibit 2, at 39-50 and Kotzebue Exhibit 27, at 9-23. The category equivalencies of the groups are as follows:

Level I	pre-school	Ages 5 and under
Level II	kindergarten - 1 <sup>st</sup> grade	Ages 5-7
Level III	2 <sup>nd</sup> - 3 <sup>rd</sup> grades	Ages 7-9
Level IV	4 <sup>th</sup> - 5 <sup>th</sup> grades	Ages 9-11
Level V	6 <sup>th</sup> grade	Ages 11-12

curriculum standards and . . . teaching materials for students of 11 to 12 years of age [Level V]." Id. at 36, 47-48.

The OWP detailed specific activities that would be undertaken to meet each objective and provided deadlines within each year by which each activity was to be completed. Id. at 39-48. The application proposed \$174,710 in ANA funding for the first year of the project; \$173,397 for the second year, and \$173,859 for the third year. Id. at 62-67.

#### *The Notice of Grant Award*

By letter dated August 4, 2005, ANA awarded Kotzebue a grant for the first year of the proposed project. The letter stated that ANA had "significantly relied" on the project information that Kotzebue had provided in its application, "[s]pecifically, the experience of the Key Personnel, Consultants and Contractors proposed to support this project, and the goal[s], objectives and activities outline[d] in the Objective Work Plan to accomplish the project." Kotzebue Ex. 3, at 1. ANA also stated that continuation funding for the subsequent years of the project was contingent upon Kotzebue filing timely quarterly Objective Progress Reports (OPRs) and financial reports and timely implementing the project. "Grantees that are late on these required reports or delay in implementing the project," ANA wrote, "will jeopardize continuation funding." Id.

#### *History of the Project*

##### Year One (September 30, 2005 - September 29, 2006)

For the first year of the grant Kotzebue submitted one quarterly financial statement (for the first quarter), three quarterly OPRs (for the first, third and fourth quarters) and a letter dated April 30, 2006, which summarized the progress of the project as of that date, seven months into the grant year. ANA Exs. 1-4; Kotzebue Ex. 5. The documents show that Kotzebue spent none of the \$174,710 of first year ANA grant funds in the first and second quarters of the year, and that it spent \$49,235 of the award funds during the last two quarters of the year combined. ANA Ex. 4, at 11<sup>th</sup> unnumbered page. Kotzebue reported that the discrepancy in estimated and actual grant expenditures was due to "another grant which funds activities at the school."<sup>3</sup> ANA Ex.

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3. In e-mails dated October 18, 2006 and March 26, 2007, Kotzebue indicated that the referenced grant was an Alaska Native  
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3, at 12<sup>th</sup> unnumbered page. Specifically, Kotzebue wrote, "[t]hree positions that were fully or partially funded by this other grant could not be filled, permitting the funds from the other grant to go further than originally anticipated, so that it has not been necessary to draw on ANA funds." Id.

Kotzebue also documented delays in meeting the first two objectives of the project. Kotzebue Ex. 5; ANA Exs. 3-4. At year's end, four of the nine activities associated with the first objective had been completed, and two of the six activities associated with the second objective had been completed. ANA Ex. 4, at 2<sup>nd</sup>-5<sup>th</sup> unnumbered pages. Kotzebue reported that it had not finalized the teaching materials for the Level III students because of the insufficiencies of existing native language dictionaries and the need to undertake "linguistic archeology." Kotzebue Ex. 5.

Training teachers in language fluency, Kotzebue additionally reported, proved difficult because of the lack of Inupiaq classes scheduled at times when trainees would be available, and the need to develop a process for teachers to practice conversational Inupiaq. Id. Kotzebue further informed ANA that the project was "a little bit behind in the curriculum development process" for Level III (part of the grant project) because the school was finalizing the development of Levels I and II materials for pre-kindergarten and kindergarten (not part of the grant project). ANA Ex. 2, at 12<sup>th</sup> unnumbered page.

The first year documents also show that key personnel for the capacity building project had not yet been hired. Kotzebue acknowledged that, while "50% of the Nikaitchuat Administrator's salary was to be paid from this grant," neither the Administrator position nor the Director of Education position had been filled by the end of the first year. ANA Ex. 2, at 10<sup>th</sup> unnumbered page; ANA Ex. 3, at 11<sup>th</sup> unnumbered page.

By letter dated September 26, 2006, ANA notified Kotzebue that "based on the successful management and administration" of the project, ANA approved continuation funding for the project through September 29, 2007. Kotzebue Ex. 6, at 1. ANA stated that "[t]his and future continuation funding is based on

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Education Program (ANEP) grant and that the objectives of the ANEP and the ANA Language grants were not the same. Kotzebue Exs. 7, 9.

[Kotzebue's] ability to achieve the project goals and objectives and submit timely progress and financial reports." Id.

Year Two (September 30, 2006 - September 29, 2007)

In the OPRs filed for the first two quarters of the second year, Kotzebue provided no information about its progress in meeting objectives one or two of the project, which had not been completed in the first year as scheduled. ANA Exs. 5-6. The OPR for the second quarter indicated that mid-way through the second year, Kotzebue had completed only one of the thirteen activities required to satisfy the third and fourth project objectives, which were scheduled for completion in the second year. ANA Ex. 6, at 2<sup>nd</sup>-4<sup>th</sup> unnumbered pages. Kotzebue further advised ANA that the Nikaitchuat Administrator and Director of Education Programs positions remained vacant. Id. at 11<sup>th</sup> unnumbered page.

On May 25, 2007, ANA sent a letter to Kotzebue notifying the grantee that ANA was taking administrative action on the award because "the project activities [we]re not progressing according to the plan and/or timeline outlined in the Objective Work Plan," as required under the terms and conditions of the grant. ANA Ex. 7. ANA stated that its decision to fund the project had been based on the representations that Kotzebue had made in its grant application about "project strategy . . . , goals, objectives, time frames, activities, outcomes, . . . the individuals responsible for completing the objectives and performing the project activities, . . . the qualitative and quantitative data to be collected, how this data [would] measure progress towards the stated project goals . . . , and how performance/impact indicators [would] be monitored, evaluated and verified . . . ." Id. Since the project was not being implemented in accordance with those representations, ANA directed Kotzebue's Project Director to discuss the project with the ANA regional training and technical assistance provider "to arrange for technical assistance services."<sup>4</sup> Id.

A series of communications between ANA and Kotzebue followed. ANA directed Kotzebue in June 2007 to submit the missing OPRs and financial status forms, and to revise the financial status forms filed for the first and second quarters of the second year "to better reflect true expenditures." Kotzebue Exs. 11, 13; see

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4. The letter also advised that "[i]n order to increase the effectiveness of ANA projects and maximize benefits to Native communities, ANA is bolstering its grant monitoring activities." Id.

also Kotzebue Ex. 14 (financial reports for the period ended June 30, 2007 and revised financial reports for December 31, 2006 and March 31, 2007). ANA further advised that it "would be helpful" if Kotzebue submitted a catch-up plan with new activity completion dates, along with its explanation of the challenges to the project. Kotzebue Ex. 13.

In a letter dated June 20, 2007, Kotzebue wrote to ANA to explain the challenges that it had encountered in keeping to the OWP schedule. Those obstacles included: 1) loss of key project personnel; 2) staff changes in partner organizations; and 3) difficulty creating a "formalized process that creates a comfortable and effective bridge between Elders' more holistic approach to information and a Western fill-in-the-blank approach." Kotzebue Ex. 12.

By e-mail dated June 21, 2007, Kotzebue further advised ANA that it would not be able to complete the OWP curriculum goals "up through 5<sup>th</sup> grade" (Level IV) by September 2008, the end of the three-year project. ANA Ex. 8. Kotzebue also indicated that it no longer intended to develop materials for older children (Level V) because Kotzebue "ha[d] since decided that Nikaitchuat is only a Preschool - 5<sup>th</sup> grade school since the Middle School in Kotz[ebue] starts with 6<sup>th</sup> [grade]." Id.

On July 27, 2007 Kotzebue submitted its application for continued funding for the third year of the project. Kotzebue Ex. 15. Kotzebue stated that it would submit "revised Objective Work Plan information" for the project with its next quarterly OPR. Id. at 1. When it submitted the report on July 31, 2007, however, Kotzebue did not provide the proposed revision. Rather, Kotzebue stated that discussions with ANA's regional technical assistance coordinator had been "very productive," and that it was "finalizing proposed changes to [its] Objective Work Plan that will clearly indicate how we intend to get back on track." ANA Ex. 9. Further, Kotzebue told ANA that it was "proceeding with development of the Level II curriculum at a rapid pace" and that it "continued to move forward" in the development of teacher training programs. Id. The Level II curriculum development was not covered by the grant.

By letter dated September 20, 2007, ANA notified Kotzebue that the agency had decided to approve a continuation award for the third-year of the project subject to special terms and conditions. At the outset, the letter stated that ANA's initial decision to fund the project had been based on the representations made in Kotzebue's OWP. Specifically, ANA wrote, the project objectives, time frames, activities and personnel

described in the OWP "not only demonstrated the project's worthiness for funding, but also disclosed a comprehensive strategy for project implementation." Kotzebue Ex. 18, at 1. ANA then stated that since the project was "significantly delayed in the completion of activities and . . . significantly underspent," Kotzebue was required, as a condition of the continuation award, to develop a "Project Improvement Plan" (PIP) and to submit a "catch-up plan." Id. Furthermore, the third year award directed "a carryover of \$125,475 unobligated funds from Year 1 to complete Year 1 & Year 2 Objectives in Year 3." Id. ANA provided for the release of only \$1 of the third year funds under the September 2007 award. Id. at 4. Imposing an additional term/condition on the grantee, ANA advised Kotzebue that "[it] must first successfully complete Year 1 & Year 2 Objectives and expend all Year 1 & Year 2 funds before the balance of Year 3 funds can be awarded." Id. at 1-2, 5 ("\$48,383 has been deferred until a project improvement plan is completed and Program Year 1 and 2 activities have been me[et]").

#### Year Three (September 30, 2007 - September 29, 2008)

At the end of October 2007, Kotzebue submitted its OPR for the fourth quarter of the second year, which showed that none of the OWP objectives for the first or second years had been fully achieved. Kotzebue Ex. 19, at 6-8. The OPR showed that the Level III curriculum (originally scheduled for completion in the first year) would not be finalized until the end of the third year and that the grammar book and teacher training program activities (also scheduled for completion in the first year) would be completed December 31, 2007 and March 31, 2008, respectively. Id. Further, the Director of Education Programs and Nikaitchuat Administrator positions remained unfilled. Id. at 13.

The October 2007 cover letter accompanying the fourth quarter OPR for the second year summarized decisions that Kotzebue had made "about how to get caught up on all of [the grant] activities." Id. at 1. The letter also stated that Kotzebue's efforts to develop a catch-up plan had been frustrated by frequent changes of the ANA Program Officer assigned to the grant. Id. at 2; see also Kotzebue Ex. 22. Nevertheless, Kotzebue wrote, it looked forward to working with an ANA technical assistance provider during an upcoming site visit. Kotzebue Ex. 19.

ANA arranged for a contractor, Jennifer Harrison of the Chickaloon Tribe, to provide on-site technical assistance to Kotzebue. ANA intended Ms. Harrison to serve as "a bridge between Kotzebue and ANA" and to help Kotzebue develop a PIP and

a revised OWP. Kotzebue Ex. 21, at 1; Kotzebue Ex. 43, ¶ 8. Kotzebue understood that while Ms. Harrison had been asked by ANA to provide her expertise, Ms. Harrison did not have the authority to approve the plan; the revised OWP "would have to be approved in Washington." Kotzebue Ex. 43, ¶ 8.

Ms. Harrison and Kotzebue thereafter engaged in numerous communications, and Ms. Harrison conducted a site visit at Kotzebue on November 7, 2007. With Ms. Harrison's assistance, Kotzebue developed a PIP, which was sent to ANA on November 8, 2007. Kotzebue Exs. 24-25. The PIP established eight actions with deadlines varying from November 30, 2007 to January 29, 2008. Kotzebue Ex. 25. ANA signed the PIP on November 20, 2007, but did not notify Kotzebue that the document had been approved until January 11, 2008. Kotzebue Exs. 25, 29.

Kotzebue also drafted a revised OWP with Ms. Harrison's assistance. Kotzebue Exs. 27, 32. The draft was completed as of December 4, 2007, at which time Ms. Harrison instructed Kotzebue to submit the document with a signed cover letter to the ANA Program Specialist and to ensure that the document would arrive at the ANA office in Washington, D.C. by December 7, 2007. Kotzebue Ex. 27, at 1. The record contains inconsistent evidence and representations by the parties as to whether Kotzebue in fact sent the revised OWP to ANA by the December 7, 2007 deadline. Kotzebue Exs. 30, 31, 33, 43; Kotzebue Opening Brief (Kotzebue Br.) at 7; ANA Br. at 8. In any event, the parties realized in early January that ANA did not have the document, and Kotzebue sent it to ANA on January 17, 2008. Kotzebue Br. at 7; Kotzebue Ex. 32. In the meantime, Kotzebue had "proceeded to implement the final year of its program consistent with the . . . PIP and the revised OWP." Kotzebue Br. at 7.

On January 18, ANA advised Kotzebue that it had received, but had not approved, the revised OWP. ANA further told Kotzebue that Kotzebue must submit a formal request for a "Change in Scope" with its revised OWP and additional supporting budget and planning documents. Kotzebue Ex. 34.

On January 28, 2008 Kotzebue submitted the requested documents to ANA with a letter summarizing the project's progress. ANA Ex. 10; Kotzebue Ex. 35. Kotzebue wrote that it had been working with ANA's technical assistance provider and anticipated filing the last three quarterly OPRs for the project based on its revised OWP. Kotzebue added that it had discovered that meeting its curriculum objectives "turned out to be a much more detailed and challenging process than . . . originally anticipated." *Id.* Kotzebue also discussed the four central challenges it had faced

in implementing the project: 1) "[d]ifficulty filling the project director position;" 2) "[c]hanges in the local high school management" which impeded partnership and collaboration; 3) the limited number of bilingual, coastal dialect, individuals in the community; and 4) the need to develop curricula consistent with how the Elders "talk about" and "approach things." Id. The letter concluded by stating that the project was "fully caught up on the schedule presented in the new plan," and that work was progressing to timely meet the revised objectives. Id. Kotzebue's update showed that the Level III curriculum was 40-50% complete and that the Level IV curriculum was 15% complete. Id. at 7-8.

On February 28, 2008, Kotzebue e-mailed ANA to inquire about the status of ANA's review of the revised OWP. Kotzebue Ex. 38. ANA notified Kotzebue by e-mail the following day that ANA had decided not to approve the revised workplan. Kotzebue Ex. 38. After reviewing the entire grant project, ANA stated in its February 29 e-mail, "[i]t appear[ed] that Kotzebue ha[d] been operating outside the approved Objective Work Plan for some time and ha[d] been unable to complete activities that ha[d] already been funded." Id. Further, ANA wrote, it would not approve the revised OWP because "it [was] a deviation from the originally funded project." Id.

Kotzebue's Executive Director immediately responded by e-mail, stating she was "taken [a]back" by ANA's action. Kotzebue Ex. 39. She protested the lack of opportunity to discuss the proposed revisions with ANA, and she stated that ANA's action called into question both the technical assistance process and the OWP review process. Id.

At the request of Kotzebue's Executive Director, ANA and Kotzebue representatives took part in a teleconference on March 5, 2008 to discuss the project. Kotzebue Ex. 43, ¶ 11. According to Kotzebue, "ANA did not provide any response to the merits of the revised OWP or . . . work with Kotzebue to provide a different approach to revising the OWP." Kotzebue Br. at 8, citing Kotzebue Ex. 43, at 6. According to ANA, "the issues were not resolved to ANA's satisfaction." ANA Br. at 9.

On April 25, 2008, ANA notified Kotzebue that it was terminating the grant "for non-performance" effective the date of the notice. Notice of Termination at 1.<sup>5</sup> ANA enclosed with the termination

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5. A copy of the termination notice and attached summary of  
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letter a four-page "summary of findings" detailing the activities on which ANA's decision relied.

By letter dated May 21, 2008, Kotzebue filed a notice of appeal of ANA's decision with the Board.

### Analysis

*Kotzebue received adequate notice of the background and bases of ANA's decision to terminate the grant.*

Kotzebue argues that the Board should summarily reverse ANA's decision to terminate the grant because the April 25, 2008 notice of termination failed to comply with 45 C.F.R. §§ 16.3(b) and 74.90. Section 16.3(b), issued in 1981, provides that before the Board will take an appeal--

The appellant must have received a final written decision . . . . Details of how final decisions are developed and issued, and what must be in them, are contained in 45 C.F.R. § 74.304.

46 Fed. Reg. 43,818 (1981). The referenced section 74.304 of the regulations was reorganized and amended as 45 C.F.R. § 74.90.

Kotzebue contends that ANA's termination notice did not satisfy the criterion at 45 C.F.R. § 74.90(c)(1), that a final decision must include "[a] complete statement of the background and basis of the awarding agency's decision, including reference to the pertinent statutes, regulations, or other governing documents." Kotzebue submits that ANA's termination letter "fails to state the legal authority--the specific 'pertinent statutes, regulations, or other governing documents'--on which it relied to terminate the grant." Kotzebue Br. at 10; see also Kotzebue Reply Br. at 2. Kotzebue also argues that since "ANA did not identify the legal authority for the action," the letter failed to include "[e]nough information to enable the recipient to understand the issues and the position of the . . . agency," as required under 45 C.F.R. § 74.90(c)(2). Kotzebue Br. at 11.

Kotzebue further contends that the defects in ANA's termination notice were not subsequently cured during this appeal. Kotzebue

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findings is included in the record with Kotzebue's notice of appeal.

submits that it "was deprived of notice and opportunity to respond [to ANA's allegation of the legal basis of its action] in the Notice of Appeal, its first critical opportunity to identify issues and state why ANA's decision was wrongly decided." Kotzebue Br. at 11. Moreover, Kotzebue argues, nothing in the termination letter indicates that ANA officials considered or applied the "material failure" standard in section 92.43 in reaching the decision to terminate Kotzebue's grant. In sum, Kotzebue contends, ANA "terminat[ed] the grant with such haste and inattention that it failed to comply with the procedural and substantive requirements of its own regulations." Kotzebue Br. at 19.

ANA responds that section 74.90 is inapplicable here. ANA submits that in 1981, when 45 C.F.R. § 16.3 was issued, Part 74 of the regulations applied to all categories of grantees, including Indian tribal governments. Since that time, ANA argues, the Secretary has significantly amended the regulations at Part 74, added separate regulations to govern grants to state, local and Indian tribal governments at Part 92 (which does not have a corollary provision to section 74.90(c)), and made statements in the *Federal Register* which make clear that the provisions of Part 74 no longer apply to grants to Indian tribal governments. ANA Response at 10-12, citing 53 Fed. Reg. 8079 (March 1988); 45 C.F.R. § 74.4(a)(2)(iv) (1988); 59 Fed. Reg. 43,754, 43,756 (1994). Further, ANA argues, even if section 74.90 controlled in this case, it would not require reversal of the grant termination under Board precedent. ANA Response at 11-12, citing Vanderbilt University, DAB No. 903, at 86 (1987).

We need not resolve ANA's argument that 45 C.F.R. § 74.90 is inapplicable in this case because even assuming it does apply, any insufficiencies in the termination notice under the regulation's criteria were cured in the course of this appeal. The Board has previously held that the description of what a final agency decision must include, which was formerly set forth at section 45 C.F.R. § 74.304(c) and is now found at 45 C.F.R. § 74.90(c),<sup>6</sup> is among several regulatory provisions that "are not intended to provide sanctions for Agency noncompliance and they certainly do not offer the remedy of reversing an Agency determination." Vanderbilt at 86.

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6. The language of the two provisions is essentially the same, and minor differences in the wording of the two are immaterial for purposes of our analysis.

Further, the Board has held that the notice requirement in subsection 74.90(c) will be deemed satisfied (thus curing any inadequacies in a determination letter) if: 1) the agency has provided sufficient information and argument during the appeal to put the grantee on notice of the basis of the decision; and 2) the grantee has been afforded adequate opportunity to respond to the agency's allegations. Id.; Recovery Resource Center, DAB No. 2063, at 7-8 (2007); see also Illinois Department of Public Aid, DAB No. 634 (1985). Thus, the Board has rejected a grantee's argument that an agency's decision to deny a noncompeting continuation award should be reversed because the agency's decision letters cited "no law, regulation, or award condition to justify the [action]," but made only general allegations of grantee management weaknesses. Recovery Resource Center at 8-9. The Board held in Recovery Resource Center that the agency's response brief in the appeal contained sufficient information to satisfy the requirements of section 74.90(c) and that the grantee "had ample opportunity - more than one month - to respond to [the agency's contentions]" when it filed its reply brief. Id.

Here, ANA's April 25, 2008 termination letter and attached summary of findings described the background of ANA's termination decision, including the history of project delays, the technical assistance that had been provided to the grantee, the development of the PIP, the November 2007 site visit, and the project status information that Kotzebue had provided at the March 5, 2008 pre-termination conference call. The notice explicitly stated that ANA was terminating the award "for non-performance" and that the "summary of findings detail[ed] the activities upon which th[e] decision was determined." Notice of Termination at 1.

The summary of findings, in turn, explained that Kotzebue's failures to comply with the terms of the grant fell into three categories: First, the summary stated, Kotzebue was "severely behind schedule" in performing the activities and meeting the objectives of the project that the grantee itself had established in the OWP. Summary of findings at 2. To support this finding, the summary compared the OWP deadlines for the completion of curriculum and teacher training objectives with the status of Kotzebue's work in meeting those objectives at the time of the November 2007 site visit and March 5, 2008 pretermination teleconference. Second, according to ANA, Kotzebue had operated outside the scope of the approved project. Specifically, ANA averred that it had awarded Kotzebue a different language grant for the 2002-2005 period for a project that included the development of the Levels I and II curricula, and Kotzebue had represented that the Levels I and II curricula would be completed by the beginning of the current grant period. Nevertheless, ANA

wrote, Kotzebue "continually reported on conducting activities to complete the Level I and Level II curricula" during the first two years of the current grant. Id. at 3. Third, ANA stated that there were discrepancies in the first year financial reports and that Kotzebue had not accounted for earmarked personnel funds even though "certain staff positions were never filled." Id.

Thus, contrary to Kotzebue's characterization of the documents as "cryptic" and devoid of any reference to the specific terms of the grant allegedly violated (Kotzebue Br. at 11), the notice of termination and summary of findings plainly identified the terms of the award that Kotzebue had failed to meet and described how Kotzebue had worked outside of the scope of the project. The decision did not, however, explicitly cite the regulation that sets forth the legal standard supporting the action.

To ensure Kotzebue would have sufficient notice of that standard and how the Board would analyze the appeal, the Board's June 9, 2008 acknowledgment of the notice of appeal instructed ANA to confirm that the authority on which it relied for the termination was 45 C.F.R. § 92.43 (providing that an agency may terminate a grant if the grantee "materially fails to comply with any term of an award . . ."). Furthermore, to ensure that Kotzebue would have adequate opportunity to respond fully to ANA's position as to the applicable legal standard, the Board advised the parties in the acknowledgment that if ANA notified the Board that section 92.43 was not the applicable authority, the Board would amend the briefing schedule.

On June 18, 2008, ANA's legal representative entered a notice of appearance, a copy of which was sent to Kotzebue, in which she confirmed that 45 C.F.R. § 92.43 was the authority on which ACF's decision to terminate the grant relied. Kotzebue submitted its opening brief approximately one month later, on July 15, 2008, and its reply brief on October 3, 2008. Thus, Kotzebue was afforded ample time and opportunity to respond to ANA's contention that the termination for nonperformance was appropriate based on the "material failure" standard of 45 C.F.R. § 92.43.

Furthermore, the descriptions of the project delays and work outside the scope of the grant that ANA provided in the termination notice and summary of findings, together with ANA's confirmation of the legal standard on which the decision was based, provided Kotzebue "[e]nough information . . . to understand the issues and the position of the HHS awarding agency," as would be required under section 74.90(c)(2). That Kotzebue understood the agency's position is evident in the

arguments Kotzebue made in its notice of appeal, opening brief and reply brief. Kotzebue's notice of appeal responded in detail to the specific factual findings underlying ANA's determination. Kotzebue's opening and reply briefs reiterated the contentions in the notice of appeal and provided detailed argument to support the allegation that ANA had not established that Kotzebue "materially failed" to meet the terms of the grant, as required under section 92.43. Thus, Kotzebue's contentions that it was denied due process because it was not given sufficient information and opportunity to respond to ANA's position and the issues in the case are unavailing.

Accordingly, we reject Kotzebue's arguments that ANA's termination decision should be reversed based on 45 C.F.R. §§ 16.3(b) and 74.90(c), and we conclude that Kotzebue was given sufficient notice of the background of and bases for ANA's termination decision.

*Kotzebue materially failed to comply with the terms of its grant.*

Kotzebue argues that the termination should be reversed because ANA's decision did not allege or demonstrate that Kotzebue materially failed to meet the any of the terms of the award, as required under section 92.43 of the regulations. According to Kotzebue, ANA "[did] not demonstrate that it found a 'material failure,' or that the discrepancies it did identify can be characterized, even post-hoc, as 'material' failures in the administration of Kotzebue's program." Kotzebue Br. at 13.

We disagree. The Board has previously held that a grantee's delay or lack of satisfactory progress in achieving grant objectives may constitute a material failure. Recovery Resource Center at 2-3; Action for Youth Christian Council, Inc., DAB No. 1651, at 8 (1998); American Indian Center of Omaha, Inc., DAB No. 1141, at 8 (1990). Furthermore, the Board has found material failure where a grantee did not timely comply with the special conditions that an awarding agency imposed on a continuation award. Tuscarora Tribe of North Carolina, DAB No. 1835, at 2, 8-11 (2002)(failure to comply with the special condition imposed at the beginning of the second year of the project period, that the grantee "will be serving youth within 90 days," was material failure). The Board also has held that a grantee's use of award funds for work outside the scope of the approved project constitutes a "material failure." See, e.g., New Century Development Corporation, DAB No. 1438 (1993); New Opportunities for Waterbury, DAB No. 1512 (1995).

In this case, the terms, objectives, and scope of Kotzebue's grant were established in regulations, the February 3, 2005 *Federal Register* announcement, Kotzebue's grant application and OWP, and the award notices, consistent with 45 C.F.R. § 92.43(a). Under the terms of the award, Kotzebue was required to perform the activities, comply with the deadlines, and satisfy the staffing requirements established in the OWP in order to "meet[] the results and benefits expected for the project." 70 Fed. Reg. at 5866; see also Kotzebue Ex. 3, at 1; Kotzebue Ex. 18, at 1. Similarly, it was incumbent on Kotzebue to "monitor grant . . . supported activities to assure . . . that performance goals [we]re being achieved." 45 C.F.R. § 92.40(a). Also noteworthy, Kotzebue was responsible for filing timely quarterly financial reports and OPRs. Kotzebue Ex. 3, at 1. The grant announcement further made clear that, before ANA would fund the second or third year of the multi-year grant, it was incumbent on Kotzebue to satisfy the objectives and outcomes established in the OWP for the preceding year. 70 Fed. Reg. at 5865.

Contrary to Kotzebue's contentions on appeal, ANA's notice and summary of findings described in detail Kotzebue's failures in meeting its obligations under these terms. Principally, the notice and summary documented how Kotzebue had not carried out the project as approved in the OWP, and had fallen "severely behind schedule." Summary of Findings at 2. First citing a series of delays in curriculum development, ANA explained in the summary that the Level III curriculum, scheduled under the OWP for completion by the end of the first year of the project (September 2006), was less than 50% complete at the time of the November 2007 site visit. Id. At the time of the March 5, 2008 teleconference, the summary noted, Kotzebue represented that the Level III curriculum would not be finished until the end of the third year (September 2008). Id. Further, ANA wrote in its findings, at the time of the November 2007 site visit, Kotzebue had performed none of the activities associated with the development of the Level IV curriculum, which had been scheduled under the OWP for completion by the end of the second year (September 2007). Id. The summary noted that at the March 5, 2008 conference call, Kotzebue reported that the Level IV curriculum and scope sequence would be completed by the end of the third project year. Id. The summary additionally noted that the Level V curriculum, scheduled under the OWP as the only objective to be achieved in the third year, would not be developed. Id.

ANA's notice and summary of findings also cited the delay in Kotzebue's completion of the Inupiaq grammar book. Scheduled under the OWP to be finished in the fourth month of the first year of the project, the summary explained, the book was only 50% complete at the time of the November 2007 site visit, and Kotzebue reported during the conference call that the book would not be finished until month six of the third year. Id. ANA additionally explained its finding that the teacher training plan activities, scheduled for completion in the tenth month of the first year, were not complete at the time of the November 2007 site visit. Id. The intern training program too, ANA found, had not been completed as scheduled. Id. at 3.

As we described above, the notice and summary of findings additionally cited Kotzebue's work outside the scope of the funded activities as a ground for the termination. ANA wrote in the summary that it had "funded Kotzebue for a previous language grant (90NL0280) for project period 2002-2005" and that the development of the Level I and Level II curricula had been a component of the earlier project. Id. at 3. Further, the summary noted, Kotzebue had advised ANA in a letter dated February 21, 2005 that it had completed the Level I curriculum and anticipated completing the Level II curriculum in June 2005. Id. However, ANA stated in the summary, Kotzebue subsequently reported that it was continuing to work on the Levels I and II curricula during the first two years of the current grant. Id. This work, ANA wrote, plainly fell outside the scope of the current project. Id.

ANA's findings of pervasive and lengthy delays in the project's implementation and ANA's contentions that Kotzebue used project funds for work outside the scope of the current project are substantiated by the record evidence. This evidence shows that, for the first year of the project, Kotzebue filed only three of four required OPRs and one of four required financial statements. ANA Exs. 1-4. Kotzebue reported in these OPRs that it was unable to fill two key project employee positions, the Education Director and Nikaitchuat Director positions. ANA Ex. 2, at 10<sup>th</sup> unnumbered page; ANA Ex. 3, at 11<sup>th</sup> unnumbered page. The evidence further establishes that Kotzebue did not fully achieve either of the two objectives scheduled in the OWP for completion by year's end. Compare Kotzebue Ex. 2, at 39-48 (OWP), and ANA Ex. 4, at 2<sup>nd</sup> - 5<sup>th</sup> unnumbered pages (1<sup>st</sup> year, 4<sup>th</sup> quarter OPR, showing delays in development of curriculum for children ages 7-9 and delays in development of teacher training program); see also Kotzebue Ex. 5. As described above, the evidence establishes that by the end of the first year, Kotzebue had performed less than half of the activities it was required to meet to fully

satisfy the first two project objectives. ANA Ex. 4, at 2<sup>nd</sup>-5<sup>th</sup> unnumbered pages.

During the second grant year, the record evidence shows, the completion dates for the project activities and objectives continued to slip, and the key project employee positions remained unfilled. ANA Exs. 5-9; Kotzebue Ex. 19. By the end of the second grant year, the fourth quarter OPR and cover letter reveal, Kotzebue still had not fully achieved either of the first two objectives of the project (scheduled in the OWP for completion by the end of the first grant year), nor had it achieved the third or fourth project objectives (scheduled in the OWP for completion by the end of the second grant year). Kotzebue Ex. 19, at 4-8. In fact, Kotzebue reported that the first project objective, the completion of the Level III (ages 7-9 years) curriculum, would not be finished until the end of the third year, and that the grammar book and teacher training activities, also to have been completed in the first year, were to be finished in the third year. Id. at 7-8. In addition, Kotzebue had indicated that it no longer intended to develop the Level V curriculum, which was the only OWP scheduled objective for the third year. ANA Ex. 8.

Correspondence in the record further establishes that the project remained substantially delayed through the Winter of 2008, notwithstanding the technical assistance provided to the grantee during the second year and the opportunity ANA gave Kotzebue in the third year conditional award to catch up with the project objectives. Kotzebue reported in its January 28, 2008 letter to ANA that the Level III curriculum and the grammar book, which were to have been completed by September 29, 2006, were only 50% and 75% complete, respectively; and the Level IV curriculum, which was to have been completed by September 29, 2007, was only 15% complete. ANA Ex. 10, Att. B. Further, as it had indicated earlier, Kotzebue reported that it was not attempting to develop the sixth grade, Level V curriculum since the Kotzebue middle school "begins with 6<sup>th</sup> grade." Id. "Nikaitchuat will not attempt to develop 6<sup>th</sup> grade curriculum until such time as the school is ready to undertake a full Middle School program," Kotzebue wrote. Id. Further, the summary of findings attached to the termination notice itself shows that during the March 5, 2008 pretermination teleconference, Kotzebue reported it still had not fully achieved any of the curriculum development objectives. Summary of Findings at 2.

The record additionally substantiates ANA's findings that Kotzebue was performing work outside the scope of the approved project. Kotzebue does not dispute that a previous ANA language

grant funded an earlier project that had included the development of the Levels I (preschool) and II (kindergarten - 1<sup>st</sup> grade) curricula. Nor does Kotzebue dispute that it told ANA in February 2005 that the Levels I and II curriculum work would be completed before September 2005 (the first month of the grant award in question here). Nevertheless, Kotzebue reported throughout the current project that it was continuing to work on the Levels I and II curricula. For example, in its OPR for the September 2005-December 2005 quarter, Kotzebue reported that it was "a little bit behind in the curriculum development process . . . because the team felt strongly that it was important to fully develop the pre-K and Kindergarten materials . . . ." ANA Ex. 2, at 12<sup>th</sup> unnumbered page. Kotzebue stated in the July 31, 2007 cover letter to its April-June 2007 OPR that it was "proceeding with development of the Level II curriculum at a rapid pace . . . ." ANA Ex. 9, at 1<sup>st</sup> unnumbered page. In the last quarter OPR for the second year, Kotzebue wrote that the curriculum work for Level III "was not completed because we have had to focus on earlier grades." Kotzebue Ex. 19, at 7. In a November 5, 2007 letter to ANA's technical assistance provider, Kotzebue acknowledged that its continued work on the lower level curricula did not fall within the parameters of the approved project:

The most important thing for you to know about why so many activities are shown as incomplete is that curriculum work has been going on very intensively during both years of this grant BUT it has not been focused on the grade/age levels that we originally projected. Therefore, I've been forced to keep showing curriculum-related activities as incomplete, and we haven't really been getting any credit for the curriculum work that is going on.

ANA Ex. 22 (emphasis in original). Indeed, it appears that Kotzebue's subsequent proposed revision to the OWP sought to expand the scope of the project retroactively to encompass lower level curriculum work that Kotzebue had been doing during the current project period. See Kotzebue. Ex. 27, at 2-4, 9-11 (revising Objective 1 to include: "By the end of the 36<sup>th</sup> month . . . staff, consultants, and volunteers have finalized curriculum standards for Level I-IV (Preschool-) and developed and approved teaching materials for students for Level II (K-1st Grades) and 50% of lesson plans for Level III (2nd-3rd Grades).").

Thus, the record conclusively establishes that at the time of ANA's April 25, 2008 decision to terminate the grant, the Nikaitchuat capacity building project had experienced lengthy and pervasive delays. Kotzebue failed to perform timely the majority of scheduled project activities and failed to achieve timely any of the project objectives. The record further demonstrates that during the project period, Kotzebue continued to work outside the scope of the approved project. The scope and magnitude of these failures, as detailed above, were substantial. That Kotzebue was unable to adhere to the time frames and deadlines that it had established in the OWP, and that Kotzebue was performing work outside the scope of the approved project, plainly constituted material failure by the grantee to comply with the terms of the award under 45 C.F.R. § 92.43(a). As a grantor of taxpayer dollars to fund community-based projects to promote self-sufficiency, it was ANA's responsibility to ensure that NALA funds were used effectively and consistent with program regulations. Carrying out its responsibility in this case, ANA properly terminated Kotzebue's grant.

Kotzebue argues that the objectives, benchmarks and timelines in the OWP "must be viewed in light of the unique purpose of NALA and the recognition that encouraging tribal self-sufficiency and control is the critical dynamic in a program to preserve and maintain Native language." Kotzebue Br. at 15. Further, Kotzebue writes, the purpose of the statute "is to develop a program responsive to community circumstances and needs, not to apply a one-model-fits-all methodology." *Id.* ANA's findings, Kotzebue submits, "fail to weigh the relative accomplishments of the program (e.g., as of the time it submitted its opening brief, Kotzebue had completed 24 of the 36 activities) against the overall objectives of NALA to preserve and maintain Native language." *Id.* at 16. Conceding that it did not meet the deadlines in the original OWP, Kotzebue argues that "the standards should measure the actual accomplishments and circumstances of a program, not, certainly, the untested estimate of likely timelines included in Kotzebue's original OWP." Kotzebue Br. at 19.

The regulation is clear that the terms of the award with which the grantee must comply are established not only by the authorizing statute, but also by the regulations, the grant application, the notice of award, and other applicable documents. 45 C.F.R. § 92.43(a). Kotzebue's work therefore not only had to be consistent with the overall objectives of NALA, but also had to adhere to the time frames, deadlines, activities and objectives set forth in the OWP, as required by the February 3, 2005 *Federal Register* notice and the August 2005 notice of award.

Moreover, since Kotzebue had been operating the language immersion school for over six years at the time of the grant application, and since Kotzebue had prior experience with the ANA grant process, it was altogether reasonable for ANA to rely on Kotzebue's OWP representations when it decided to award the grant. It is also important to note that where, as here, a discretionary grant was awarded competitively, "[o]ther applicants may not have received funding for their proposals because [the agency] relied on the representations which [the grantee] made in its application." Southbay Community Development Corp., DAB No. 1432, at 11 (1993). Accordingly, we reject Kotzebue's suggestion that it should not be held to the specific terms of its award and that the Board should reverse the termination effectively on equitable grounds.

Kotzebue also argues that its administration of the project should be evaluated not simply based on the terms of the original award, but in light of the terms established under the September 20, 2007 continuation award. Specifically, Kotzebue submits, ANA recognized at the end of the second year that the project was delayed due to unforeseen obstacles and setbacks. Rather than finding material failure and choosing to terminate the grant at that time, Kotzebue argues, ANA imposed conditions on the third year authorization "in order to facilitate completion of grant objectives." Kotzebue Br. at 16. Thus, Kotzebue submits, the continuation award "effectively modified the operative terms of the grant" by requiring Kotzebue to develop a PIP and a revised OWP. Id.; see also Kotzebue Br. at 13, 18; Kotzebue Reply Br. at 7. According to Kotzebue, ANA's subsequent refusal "to approve or even respond to the merits of the OWP should not be imputed to Kotzebue, much less be characterized as a 'material' failure warranting termination of the grant." Kotzebue Br. at 18-19. In sum, Kotzebue argues, ANA "should not be allowed to declare that Kotzebue failed to meet the original grant objectives, as if the change in direction it ordered never happened." Id. at 19.

Kotzebue mischaracterizes the substance and effect of the September 20, 2007, third year continuation award. As reflected in the document itself, the special terms and conditions of the continuation award did not supplant the original terms of the grant. Rather, they were additional requirements that Kotzebue had to meet in order to continue to work into the third year toward achieving the original objectives for the first two years of the project. That this was the purpose of the continuation award is clear from the language of the continuation award, which provided that the release of all but one dollar of the third year funds was conditioned upon Kotzebue's completion of the original OWP objectives for the first two years of the project (Objectives

1-4), as well as the submission of a PIP and catch-up plan. ANA advised Kotzebue that it was providing "a carryover of \$125,475 unobligated funds from Year 1 [for Kotzebue] to *complete Year 1 & Year 2 Objectives in Year 3*," but that Kotzebue must "*first successfully complete Year 1 & Year 2 Objectives*" before the balance of third year funds would be released. Kotzebue Ex. 18, at 1 (emphasis added). Therefore, when, at the end of February 2008, Kotzebue reported that it still had not completed the activities and objectives originally scheduled for completion in the first two years of the project, and that it planned not to fully achieve those objectives until the end of the third year, it was reasonable for ANA to conclude that termination of the grant was warranted.

Furthermore, Kotzebue understood that its work with the technical assistance provider, its development of a PIP, and its submission of a proposed revision to the OWP would not alone guarantee approval of the proposed revision. As Kotzebue's Executive Director has stated, Kotzebue "understood that [the technical assistance provider] was there to provide her expertise in helping us revise the OWP, but that it would have to be approved in Washington." Kotzebue Ex. 43, at ¶ 8. Under 45 C.F.R. § 92.30(d), it is within the awarding agency's discretion to approve a proposed revision to the scope or objectives of a grant project. The Board will not disturb a decision committed to agency discretion unless it is arbitrary. See, e.g., New Century at 7, citing Southbay at 7 (under this standard, the Board considers whether the agency's decision was reasonable, not whether it was the best or only possible decision). Exercising its discretionary authority in this case, ANA determined that Kotzebue's revised OWP was not acceptable since it represented a "deviation from the originally funded project." Kotzebue Ex. 38. Since it appears that the proposed revision sought to expand the scope and objectives of the project to include work on the Levels I and II curricula, which was a component of an earlier ANA grant, and since the revision sought approval of Kotzebue's intention not to attempt to meet the single objective for the third year under the original plan, ANA's decision cannot be deemed arbitrary.

Furthermore, "[a]lthough an awarding agency may, as a matter of policy or prudence, give an award recipient the opportunity to correct noncompliance before imposing termination . . . [the awarding agency is not] precluded from terminating the award at a later date on the same basis on which it could have previously terminated the award." Away from Home, DAB No. 2162, at 19 (2008). Here, while ANA exercised its discretion to permit a carryover of unobligated first year funds to year three in order

to provide Kotzebue an opportunity to catch up with the objectives of the first two years of its project, we see no reason why ANA should be precluded from terminating the award when it later became clear that Kotzebue would be unable to meet the objectives using the carryover funds. In sum, merely because ANA did not terminate the grant at the beginning of the third year did not prevent it from doing so later when the significant delays persisted.

Finally, Kotzebue argues that ANA's termination of the grant was inconsistent with "the spirit of 45 C.F.R. § 74.90(a)," which provides that "final decisions are not issued until it is clear that the matter cannot be resolved through further exchange of information or views." Kotzebue Br. at 12. Kotzebue argues that, in light of its diligent work with ANA staff to develop a PIP and revised OWP, and ANA's failure to explain its delay in responding to the OWP or its reasons for rejecting the revised plan, "ANA did not engage in adequate pre-termination efforts to resolve the matter." Kotzebue Br. at 12; see also Kotzebue Reply Br. at 5-7.

Even if we were to conclude that section 74.90(a) is applicable in this matter, we would find that ANA was not required to engage in any further exchanges of information or views with Kotzebue before terminating the grant. As reflected in the history of the project, ANA issued the decision to terminate the award after more than two years of documented delays in the implementation and achievement of the approved project activities and objectives (delays caused, in part, by working on matters outside the scope of the grant), failure by the grantee to submit all of the required quarterly project and financial reports, the provision of technical assistance to help the grantee meet the original project objectives, and numerous written exchanges and oral communications between the parties. By the end of February 2008, when ANA advised Kotzebue by e-mail that ANA intended to terminate the grant, the parties had already engaged in a lengthy history of "exchange[s] of information and views" (45 C.F.R. § 74.90(a)). These exchanges had not resolved to both parties' satisfaction Kotzebue's desire to continue to receive grant funding for its Native language preservation work and ANA's concerns about the grantee's failure to achieve the original project objectives.

We are also unpersuaded by Kotzebue's argument that ANA unreasonably delayed its review of the OWP and should have provided an explanation as to why it did not respond to the revised OWP sooner. Even though the draft revised OWP was completed by December 4, 2007, the record does not establish that

Kotzebue in fact sent the document to ANA any earlier than January 17, 2008. Furthermore, the additional change-in-scope documents that Kotzebue was required to submit with the OWP were not mailed until January 28, 2008. Kotzebue Exs. 34-35. We find that the period of approximately one month between the submission of all of Kotzebue's proposed OWP documents and ANA's decision not to approve the proposed revision was not unreasonably long. During that period ANA undertook a review of the entire history of the project before reaching its decision, while, presumably, also meeting other workload demands. Kotzebue Ex. 38. Further, while it may have been preferable for ANA to have provided Kotzebue a more detailed response to the merits of the OWP, the agency was under no obligation to do so under the procedures for prior approval of programmatic changes at section 92.30(d) or any other provision.

Finally, we note that ANA did grant Kotzebue's February 29, 2008 request to discuss the matter with ANA representatives before issuing the final termination decision. At the March 5, 2008 teleconference, Kotzebue's Executive Director was given an opportunity to explain the revised OWP and advocate for the plan's acceptance. While Kotzebue was not satisfied with that meeting, ANA's representation that the teleconference did not resolve the outstanding issues to ANA's satisfaction leads us to conclude that any further discussions or exchanges of information likely would have been fruitless. Under the circumstances, we find that ANA did engage in adequate pre-termination efforts to resolve the parties' differences, to the extent, if any, it was required to do so.

### Conclusion

Kotzebue was provided sufficient notice of the background and bases of ANA's decision to terminate the grant. The record fully supports ANA's determination that Kotzebue materially failed to

comply with the terms of its grant award. Accordingly, we sustain the ANA determination to terminate Kotzebue's grant.

\_\_\_\_\_/s/  
Judith A. Ballard

\_\_\_\_\_/s/  
Stephen M. Godek

\_\_\_\_\_/s/  
Sheila Ann Hegy  
Presiding Board Member