

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Economic Opportunity Commission of Nassau County, Inc.
Request for Reconsideration of Decision No. 2731
Ruling No. 2017-1
January 26, 2017

RULING ON REQUEST FOR RECONSIDERATION

Economic Opportunity Commission of Nassau County, Inc. (EOC), a Head Start grantee, asks the Board to reconsider the decision in *Economic Opportunity Commission of Nassau County, Inc.*, DAB No. 2731 (2016). The Board sustained a decision by the Office of Head Start, Administration for Children and Families (ACF) disallowing \$879,876 in employee salary and fringe benefit costs. The Board may reconsider its own decision “where a party promptly alleges a clear error of fact or law.” 45 C.F.R. § 16.13.

For the reasons discussed below, we conclude that EOC’s reconsideration request does not demonstrate any legal or factual error in the Board’s decision. EOC’s request mainly repeats its prior arguments on appeal and includes documentation that is similar to the exhibits on which it previously relied. As we further explain below, EOC filed an additional brief and exhibits after ACF filed a response to EOC’s reconsideration request. EOC’s additional submission, filed without leave, makes new representations and includes exhibits which EOC admits it could have produced earlier. EOC was responsible for ensuring that all arguments and evidence were included in those submissions. The Board has repeatedly held that arguments, representations, and evidence that an appellant could have submitted with its appeal (but did not) are not considered allegations of errors of fact or law justifying reconsideration of a decision.

Accordingly, we deny EOC’s Request for Reconsideration.

1. Summary of the Board’s decision

In DAB No. 2731, the Board upheld the decision by ACF to disallow \$879,876 in employee salary and fringe benefit costs for 78 employees for the period, August 1, 2010 through July 31, 2011. ACF based the determination on an Office of Inspector General

(OIG) audit report, which concluded that the costs were not properly documented by personnel activity reports meeting the requirements at 2 C.F.R. Part 230, Appendix B, ¶ 8.m.¹

Under the documentation requirements, a Head Start grantee's charges to its federal "awards for salaries and wages, whether treated as direct costs or indirect costs," must "be based on documented payrolls approved by a responsible official" of the grantee organization." 2 C.F.R. Part 230, App. B, ¶ 8.m.(1). The grantee must keep "personnel activity reports" that reflect "the distribution of activity of each employee ... whose compensation is charged, in whole or in part, directly to awards." *Id.* App. B, ¶ 8.m.(1)-(2). The personnel activity reports must: (1) "reflect an after-the-fact determination of the actual activity of each employee"; (2) "account for the total activity for which employees are compensated ..."; (3) be "signed by the individual employee, or by a responsible supervisory official having first hand knowledge of the activities performed by the employee, [and indicate] that the distribution of activity represents a reasonable estimate of the actual work performed by the employee during the periods covered by the reports"; and (4) be "prepared at least monthly and ... coincide with one or more pay periods." *Id.* ¶ 8.m.(2)

Following review of the OIG audit report, ACF's decision, and the parties' arguments and exhibits, the Board concluded that EOC's documentation to support the disallowed costs did not satisfy the requirements at 2 C.F.R. Part 230, App. B, ¶ 8.m.(1)-(2). The OIG audit found that staff at five of EOC's seven Head Start centers made handwritten notations on timesheets produced by EOC's new electronic timekeeping system (TimeStar) to show the distribution of activity for each employee -- that is, how much time the employee spent on each of EOC's federal awards. ACF Ex. 2, at 1-3. The amended time sheets were signed by a responsible supervisory official. *Id.* Staff at the remaining two Head Start centers and EOC's administrative office, however, "did not always record their time spent on Federal awards." *Id.* at 2-3. According to the OIG audit report, this "occurred because EOC did not update its policies and procedures for time and effort reporting when it" began to use TimeStar in January 2010. *Id.*²

¹ This decision cites to the regulations in effect during the August 1, 2010 through July 31, 2011 cost period at issue. Under these regulations, a Head Start grantee must (with some exceptions not relevant here) comply with the grant administration requirements in 45 C.F.R. Part 74. 45 C.F.R. § 1301.10. The Part 74 regulations required a nonprofit grantee to comply with OMB Circular A-122, "Cost Principles for Non-Profit Organizations." *Id.* §§ 74.2, 74.27(a). During the cost period at issue here, OMB Circular A-122 was codified at 2 C.F.R. Part 230.

² During the on-site visit, the auditors advised EOC that the timesheets without the distribution of activity information did not satisfy the regulatory requirements. EOC staff subsequently added work allocation information to the timesheets and proffered the altered documents to the auditors. ACF Br. at 7; DeGroff Decl. ¶ 8. The auditors advised EOC that the altered timesheets did not satisfy 2 C.F.R. Part 230, App. B, ¶ 8.m. because they had not been prepared on at least a monthly basis, coinciding with the pay periods covered by the timesheets.

The Board determined that the timesheets generated by the TimeStar system did not satisfy the personnel activity report requirements because they did not include distribution of activity information. The Board noted that the timesheets that EOC submitted with its appeal brief contained either handwritten notations indicating the amount of time that the employee worked on Head Start and other programs, or a chart indicating that 100 percent of the employee's work related to Head Start. EOC admitted in its reply brief, however, that it had added the time allocation information to the timesheets after the OIG auditors' on-site review, many months after the periods that the reports covered. The Board explained that the belatedly-altered timesheets were not acceptable because they had not been prepared monthly to coincide with the covered pay periods.

EOC also submitted Payroll Transfer Schedules and Labor Distribution Reports generated by another software system to support the disallowed costs. According to EOC, its different software systems produced "several reports that, taken together" satisfied the regulations. EOC Reply at 2, 6. The Board rejected this argument, determining that the Labor Distribution Reports and Distribution Codes List contained employee allocation of work information, but did not show the bases for the allocation amounts and were not signed by the employees or supervisors with firsthand knowledge of the employees' work. Consequently, the Board concluded, the Labor Distribution Reports and other documents did not meet the regulatory requirements.

Lastly, the Board responded to EOC's request to reverse the disallowance on the ground that it would be unduly harsh and unfair in light of EOC's excellent stewardship of its Head Start program and its lack of funds to pay the disallowance. The Board explained that it is bound by all applicable regulations and could not provide equitable relief to EOC.

2. Analysis

A. EOC's reconsideration request does not establish any error of fact or law in the Board's decision.

EOC's Request for Reconsideration repeats EOC's prior argument that the TimeStar system timesheets and activity reports, together with EOC's payroll and accounting system reports, provided all of the information required under 2 C.F.R. Part. 230, App. B, ¶ 8.m. Request for Reconsideration (RR) at 2-3. EOC explains that employees log in daily to the TimeStar system, which records their hours, and at the end of the pay period, the employees and supervisory officials with first-hand knowledge of the employees' activities electronically approve/sign the employees' total hours by pay type (e.g., holiday, regular, vacation). RR at 2; RR Exs. A-C (TimeStar Timesheet, Login Module, Total

Hours Report). The system then generates Daily Summary Reports, which show each employee's total hours for the pay period; and a Combined Pay by Type Report, which groups total hours by pay type. RR at 3; RR Ex. D. EOC's TimeStar exhibits are similar to the exhibits EOC submitted on appeal and confirm that the timesheets reviewed by supervisors do not include distribution of activity information. Rather, the documents list employee time only by "pay type," such as, "REG," "VAC," and "HOL."

EOC again asserts that its accounting department enters the TimeStar information into EOC's payroll and accounting system, which creates the Labor Distribution Reports and Payroll Transfer Schedules. RR at 3; RR Ex. E. The Labor Distribution Reports show each listed employee's efforts and earnings allocated to different programs (e.g., Head Start, CSBG, HIV). *Id.* For each employee on the list, the reports also show the "allocation percentage" of the employee's work associated with each program. *Id.*

EOC characterizes the Labor Distribution Reports as "activity reports which are generated based on the [TimeStar] timesheets that are electronically signed by both the employee and the responsible supervisory official," and, EOC states, "there is no requirement by law that every aspect of the activity reports be signed." RR at 4.³ At the same time, EOC explains that "the allocation percentages" in the reports are "calculated using the total amount of financial transactions for all activities of the organization as a distribution basis, divided by the financial transactions relating specifically to the Head Start Program." *Id.*; RR Ex. F (Allocation Calculation). EOC contends that "[t]his method ... is wholly allowable under the Law" and is "only relevant to the 10 employees whose salaries represent indirect administrative costs." *Id.* Further, EOC states, there is "no reason for an allocation of time for the 68 employees who were assigned exclusively to the Head Start Program, when 100% of the compensation is a direct cost which is evidenced in both the Labor Distribution Report and the Payroll Transfer Schedule (See Exhibit E)." *Id.*

³ EOC argues that the OIG auditors determined that the only properly-documented salary and fringe benefit costs were those supported by timesheets with labor distribution notations, and the auditors "at no time requested other evidence of time and reporting documentation which was always available to the auditors upon request." RR at 3. Responding to this allegation, a senior OIG auditor states that the auditors told EOC "multiple times that [they] would accept audit evidence either electronically or handwritten," and "explained that accounting department labor distribution reports are not considered personnel activity reports because they are not signed or reviewed by the employee or the employee's supervisor." ACF Response to RR, Ex. 1, ¶ 8. EOC's suggestion that the auditors failed to provide EOC sufficient opportunity to present all of its documentation supporting the questioned costs, even if true, is irrelevant because the documentation that EOC provided on appeal does not satisfy the personnel activity report requirements.

The signature requirement at 2 C.F.R. Part 230, App. B, ¶ 8.m.(2)(c) provides: “The reports must be signed by the individual employee, or by a responsible supervisory official having first hand knowledge of the activities performed by the employee, *that the distribution of activity represents a reasonable estimate of the actual work performed by the employee during the periods covered by the reports.*” (Emphasis added.) Thus, the regulation explicitly requires signature approval not only of the total hours for which the employee was paid, but also the allocation of labor to the grantee’s awards. The TimeStar timesheets do not meet this requirement because they do not include distribution of activity information. DAB No. 2731, at 6. A supervisor’s electronic approval/signature in the TimeStar system of an employee’s electronic timesheet constitutes approval only of the number and type of hours the employee worked. The electronic approval/signature of the TimeStar timesheet does not constitute approval of the Labor Distribution Reports or Payroll Transfer Schedules because those reports are subsequently and separately prepared by the accounting department and contain additional labor distribution information that is not reviewed and approved by the employees or their supervisors. Furthermore, EOC’s contention that there was no reason for it to maintain allocation of time information for the 68 employees who were assigned only to Head Start is incorrect. Under the plain language of the regulation, personnel activity reports are required for each employee “whose compensation is charged, *in whole or in part*, directly to awards.” 42 C.F.R. Part 230, App. B, ¶ 8.m.(2) (emphasis added).

Furthermore, EOC’s argument that we should accept the percentage work allocations in its Labor Distribution Reports because they were based on its allowable indirect cost allocation methodology undercuts its contention that its documentation meets the criteria at 2 C.F.R. Part 230, App. B, ¶ 8.m.(2). ACF did not disallow the salary and fringe benefit costs because it concluded that EOC’s methodology for allocating indirect costs was impermissible. ACF Response to RR at 5. Rather, it disallowed the costs because they were not documented by personnel activity reports, which must include a reasonable, after-the-fact determination of the *actual amount of time the employees worked on Head Start matters*, as required under 2 C.F.R. Part 230, App. B, ¶ 8.m.(2). EOC’s explanation of the basis for the percentage work allocations in the Labor Distribution Reports thus clarifies that the allocations are in fact *not* based on the amount of time the employees actually worked on Head Start matters.

EOC additionally contends that the Board erred in concluding that the Board was not authorized to waive the disallowance on equitable grounds. EOC argues that its appeal is distinguishable from the factual scenarios presented in the cases cited by the Board in DAB No. 2731. RR at 5, citing *Municipality of Santa Isabel*, DAB No. 2230, at 10-11 (2009); *accord Bedford Stuyvesant Restoration Corp.*, DAB No. 1404, at 20 (1993). EOC states that the appellants in those cases did not dispute any material fact or identify a

legal basis for reversing the agency decisions. Furthermore, EOC argues, the Board stated in *Huron Potawatomi*, DAB No. 1889, at 9 (2003), that it does not have the authority to forgive a disallowance where the grantee does not contest the legal or factual basis of the disallowance, but merely seeks equitable relief. In contrast, EOC argues, it “expressly disputes the conclusions reached by ... ACF...” RR at 6. “Thus,” EOC asserts, “the Board is not precluded from providing an equitable remedy made to address the negative effects of a disallowance that is factually and legally insufficient.” *Id.*

EOC is mistaken that the grantees in the cited decisions did not contest the factual or legal bases of the agency determinations. *Municipality of Santa Isabel*, DAB No. 2230, at 6-8 (stating, “the only question before [the Board] is whether any of the legal arguments made by the Municipality in its appeal ... provide a basis for reversing ACF’s determination to terminate the grant”); *Bedford Stuyvesant Restoration Corp.*, DAB No. 1404 (grantee challenged agency’s assertion that it had drawn down federal funds absent necessary matching funds; agency’s position that matching funds must be received before federal funds are drawn down; and agency’s conclusion that grantee had not made substantial progress and efforts toward completion of the grant). In any event, as the Board explained in these decisions and in DAB No. 2731, it is authorized to resolve legal and factual disputes and is bound by all applicable law and regulations; it is not authorized to waive an agency’s legally sound decision to terminate an award or issue a disallowance. Thus, where a disallowance, termination or other authorized agency action is legally sufficient, the Board may not provide equitable relief to the grantee regardless of whether the grantee has challenged the factual or legal basis of the action. For the reasons discussed in DAB No. 2731 and above, we conclude that ACF’s disallowance in this case was factually and legally sufficient. Accordingly, there was no error in the Board’s conclusion that it was not authorized to provide equitable relief to EOC.

B. *EOC’s additional submission does not establish grounds for reconsideration of the Board’s decision.*

As noted above, EOC filed an additional brief and exhibits after ACF filed a response to EOC’s reconsideration request.⁴ EOC states in the additional submission that, “notwithstanding the fact that the separate reports previously submitted by EOC, taken together,” satisfy the personnel activity report requirements, “extended due diligence has manifested additional evidence of EOC’s compliance which existed during the Audit period, but was not presented.” RR Reply at 2. Specifically, EOC states, the TimeStar system has a reporting feature, of which EOC was previously unaware, that shows the

⁴ On receipt of EOC’s Request for Reconsideration, the Board issued a notice providing ACF an opportunity to submit a response but did not provide an opportunity for any additional submissions by the parties.

number of hours worked by each employee, the position of the employee, and the programs to which the employee was assigned. *Id.* at 3. According to EOC, “These timesheets are maintained monthly and show the electronic approval of the supervisor providing first-hand knowledge of the total activities performed by the employee.” *Id.* Thus, EOC asserts, its “compliance was inherently contained within its Time Management software,” and its new evidence establishes “a clear error in the Board’s decision ...” *Id.* EOC also argues for the first time that “10 of the 78 EOC employees’ salaries are those of a general administration classification which require indirect cost treatment.” *Id.* at 4. EOC states that it was not required to maintain personnel activity reports for these employees because 2 C.F.R. Part 230, App. B, App. B, ¶ 8.m., requires personnel activity reports only for employees whose salaries were charged in whole or in part directly to the awards. In addition, EOC asks the Board for the first time to waive the personnel activity report requirements because they have been eliminated under current rules, which may be applied retroactively by mutual agreement between the grantee and federal agency. *Id.* at 5.

The Board’s regulations at 45 C.F.R. Part 16 put EOC on notice that it is the “appellant’s responsibility” to submit to the Board an “appeal file containing the documents supporting the claim,” that is, “those documents which are important to the Board’s decision on the issues in the case.” 45 C.F.R. § 16.8(a). The Board’s acknowledgment of EOC’s appeal also explained that the Board “may decide the case based solely on the” parties’ briefs and appeal files; “appeal files should therefore include all documents which would assist the Board in making findings of fact on disputed issues, as well as documents which provide necessary background information.” Acknowledgment of Notice of Appeal at 3. Moreover, the Board has held that “[a]rguments, representations, and evidence that were not previously submitted are not considered to be allegations of an error of fact or law justifying reconsideration of a decision.” Ruling on Request for Reconsideration of *Puerto Rico Dept. of Health*, DAB No. 2385 (2011), Board Ruling No. 2011-5, at 2 (Sept. 30, 2011); *see also* Ruling on Request for Reconsideration of *Peoples Involvement Corp.*, DAB No. 1967 (2005), Board Ruling No. 2005-2, at 2 (Apr. 29, 2005) (a “motion for reconsideration is far too belated a context in which to undertake to present [additional] documentation” where the grantee “made no claim that this documentation was not available to it earlier in this process”).

EOC’s late submission makes new arguments and relies on documents provided for the first time. EOC does not allege that it could not have produced the new evidence or have made the new arguments earlier. Indeed, EOC acknowledges that it had access to the information in its TimeStar system as long ago as when the auditors conducted the on-site visit; it simply did not exercise “due diligence” until after we issued our decision. EOC

also does not allege that it did not have ample notice that it was required, during the appeal, to make all arguments and submit all documents that, in its view, established that ACF's disallowance determination was incorrect. Accordingly, we reject these arguments and documents as a basis for reconsideration because they were not made or submitted during the appeal.

Conclusion

For the reasons discussed above, we find no clear error of fact or law and therefore decline to reconsider DAB No. 2731.

_____/s/
Leslie A. Sussan

_____/s/
Susan S. Yim

_____/s/
Christopher S. Randolph
Presiding Board Member