

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Delta Health Alliance, Inc.
Request for Reconsideration of Decision No. 2624
Ruling No. 2015-2
July 21, 2015

RULING ON REQUEST FOR RECONSIDERATION

On April 29, 2015, Delta Health Alliance, Inc. (DHA) asked the Board to reconsider in part and amend its March 12, 2015 decision, *Delta Health Alliance, Inc.*, DAB No. 2624. In that decision, the Board upheld in part and reversed in part a disallowance of \$1,089,052 DHA charged to a grant awarded by the Health Resources and Services Administration (HRSA) for the period July 1, 2009 through November 30, 2011 for a project titled “Delta Health Initiative” (DHI). The Board also remanded the case to HRSA “to obtain input from the Division of Cost Allocation regarding whether DHA’s indirect cost rate agreement should be reopened and recalculated to take into account certain legal fees that we find are not properly charged as direct costs.”¹ DAB No. 2624, at 1. In its request for reconsideration, DHA alleges that the Board made “a clear error of law” in not remanding “*all* disallowed direct costs . . . for consideration as indirect costs” and that “the failure to reallocate as indirect costs the disallowed direct costs (that otherwise would have been properly allowed as indirect costs) is a clear error of fact.” Motion of Appellant to Reconsider and Amend Decision (Motion to Reconsider) at 2 (*italics in original*).

The Board may grant a request for reconsideration if a party promptly alleges a “clear error of fact or law.” 45 C.F.R. § 16.13. As explained below, we find no error of law or fact because DHA did not previously argue that any disallowed direct costs could lawfully have been charged to the DHI grant through DHA’s indirect cost rate. Accordingly, we deny DHA’s request for reconsideration.

¹ “An indirect cost rate is a method for allocating indirect costs (that is, costs that cannot be readily identified with a particular final cost objective) among all of the activities that benefit from those costs.” *Piedmont Cmty. Actions, Inc.*, DAB No. 2595, at 1 (2014). “Depending on the organization’s functions, indirect costs may be accumulated into an indirect cost grouping (or pool) or into separate, multiple cost groupings and then allocated to benefitting functions through use of an indirect cost rate or rates.” *Id.* at 4.

The remand in DAB No. 2624 was a limited remand, pertaining only to a disallowance of charges for certain legal fees. On appeal, DHA initially acknowledged that none of the legal fees should have been charged as direct costs of the DHI grant, but argued that they should have been included in calculating DHA's indirect cost rate and reimbursed as indirect costs. DAB No. 2624, at 38. In a February 2, 2015 Order to Develop Record (Order), the Board asked the parties to address whether a remand would be appropriate if the Board were to conclude that any legal fees could properly have been charged as indirect costs. In response to the Order, DHA took the position that the legal fees are allowable under the applicable cost principles as direct costs, but stated that if the Board were to find that the legal fees are not allowable as direct costs, a remand would be appropriate. *Id.* at 40. HRSA took the position that that "assuming they are otherwise proper, legal fees are direct costs" but stated that "in the event the [Board] concludes otherwise, HRSA has no objection to remand." *Id.* n.42 (citations omitted). DHA then replied to HRSA's response to the Order, stating in relevant part:

HRSA's position is that the legal fees...are allowable as direct costs, assuming they are found to be sufficiently Grant-related. DHA concurs with HRSA's position . . .

In the alternative, HRSA states it has no objection to remand for recalculation of DHA's likely increased indirect cost rate. *DHA again concurs with HRSA's position and contends that any disallowed direct expenses that otherwise would have been properly counted as indirect expenses should be remanded for input from the Division of Cost Allocation as to what effect the larger indirect expense total would have on DHA's indirect cost rate.*

Feb. 10, 2015 Reply to HRSA's Response to Order to Develop Record at 2 (italics added).

The Board concluded that some of the legal fees were not allowable as direct costs of the DHI grant because they related to DHA's internal investigation of a DHA employee's allegations that DHA's CEO misused federal funds generally and thus benefitted all of the federally-funded programs operated by DHA. DAB No. 2426, at 40. The Board thus upheld the disallowance of these legal fees but remanded the case for a determination as to whether DHA's indirect cost rate for the relevant periods should be reopened and recalculated to take these legal fees into account. *Id.* at 41.

In its request for reconsideration, DHA contends that in its reply to HRSA's response to the Order, DHA "made clear that it sought remand, for consideration as indirect costs, [of] 'any' disallowed direct expenses that otherwise would have been properly counted as indirect expenses[.]" Motion to Reconsider at 2. We do not agree that it is clear from

DHA's use of the word "any" that it was seeking remand for consideration of potential indirect cost eligibility of any cost other than the legal fees. The question in the Board's Order to which the parties were responding asked only whether the parties would object to a remand as to any legal fees that the Board might find were allowable costs but not solely allocable to the DHI grant. DHA's and HRSA's responses both specifically addressed only the legal fees. Thus, in context, the reference in DHA's reply to "any disallowed direct expenses" is limited to the specific legal fees at issue.

DHA does not assert, nor are we aware, that it raised the issue of whether other disallowed direct costs could properly be charged through an indirect cost rate elsewhere in its submissions on appeal. Since DHA did not raise this issue in the Board proceedings on its appeal, the Board did not err in not considering it.

Even if the Board were to consider this issue now, it could not simply expand the scope of the remand to cover additional disallowed direct costs. DHA asks that the remand be expanded to cover costs the Board found unallowable only on the ground that they were not properly charged to the DHI grant as direct costs, not on the ground that they were otherwise unallowable costs such as "expenses for lobbying, alcoholic beverages, donations, entertainment, etc."² Motion to Reconsider at 2. DHA does not identify specific disallowed costs that fit this description of costs it believes should be subject to remand. However, even assuming it had, before the Board could determine whether a remand would be appropriate as to any additional costs so identified, the Board would need to reopen the case and make additional findings, which might necessitate additional development of the record. For example, the Board did not reach the issue of whether the costs in the category Event Costs are unallowable entertainment costs under the cost principles at 2 C.F.R. Part 230, App. B, ¶ 14. *See* DAB No. 2624, at 19-20. The Board did not do so because a basis existed for upholding the disallowance that rendered that inquiry unnecessary. DHA has not identified any authority for the Board to reopen to develop the record on issues not raised by an appellant while the case was pending and, thus, not reached or decided by the Board. Reopening under these circumstances would also undercut the principle of administrative finality reflected in the Board's procedures and the law generally.

Finally, we note that DHA's request for reconsideration also states: "To the extent that reallocation of direct to indirect costs can be made here, rather than on remand to HRSA and the Division of Cost Allocation, DHA requests that the Departmental Appeals Board perform that reallocation." Motion to Reconsider at 2. This request reflects a misunderstanding of the process for developing indirect cost rates. Generally, indirect

² As DHA recognizes, costs that are not directly allocable to a grant must be otherwise allowable to be charged to the grant through an indirect cost rate. *See* 2 C.F.R. Part 230, App. A, ¶ A.2.a, d, e, g (quoted in DAB No. 2624, at 3).

costs may be charged to an award only through an approved indirect cost rate. *See, e.g.*, 2 C.F.R. Part 230, App. A, ¶¶ D.3.e., E. As DAB No. 2624 indicates, DHA had an indirect cost rate agreement approved by the Department's Division of Cost Allocation (now called Cost Allocation Services) that included a final rate for the period July 1, 2009-June 30, 2010, and a provisional rate from July 1, 2010 until amended. DAB No. 2624, at 4 n.5, *citing* DHA Ex. 110, at 6. The agreement stated that if the information provided by the organization which was used to establish the rate was materially incomplete or inaccurate, the rate would be subject to renegotiation at the discretion of the federal government. *Id.* at 41 n.44, *citing* DHA Ex. 110, at 8. Consultation between HRSA and DCA will be needed to decide whether DCA should reopen that agreement and renegotiate the rates for one or both of the years at issue here. *See Piedmont Cmty. Actions, Inc.* at 25. Moreover, HRSA, not the Board, would have the information necessary to recalculate the disallowance were revised rates to be negotiated. Thus, even if we concluded that reconsideration is appropriate (which we do not), a remand would be necessary.

/s/

Stephen M. Godek

/s/

Leslie A. Sussan

/s/

Sheila Ann Hegy
Presiding Board Member