Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Southeastern Michigan Health Association
Docket No. A-16-4
Decision No. 2682
March 18, 2016

DECISION

The Southeastern Michigan Health Association (SEMHA) appeals a disallowance of $528,602.83 in administrative fee costs claimed under a grant from the Office of the National Coordinator (ONC) for the period of September 1, 2010 to September 30, 2013. ONC determined that SEMHA's charge of five percent (5%) of grant funds as an administrative fee was not allowable under applicable cost principles and contended that SEMHA could only charge to the grant costs that it could demonstrate directly benefited the grant.

Because we find that SEMHA, despite multiple opportunities to do so, failed to demonstrate that any part of the charge represented costs that could be documented to be allowable and have benefited the grant, we uphold the disallowance in full.

Factual background

SEMHA is a not-for-profit organization, composed of a consortium of the eight local public health departments serving Southeast Michigan. SEMHA Br. at 3.

SEMHA applied for and received a cooperative agreement for a Beacon Communities Program (Beacon grant) from ONC, funded under the authority of the Public Health Service Act, Sec. 3011, as added by the American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5) codified at 42 U.S.C. § 300jj-31. SEMHA Exs. A and B (original and revised notices of grant award (NGAs)). The objective of the Beacon grant was to "[e]xpand the role of electronic health record exchange, across the continuum of care, in the provision of coordinated care." SEMHA Ex. A, at 7.[1]

[1] The electronically submitted exhibits were not consecutively numbered. We cite to the pages by counting from the cover sheet of each exhibit.

We discuss the course of the grant project in more detail as part of our analysis, but we note that from the beginning SEMHA charged the grant an "administrative fee" of 5% of the total grant award. ONC disallowed the total amount of this administrative fee.[2]

This matter is before the Board for the second time. ONC first issued a disallowance of all administrative costs under the Beacon grant on October 30, 2013. SEMHA Ex. L; ONC Ex. 6. SEMHA timely appealed that decision. After correspondence between the parties, in April 2014, ONC agreed to withdraw the disallowance subject to redetermination, and SEMHA withdrew its appeal without prejudice. ONC Exs. 4-6 (correspondence between the parties). ONC and SEMHA thereafter engaged in discussions and document exchanges aimed at determining whether SEMHA could document administrative costs that could be directly charged to the Beacon grant. ONC Br. at 5-6 (and exhibits cited therein).

After significant delays, ONC issued a new disallowance on September 22, 2015 which again found SEMHA's fee unallowable and concluded that efforts to document an alternative claiming approach had failed. SEMHA again filed a timely appeal.

Legal Authorities

Nonprofit organizations receiving federal funds were, at the relevant time, subject to cost principles in Office of Management and Budget (OMB) Circular A-122 applied to grants of the Department of Health and Human Services by federal regulations at 45 C.F.R. § 74.27(a) and codified at 2 C.F.R. § 230, App. A. The cost principles govern the allowability of direct costs, as well as the appropriate identification and allocation of direct and indirect costs. *Home Educ. Livelihood Program, Inc.*, DAB No. 1598, at 5-6 (1996). The general criteria require that, to be considered allowable under a grant award, costs must –

> a. Be reasonable for the performance of the award and be allocable thereto under these principles.
> b. Conform to any limitations or exclusions set forth in these principles or in the award as to types or amount of cost items.
> c. Be consistent with policies and procedures that apply uniformly to both federally-financed and other activities of the organization.
> d. Be accorded consistent treatment.
> e. Be determined in accordance with generally accepted accounting principles (GAAP).

[2] SEMHA originally sought reimbursement of $536,827.84 for its fee which ONC disallowed. SEMHA later reduced its claim "in good faith" during the appeal to $528,602.83, so that amount remains in dispute. SEMHA Br. at 2.

> f. Not be included as a cost or used to meet cost sharing or matching requirements of any other federally-financed program in either the current or a prior period.
> g. Be adequately documented.

2 C.F.R. § 230, App. A at ¶ A.2. To be allowable, all costs must be thus both reasonable for the performance of the grant award and allocable thereto. *Id*. Allocability is the "core concept" that a federal grant may only be charged for costs of activities from which that grant benefits - and that "when multiple programs receive some benefit from an activity, the costs of that activity should be shared in a manner that fairly reflects the relative degree to which each benefits." *Pa. Dep't of Pub. Welfare*, DAB No. 2653, at 9 (2015). To be allocated to a grant, therefore, a cost that benefits more than one activity of the grantee must be able to be "distributed in reasonable proportion to the benefits received." 2 C.F.R. § 230, App. A at ¶ A.4.a(2).

The Board has consistently held that it is a fundamental principle of grants management that a grantee "bears the burden of demonstrating the allowability and allocability of costs for which it received federal funding." *Bright Beginnings for Kittitas Cty*., DAB No. 2623, at 5 (2015); *see also Council of the S. Mountains*, DAB No. 1861, at 3 (2003); *Tex. Migrant Council, Inc*., DAB No. 1743, at 4 (2000).

A cost is "reasonable" if it is the type generally recognized as ordinary and necessary for the operation of the organization or performance of the award, and allocable to the award in accordance with the relative benefits received. 2 C.F.R. § 230, App. A at ¶¶ A.3.a, A.4. A reasonable cost must not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. *Id*. at ¶ A.3.

It is well-established that the burden of demonstrating that an expenditure claimed under grant is supported by adequate documentation, once that question has been raised by the granting agency, lies with the grantee. *Galveston Cty. Comm. Action Council*, DAB No. 2514, at 2 (2013); *Northstar Youth Servs., Inc.*, DAB No. 1884, at 5 (2003). That burden "includes 'demonstrating that its allocation methodology was reasonable.'" *Pa. Dep't of Pub. Welfare* at 10 (2015), quoting *Mo. Dep't of Soc. Servs.*, DAB No. 1783, at 25 (2001).

In addition to these overarching provisions, the cost principles set out requirements applicable to specific types of costs. 2 C.F.R. § 230, App. B. We set these out below where relevant to particular cost items that SEMHA sought to charge as direct costs to the Beacon grant in place of the disallowed flat fee.

Analysis

1. ONC correctly determined that the flat administrative fee originally charged by SEMHA is unallowable.

The dispute in the present matter appears to result from SEMHA bringing to its receipt of the Beacon grant a perspective on grants management based on its experience in other contexts in which it assisted grantees rather than itself serving as a grantee. Thus, SEMHA describes its usual experience as follows:

> In the typical grant funding model with which SEMHA is involved, when a public health agency receives grant funding, that recipient agency contracts with SEMHA to provide fiduciary services regarding the grant funds. SEMHA is therefore a contractor/vendor to the state, local and grant recipient. Funds entrusted to SEMHA essentially pass through it to support the grant recipient's grant-funded community-based health programs.[2]
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> 2 Occasionally, SEMHA will directly receive specified grant funding on behalf of state, local or private clients which SEMHA then subcontracts to a grant program administrator who contracts with vendors to perform the grant's scope of service.

SEMHA Br. at 3. In short, SEMHA typically is "merely a contract partner to the state, county and local health departments that are the grant recipients." *Id*. at 4. SEMHA reports that it has historically charged an administrative fee of 5% of the total grant funds for its grant support services which reflects "building costs, utilities, office costs like copying and telephone service, and time spent by SEMHA central administrative staff such as the Executive Director, CFO, personnel, payroll and benefits staff." *Id*. at 4, n.4.

SEMHA asserts that it applied for the Beacon grant on behalf of the Southeast Michigan Health Information Exchange (SMHIE) (a group of which SEMHA is a member). *Id*. at 5. SEMHA acknowledges, however, that (as the Notice of Grant Award establishes) SEMHA itself was the "direct grant recipient of the Beacon grant," apparently because SMHIE was not a qualified nonprofit at the time. *Id*.

ONC, for its part, apparently began to have concerns about the implementation of the grant project early on. As early as November 2010, ONC staff was communicating with SEMHA about providing better breakdowns of costs and began imposing restrictions on drawdowns of federal funds absent such information. SEMHA Ex. A, at 10. ONC expressed concerns about the structuring and staffing of the project and about SMHIE's capacity to carry out any leadership role. These discussions resulted in a December 13, 2010 ONC meeting with the Beacon grant team members. ONC Ex. 1. SEMHA describes ONC as asking it to "become" the "lead agency" for the Beacon grant in January 2011, but we do not see documents supporting this characterization of events.

SEMHA Br. at 6. In fact, ONC's December 23, 2010 letter pointed to multiple issues with the project management, including lack of clarity in accountability, workflow and governance, and exhorted SEMHA **as** "lead grantee" to step forward and provide more effective leadership. ONC Ex. 1, at 1-2.

The reality is that, from the beginning, SEMHA was indeed the direct grantee and undertook all the responsibilities of a grantee. Its role was **not** that of a fiduciary passing through funds to others, nor that of a "contract partner" providing administrative services to other grantees.[3] While SEMHA may have envisioned itself as brokering arrangements in which it was not the "lead agency," the NGA plainly identifies SEMHA from the beginning as the grant recipient. SEMHA Ex. A. The cost principles have no provision allowing a grantee to charge a fee for the management of its grant activities based on the total amount of the grant. Such a fee inherently deviates from the principles of allocability, absent a showing that the relative benefits each grant received from the grantee's administrative activity costs were directly proportional to the amount of the grant award. We therefore agree with ONC's initial conclusion that SEMHA's 5% administrative fee was unallowable.

A central concern expressed by ONC about SEMHA's use of the administrative fee was triggered after review of SEMHA's own policies. SEMHA's policy, identified as "PL 7.00 Administrative Fee," provides as follows:

> As SEMHA is a fiduciary agent and, as such, the funds entrusted to the organization essentially pass through it, SEMHA produces revenue by charging an administration, or grant management, fee. This fee is charged as a percentage of overall grant/program expenditures.
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> The fee is charged, on a monthly basis, to each SEMHA grant/program as payment for the administrative/grant management services provided by SEMHA to the grantor/funding agencies. It should be noted that the administrative/grant management fee is just that; it is a fee charged by a contractor (in this case SEMHA) to a contractee (the funding agencies) for services rendered. The fee is not to be considered as overhead or as an indirect cost. The administrative/grant management fee is included on the Financial Status Report and is charged against the monthly expenses for each grant/program. The standard fee is calculated at five (5) percent of grant/program expenditures per contract/grant year but in some cases may be adjusted as established by negotiation.

[3] SEMHA apparently continues not to comprehend this basic fact, given its comment that ONC "cannot get past SEMHA's original administrative fee structure included in the original budget when SEMHA was just a contracted-for fiduciary to the lead agency [SMHIE]. That was years ago." SEMHA Br. at 12. As explained below, it is SEMHA that is confused about its responsibilities as a grant recipient to demonstrate that all costs it charged to the grant directly benefit the grant activities.

SEMHA Ex. F, at 2 (ONC letter to SEMHA quoting SEMHA policy). As the policy makes clear, the flat percentage fee does not represent either an indirect cost rate or an allocation of costs according to benefits accruing to different grants. The fee is instead intended to be a service charge paid by other grantees to SEMHA for services provided to them in managing their grant funds.

SEMHA's audits show it as receiving "revenue" identified as "Administrative fees" of roughly two million dollars per year in the years 2010-2012, in addition to the grant funds it handled during that period. SEMHA Ex. R, at 5, 8. The audits do also report that SEMHA incurred program support costs that reached nearly the same totals. *Id*. What is not demonstrated (or tested) in the audits is whether the costs it incurred for a particular grant correlated directly to the fees it received based on the total amount of that grant. In other words, it is entirely possible that a small grant generated a large portion of SEMHA's own costs and support activities but was charged only a small fee based on the grant amount, or vice versa.

We make no findings as to whether charging a fee based on total grant expenditures is permissible where SEMHA indeed serves as a management contractor rather than a grant recipient. Where, however, SEMHA receives revenue from a fee charged to a federal grant of which SEMHA was the direct recipient beyond the costs documented as allocable to that grant SEMHA would in effect be making a "profit" from the grant, which is impermissible for federal grantees. 2 C.F.R. § 200.400(g). That is one reason that ONC insisted that SEMHA document a basis for allocating particular administrative costs directly to the Beacon grant rather than permitting use of proportions based on the relation of Beacon grant funds to other grants managed by SEMHA.

SEMHA denies that it "profits" from "any of its grant management activities" and asserts that the cited policy would not, in any event, apply to the Beacon grant, SEMHA's first-ever experience as a direct grant recipient. SEMHA Br. at 8. SEMHA may not make a profit in the sense that its receipts may not exceed its costs and it operates as a non-profit. Although SEMHA alleges that the policy was quoted out of context, it provides no context which would explain its charging the same 5% flat fee on grant expenditures to the Beacon grant of which it was the direct grant recipient. *Id*. The policy may well not apply because SEMHA was a direct grant recipient, but SEMHA identifies no other policy that would permit it to charge the 5% fee to its own grant.

ONC does not dispute that the Beacon grant could be used to cover the costs of administrative activities by SEMHA shown to be necessary for it to carry out the purposes of the grant. Any such costs are, however, subject to the requirements of adequate documentation to establish both the allowability of each cost item and the allocability of any share charged to a particular grant by showing the relative benefit received by the grant. Where a grantee has general administrative costs (such as payroll or accounting) that provide some benefit to multiple activities, one method of documenting the appropriate share is to negotiate an approved indirect cost rate. 2 C.F.R. § 230, App. A, at ¶ E.2. Alternatively, in some situations, it is possible to directly charge costs to a grant where the appropriate allocable portion can be documented.

SEMHA has not negotiated any indirect cost rate. SEMHA Br. at 7. According to SEMHA, by the time it understood that its fee arrangement was unacceptable, it had already incurred most of the costs involved in administering the grant so it would be unhelpful to have sought approval of an indirect cost rate that would not be available back to the start of the grant period. *Id*. at 6-7.

Instead, SEMHA argued that its administrative costs could be documented and charged to the Beacon grant. We therefore turn next to SEMHA's efforts to demonstrate that it could adequately support such direct charging.

2. <u>SEMHA failed to adequately identify and document allowable and allocable administrative costs</u>.

   a. Bases for ONC's rejection of SEMHA's proposed alternative cost charging

ONC offered SEMHA several opportunities to demonstrate that SEMHA could retrospectively identify administrative costs that could be directly charged to the Beacon grant. Ultimately, ONC determined that SEMHA was not able to identify and document allowable costs. SEMHA suggested that ONC reached this conclusion merely because of formatting errors in SEMHA's reimbursement request, "a purely clerical, rather than substantive, issue," despite SEMHA having "submitted them in its amended budget – which was approved" by ONC. SEMHA Br. at 13-14. The final disallowance letter, however, sets out the bases for ONC's determination that SEMHA did not adequately document administrative costs that could be claimed as direct costs of the Beacon grant, as follows:

> Based on the review of this voluminous information ONC made the following determinations:
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> - Regarding personnel costs, while SEMHA stated in its August 8, 2014 letter that it is "neither time- nor cost-efficient" to track staff time as it relates to a particular program, federal regulations require that in order for costs to be allowed under a grant award, they must be "'reasonable for the performance of the award and allocable." The HHS Grants Policy Statement states that in order for a cost to be allocable, it must be chargeable or assignable to a grant in accordance with the relative benefits received. Since SEMHA did

not provide supporting documentation that established the allocation of staff hours directly assignable to the grant, SEMHA's personnel costs do not meet the standards for allocability as a threshold determination. SEMHA failed to provide revised policies and procedures related to the Direct Support Costs, as well as an adequate direct allocation methodology to substantiate the Direct Support Costs. Based on the information submitted, ONC is unable to verify the allocability, allowability, reasonableness of, and the methodology used to compute, the amounts and percentages and, therefore, the costs claimed by SEMHA as direct program support costs to the Beacon Award are disallowed. . . .[4]

- The nature of the supporting documentation provided by SEMHA per expense category was neither consistent nor adequate throughout the period of the award. For example, the September 1, 2010 supporting documentation packet only included copies of employee timesheets and is missing all supporting documentation for the non-personnel expenses.
- SEMHA included charges in the proposed Direct Support Costs that had already been charged to the grant and reimbursed. Duplicative costs are unallowable per OMB Circular A-122, 2 C.F.R. Part 230 App. A, ¶ C.l, which states that "a cost may not be allocated to an award as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been assigned to an award as a direct cost." *See* Attachment A for a list of costs that have been previously reimbursed throughout the period of performance of the award, and are also included in the Direct Support Costs, resulting in duplicative charges.
- Additionally, based on supporting documentation submitted by SEMHA, many of the costs included in the Direct Support Cost charges were found to be unallowable. *See* Attachment B for a breakout of Direct Support Cost categories and the reasons that ONC has determined them to be unallowable.
- Based on review of the submitted documentation on August 8, 2014, in support of SEMHA's Direct Support Costs, ONC has decided to disallow the amount of $528,602.83.

[4] We omit ONC's discussion of SEMHA's practice of having the finance director both write and approve multiple checks as showing poor financial management. September 22, 2015 disallowance letter at 5. SEMHA argued that auditors had not questioned this practice which was only used for certain fixed costs such as rent. SEMHA Br. at 20. While this issue may be peripherally relevant to the reliability of SEMHA's documentation, ONC did not specifically identify any costs directly at issue before us that involved a check both written and approved by the same individual. Given that we find the documentation insufficient to support the allowability of the support costs on other grounds, we need not consider whether the practice, even if limited as SEMHA argues, is ever acceptable.

September 22, 2015 disallowance letter at 5-6. The two attachments to the letter contain lengthy lists of cost items found to be either duplicative or unallowable in nature. Clearly, the bases include multiple substantive and significant problems with SEMHA's attempts to document allowable, allocable costs to claim in lieu of the unallowable administrative fee, rather than mere clerical mistakes in the alternative claiming efforts. We also note that SEMHA's efforts to retrospectively compile evidence of costs that it did not intend to charge to the grant at the time they were incurred raises problems in itself. In general, source documentation created at the time a cost was incurred is more credible than any later reconstructions. Thus, the Board has held that it "generally will not rely on non-contemporaneous documentation as evidence to support claimed costs, holding that such documentation must be closely scrutinized." *Nat'l Alliance on Mental Illness*, DAB No. 2612, at 7 (2014), citing *Suitland Family & Life Dev. Corp.*, DAB No. 2326, at 10 (2010) (relating to non-contemporaneous documentation of personnel costs).

We turn next to the nature of the costs that SEMHA sought to substitute for the unallowable flat fee and the documentation that it offered to support those costs.

b. Disputed cost items and documentation issues

i. Nature of the costs at issue

SEMHA offered to provide its raw data to the Board in the form of four full flash drives. SEMHA Br. at 11; SEMHA Ex. N. The Board does not normally undertake an undirected search through volumes of raw documentation but rather expects the grantee to provide a detailed explanation for which documents provide support to the allowability and allocability of specific costs claimed. *See, e.g., Pa. Dep't of Pub. Welfare*, DAB No. 1089, at 4 (1989) (while some flexibility may be possible in determining what source documentation suffices, the grantee must explain how the available documentation demonstrates compliance with applicable requirements). SEMHA did not provide any roadmap or explanation sufficient to allow us to trace individual cost items and determine with any confidence what amount might be properly allocated to the Beacon grant from the raw data. We therefore did not request submission of the flash drives themselves.

SEMHA did provide a spreadsheet laying out its total claims for administrative costs incurred to support the Beacon grant by month, broken into "HR," "Accounting," and "Executive" functions. SEMHA Ex. J (Part 2). Along with the spreadsheet, SEMHA offered the following seven points to explain its alternative approach to allocating these costs to Beacon in lieu of the administrative fee:

1. Human resources services and payroll processing are allocated to Beacon based on the proportional percentage of Beacon payroll costs to total SEMHA payroll costs. This has been allocated for each individual human resources and payroll services employee and summarized by functional area.
2. Accounting services costs are allocated to Beacon based on the proportional percentage of total Beacon payroll and non-payroll costs to total SEMHA payroll and non-payroll costs. This has been allocated for each individual accounting services employee and summarized by functional area.
3. General management costs are allocated to Beacon based on the proportional percentage of total Beacon payroll and non-payroll costs. This has been allocated for each individual general management employee and summarized by functional area.
4. The individual employee tabs list all payroll paid, by month, from the start of the Beacon program (September 2010) onward. Fringe benefits costs are listed the same way, including detail of type of benefit.
5. Physical space costs charged to Beacon (rent, utilities, etc.) are allocated among the functional areas based upon the following formula:

Human Resources and Payroll Processing	32%
Accounting Services	25%
General Management	38%

   This represents each functional area's percentage of office space occupied.
6. Non-space costs charged to Beacon (supplies, copier, IT support, etc.) are allocated among the functional areas based upon the following formula:

Human Resources and Payroll Processing	50%
Accounting Services	40%
General Management	10%

   This represents each functional area's percentage of use of non-space items.
7. Salary and fringe costs for Thomas Cieszynski (General Management) and Jeremy Andrews (Accounting Services) are allocated based on an average of one and a half days per week spent on Beacon program support.

SEMHA Ex. J (Part 1) at 4.

ii. Employee costs

In regard to allocating personnel costs, the applicable cost principles require maintenance of specific detailed records:

> The reports reflecting the distribution of activity of each employee must be maintained for all staff members (professionals and nonprofessionals) whose compensation is charged, in whole or in part, directly to awards. In addition, in order to support the allocation of indirect costs, such reports

> must also be maintained for other employees whose work involves two or more functions or activities if a distribution of their compensation between such functions or activities is needed in the determination of the organization's indirect cost rate(s) (e.g., an employee engaged part-time in indirect cost activities and part-time in a direct function). Reports maintained by non-profit organizations to satisfy these requirements must meet the following standards:
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> (a) The reports must reflect an after-the-fact determination of the actual activity of each employee. Budget estimates (*i.e.*, estimates determined before the services are performed) do not qualify as support for charges to awards.
> (b) Each report must account for the total activity for which employees are compensated and which is required in fulfillment of their obligations to the organization.
> (c) The reports must be signed by the individual employee, or by a responsible supervisory official having firsthand 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.
> (d) The reports must be prepared at least monthly and must coincide with one or more pay periods.

2 C.F.R. Part 230, App. B, at ¶ 8.m.

The Board has been particularly reluctant to accept after-the-fact reconstructions of how employees' work was distributed among cost objectives. Thus, the Board has explained that, "[g]enerally, where a grantee has not maintained contemporaneous records documenting time and effort consistent with the cost principles or obtained approval for a substitute system, the Board will not accept a grantee's evidence about how its employees spent their time, absent strong indicia of reliability." *Piedmont Cmty. Actions, Inc.*, DAB No. 2595, at 17 (2014), *citing Philadelphia Parent Child Ctr., Inc*., DAB No. 2297, at 6 (2009) and *Norwalk Econ. Opportunity Now, Inc.*, DAB No. 2543, at 9 (2013). In *Piedmont*, the grantee attempted to use a time study performed in 2013 to backcast the time spent by administrative staff on various activities during the period from 2009-12. The Board found this retrospective analysis insufficiently reliable to support allocating the costs of employees performing administrative work. DAB No. 2595, at 17.

In the present case, SEMHA has provided even less support for its attempts to retrospectively allocate personnel costs to Beacon. For each category of administrative employee identified in points 1-3 regarding SEMHA's spreadsheet, SEMHA proposes to assign their costs based on proportions that are not supported by any study of actual time and effort by the employees involved nor by any affidavits suggesting that, in the absence of contemporaneous time-and-effort tracking, each employee could verify time spent on grant-specific activities. SEMHA instead applied retrospectively a percentage based on "total Beacon payroll and non-payroll costs to total SEMHA payroll and non-payroll costs" to all employees in each of the administrative function categories (payroll, accounting and general management, as explained above). ONC rejected SEMHA's percentages because the methodology could not be verified. September 22, 2015 disallowance letter at 3-4. Put briefly, SEMHA has not demonstrated that the percentage of SEMHA's payroll and other costs it seeks to attribute to its Beacon grant correlates to the amount of time and effort the various administrative employees actually devoted to performing activities directly benefiting the Beacon grant.

For the two named executive employees, SEMHA proposed to allocate an "average" of 1½ days per week of their time to the Beacon grant. SEMHA does not explain the method by which it arrived at this "average" or provide documentation to establish that this average reasonably reflected actual time spent by these individuals on supporting the Beacon grant throughout the grant period. Absent a substantiated basis for determining the amount of time they spent on supporting the Beacon grant, we cannot allow any of their salary costs to be charged directly to the grant.

ONC concluded that the personnel documentation submitted by SEMHA did not enable ONC "to verify the allocability, allowability, reasonableness of, and the methodology used to compute, the amounts and percentages . . . ." September 22, 2015 disallowance letter at 5. Before us, SEMHA admits that the personnel activity reports it offered to support its claims were "based upon staff information and belief as to time that had been spent on Beacon activities." SEMHA Reply Br. at 3. ONC pointed out, and SEMHA did not deny, that the reports were reconstructed in 2014 (long after the grant ended) and purport to show actual daily activity despite simply repeating the same numbers for each day. ONC Br. at 13.[5] We agree that these reports lack reliability and do not suffice to establish that a specific share of the employees' salaries constitutes an allowable direct charge to the Beacon grant.

[5] SEMHA instead merely asks, in response to these observations, how ONC can "argue in its brief that reimbursement was rejected for lack of real-time activity reporting when the factual reality is that ONC failed to object to SEMHA's methodology for two years making it impossible to have real-time reporting records for two years prior." SEMHA Reply Br. at 3. The "methodology" to which SEMHA refers is its flat administrative fee and we find no evidence that ONC was aware of or approved the use of that fee. SEMHA's repeated claims that its own failure to meet grant documentation requirements should be attributed to ONC not taking action sooner are unpersuasive. SEMHA was repeatedly warned about weaknesses in its financial systems and its grant management, to the point of having its drawdowns restricted more than once. *See, e.g.,* ONC Ex. 2 (site monitoring report and history and findings recounted therein).

iii. Physical space and non-space costs

SEMHA proposes to allocate its costs for physical space and non-space expenses to the Beacon grant by first dividing them among SEMHA's grant support functions and then allocating a share of each of those support functions (including their respective employee salary costs) to Beacon. SEMHA distributed the physical space costs using percentages which it asserts were derived from the office space occupied by each of its support functions as follows: human resources and payroll processing (32%), accounting services (25%), and general management (38%). SEMHA Ex. J (Part 1) at 4 (SEMHA does not identify the use of the other 5% of physical space). The non-space costs are similarly distributed by formula among the support functions as follows: human resources and payroll processing (50%), accounting services (40%), and general management (10%). *Id*. SEMHA asserts that these percentages represent the use of non-space items by each functional area. While the square footage of office space used by employees in each of the defined functions might reasonably be a straightforward calculation (although the supporting information was not provided to us), it is much more difficult to see how the percentages reflecting differential usage of a wide range of items and services (from postage; to audits and insurance; to purchase, use and maintenance of equipment such as copiers or computer networks) could be reliably calculated. SEMHA provided no detailed explanation of how these calculations were performed or validated.

These functional areas were in turn allocated to the Beacon grant based on various percentages intended to capture Beacon's share of each of the function's costs. SEMHA says that these allocations were based on the "proportional percentage of Beacon payroll costs to total SEMHA payroll costs." *Id*.[6] SEMHA has not demonstrated that these proportions accurately reflect what share of the costs for each function was actually incurred for the benefit of the Beacon program. For example, it is not evident that the Beacon program's need for accounting services (as compared with the usage of those services by other SEMHA programs or grants) has any relation to the salary costs incurred by Beacon (as compared to those other components). For this reason, even if we had not found the salary costs of the SEMHA employees overall to lack documentation of time and effort, and even if we had not found questionable the distribution of non-space costs to the functional areas, we would in any case agree with ONC that the proposed proportional allocation of the support function costs to Beacon was unallowable.

[6] ONC states that SEMHA proposed to allocate based on the "proportion of Beacon related payroll and non-payroll related expenses as a proportion of SEMHA's total payroll and non-payroll related expenses (excluding benefits)." ONC Br. at 11, quoting SEMHA Ex. N. This exhibit number refers to the flash drive contents which are not in the record, but SEMHA did not dispute the quote in its reply brief, so we assume it to be accurate. In any case, neither formula demonstrates that the costs would be assigned to the Beacon grant only to the degree that the Beacon program benefited from those costs, the fundamental requirement for allocability.

iv. Duplicative or unallowable costs

ONC determined that SEMHA was claiming as part of the administrative support expenses that were already reimbursed by the grant as direct costs, and therefore unallowable as duplicative. September 22, 2015 disallowance letter at Att. A; ONC Br. at 14. These duplicative claims allegedly included facility costs (rent, electricity, water) and operating costs (telephone, postage, printing, equipment, computer services, insurance, contract services and audits). *Id*. We agree with ONC that a grantee may not charge the same cost both as a direct cost of the grant and as an administrative cost allocated to the grant. In other words, a grantee cannot be reimbursed more than once for an expense even if allowable.

SEMHA, however, denies that any of the costs at issue were duplicative, asserting that the costs already charged to the Beacon grant related to a facility used by Beacon staff (identified as 206 Fisher), whereas the administrative costs related to a facility used by SEMHA general grants management staff (at 200 Fisher). SEMHA Br. at 21. ONC acknowledges that SEMHA had these two locations and that the charges for the direct use of 206 Fisher by Beacon staff were permissible (and already reimbursed). ONC Br. at 15. ONC then reiterates that expenses related to the 206 Fisher facility are not allowed because SEMHA’s attempt to allocate a share of those expenses to Beacon on a proportional basis is not supported by adequate documentation to show that the amounts charged are only those that benefit Beacon. *Id*. We agree with this conclusion for the reasons already explained in the previous section. It is not clear to us, and neither party has elucidated the point, that all of the allegedly duplicative expenses can be identified to the 206 Fisher facility, such as postage or audit costs for example. In any case, we need not conclusively determine whether any of the costs SEMHA now seeks to charge on a proportional basis do indeed duplicate costs already reimbursed as direct costs since this ground for the disallowance was simply an additional basis for disallowing costs that we have already concluded are not adequately documented as allocable to the Beacon grant.

ONC also argued in the disallowance determination that certain costs (including legal fees, stop payment costs, and a leased vehicle) were unallowable regardless of whether they were allocable to the Beacon grant. September 22, 2015 disallowance letter at Att. B. SEMHA responds that the costs to which ONC refers were contained in the full general ledger which SEMHA submitted to ONC during the negotiation process but they were not among the costs which it sought to allocate to the Beacon grant as administrative support. SEMHA Br. at 21-22. ONC accepted this explanation, so we need not address these costs here. ONC Br. at 6, n.2.

3. <u>SEMHA's further arguments are unavailing</u>.

We recognize that SEMHA has found this process frustrating, as it expressed in its briefing, and that it believed that various aspects of its dealing with ONC led it to think that either its original fee or its efforts at developing after-the-fact proportional charging would be accepted. *See, e.g.*, SEMHA Br. at 5-13; SEMHA Reply Br. at 1-2. ONC, by contrast, views the same interactions and events as basically a series of unsuccessful efforts to obtain adequate documentation from SEMHA to permit some of the administrative costs to be directly charged to the Beacon grant. ONC Br. at 2-6. We discuss the communication difficulties briefly below, but ultimately the essential point is that SEMHA has failed to demonstrate (even after a full opportunity to do so before this Board) that it can adequately document allowable administrative costs that can be directly charged to the Beacon grant.

SEMHA insists that its administrative fee arrangement was accepted in both the original and revised NGAs and not questioned until two years into the project. SEMHA Br. at 5-6, citing SEMHA Exs. A and B.[7] While the NGAs each included an approved budget, we do not find, and SEMHA does not specifically show, that those budgets actually contained line items identifying the administrative fee as such. We thus do not find that SEMHA disclosed that it intended to charge a flat percentage fee for grant management without documenting underlying allocable and allowable costs. The NGAs did, on the other hand, explicitly notify SEMHA that compliance with applicable federal administrative requirements and cost principles was a term of the grant award. Mere inclusion of a cost item in an initial budget in the NGA does not exempt the grantee from demonstrating that all expenditures comply with those requirements and principles. *See, e.g., R.I. Substance Abuse Task Force Ass'n*, DAB No. 1681, at 4 (1999) ("grantee's obligation to document its costs is not extinguished by the inclusion of a cost in an approved budget"; grantee "must always be able to document that a cost charged to a grant was actually incurred, is properly allocated to the grant, and is reasonable").

SEMHA further asserts that it was paid 100% of its fee in grant reimbursements during those years. *Id*. at 6. SEMHA argued that, had it known that the fee was objectionable, it could have sought an indirect cost rate from the start of the grant period, and asks that ONC therefore be estopped from arguing that the fee is unallowable. SEMHA Reply Br. at 2, 5. The Board has repeatedly rejected efforts to overturn disallowances based on claims of estoppel, explaining that –

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[7] SEMHA states that it originally set its fee at 3%, "because at the start of the program SEMHA was not the lead agency; just the contracted-for fiduciary," (SEMHA Br. at 5) but that it raised its fee to 5% in the revised NGA "to reflect increased administrative resources expended on the Beacon program" after it saw itself as the "lead agency" (*id.* at 6). The change seems inconsistent with SEMHA's insistence throughout its briefing that it always successfully charged its 5% fee over a history of more than 60 years (*see, e.g.*, *id.*), but the specific amount of the fee is not central to the dispositive issue here, which is SEMHA's inability to document that the amounts charged related to allowable costs properly allocated to this grant.

> [i]t is well-established that “the government cannot be estopped absent, at a minimum, a showing that the traditional requirements for estoppel are present (i.e., a factual misrepresentation by the government, reasonable reliance on the misrepresentation by the party seeking estoppel, and harm or detriment to that party as a result of the reliance) and that the government's employees or agents engaged in ‘affirmative misconduct.”’ *Oaks of Mid City Nursing & Rehab. Ctr.*, DAB No. 2375, at 31 (2011), citing *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421 (1990), and *Pacific Islander Council of Leaders*, DAB No. 2091, at 12 (2007) (“equitable estoppel does not lie against the federal government, if indeed it is available at all, absent at least a showing of affirmative misconduct.”).

Bright Beginnings for Kittitas Cty. at 8. SEMHA has not identified any factual misrepresentation by the government, much less any affirmative misconduct by any of its employees or agents. Estoppel is not available here.

SEMHA also points to ONC’s approval on September 13, 2013 of an amended NGA with a revised budget covering the period until the grant ended on September 30, 2013 as proof that ONC approved the costs that are now being disallowed. SEMHA Br. at 9, 17; SEMHA Ex. K. SEMHA apparently thought that issuance of this amended NGA indicated ONC would accept SEMHA’s claims to bill its grant support activities as direct costs. *Id*. This interpretation of the approval of the amended NGA was mistaken. The revision resulted from a re-budget request submitted by SEMHA on August 21, 2013, which indicated that SEMHA had claims in the amount of $591,819.00 in “direct program support costs” which would be substituted (i.e., re-budgeted) from the earlier administrative costs (which had turned out to be the unallowable flat fee). ONC Br. at 3, citing SEMHA Ex. J. The request included some of SEMHA’s breakdown of costs which we have discussed in the prior section. Based on this submission and a second urgent SEMHA request on September 13, 2013, the re-budget requests were approved but a restriction was placed on the requested direct program support costs. ONC Ex. 8; SEMHA Ex. K (final NGA maintaining prior conditions). The net effect of this action was that SEMHA could use the planned funds for administrative costs to cover direct program support costs, but that SEMHA would have to show that it could document such direct costs before it could draw down federal funds. As fully explained earlier, SEMHA did not succeed in making the required showing.

SEMHA also contends that the 5% fee was economical compared to possible negotiated indirect cost rates that others charge. SEMHA Reply Br. at 5-6. In particular, SEMHA points to recent revisions of cost principles that would permit use of a ten per cent de minimis indirect cost rate under some circumstances. The de minimis indirect cost rate was not available at the time of the Beacon grant. Furthermore, as noted, SEMHA acknowledged that it did not apply for any indirect cost rate, and SEMHA pointed to nothing in the new rule to which it cited (78 Fed. Reg. 78,589 (Dec. 26, 2013)) that would have made a de minimis rate available retroactively where a grantee did not apply until after the grant period. In any case, the core problem with SEMHA's 5% fee was not whether it was unreasonable in amount or in comparison to negotiated indirect cost rates but that a flat fee that does not necessarily correlate to the relative benefit received by the grant is unallowable and is not the same as a negotiated indirect cost rate.

Conclusion

For the reasons explained above, we sustain the disallowance in full.

/s/

Christopher S. Randolph

/s/

Susan S. Yim

/s/

Leslie A. Sussan
Presiding Board Member