DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Office of the General Counsel

Public Health Division
Room 4A-53 Parklawn Bldg.
5600 Fishers Lane
Rockville, MD 20857
(301) 443-2644
FAX: (301) 443-2639

June 25, 2008

Chairman Kevin J. Martin
Federal Communications Commission
Room 8-B201
445 Twelfth Street, S.W.
Washington, DC 20554

Dear Chairman Martin:

Re: In the Matter of *The United States Department of Health and Human Services Substance Abuse and Mental Health Services Administration Petition for Permanent Reassignment of Three Toll Free Suicide Prevention Hotline Numbers,* in *Toll Free Service Access Codes*, CC Docket No. 95-155, CC Docket No. 07-271

This letter is filed on behalf of the United States Department of Health and Human Services' (HHS) Substance Abuse and Mental Health Services Administration (SAMHSA), in response to the letter submitted on April 17, 2008 by attorney Robert Graham (attached).

Although he does not represent the Kristin Brooks Hope Center (KBHC) with respect to the matter pending before the Federal Communications Commission (the Commission), Mr. Graham represented KBHC in an unsuccessful appeal to the HHS Department Appeals Board (DAB) of SAMHSA's disallowance of expenses claimed by KBHC. Mr. Graham's April 17, 2008 letter purports to submit information relevant to the Commission's resolution of this matter. In our view, this information should not affect the Commission's deliberations. Nevertheless, to the extent that the information might be viewed as relevant, SAMHSA wishes to respond and to clarify the record with respect to the claims mentioned in Mr. Graham's letter. Accordingly, set forth below is a summary of Mr. Graham's assertions and SAMHSA's response.

The expenses and claims to which Mr. Graham refers in his April 17, 2008 letter pertain to the period between 2001 - 2004 when KBHC was a subrecipient of federal funds under a cooperative agreement awarded by SAMHSA to the American Association of Suicidology (AAS) under SAMHSA Grant No. SM54127. Despite Mr. Graham's allegations to the contrary, SAMHSA reviewed the expenses claimed by KBHC on numerous occasions, both prior to and during Mr. Graham's involvement in the case. SAMHSA's review of expenses, requests for additional information and documentation from KBHC, and communication with AAS, KBHC

and Mr. Graham, are all documented in the DAB decision[1/] and in the final agency decision letter issued by SAMHSA on December 13, 2006 (attached).[2/] After its final review of the documentation submitted by KBHC, SAMHSA determined that KBHC was able to adequately document a portion of the expenses claimed, and that $7,895 was an allowable cost payable to KBHC. SAMHSA also found that an additional $2,163 was allowable (for salary and benefits), and could be paid if a timesheet from 2004 was signed and submitted.[3/] As described in the attached decision and as summarized below, the DAB upheld SAMHSA's decision to disallow the remainder of the costs claimed by KBHC ($190,236) in full.[4/]

Contrary to Mr. Graham's unsupported allegations, SAMHSA reviewed the claims submitted by AAS (the awardee of the cooperative agreement) according to its obligation to do so under Federal regulations at 45 CFR part 74 "Uniform Administrative Requirements for Awards and Subawards to Institutions of Higher Education, Hospitals, Other Nonprofit Organizations, and Commercial Organizations." These regulations also establish appeal rights for recipients of Federal funds under certain circumstances, according to the procedures of the HHS Departmental Appeals Board set forth in 45 CFR part 16.

SAMHSA's final agency decision to KBHC included written notification of the right to appeal SAMHSA's decision to the DAB. Mr. Graham represented KBHC in the subsequent appeal, and had the opportunity to present the facts supporting his client's claims at that time. On August 22, 2007, the DAB issued its decision, upholding in full SAMHSA's disallowance of the expenses claimed by KBHC. Attached for your review is the DAB decision of August 22, 2007, which is a matter of public record, and is submitted in order to clarify the factual record.

Sincerely,

Rina Hakimian
Senior Attorney

Attachments

cc: Robert Graham, Esq.

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[1] See *Decision* of the Department of Health and Human Services Departmental Appeals Board, Appellate Division, August 22, 2007, page 4 and page 5.

[2] See SAMHSA December 13, 2006 letter to Robert Graham, page 1 and page 2.

[3] According to SAMHSA's Division of Grants Management, allowable payments may be released after the awardee files the OMB Standard Form (SF) 270 in accordance with government accounting procedures for high-risk grants.

[4] See DAB decision at page 1 and page 21.

FELDESMAN
TUCKER
LEIFER
FIDELL LLP

ROBERT A. GRAHAM
rgraham@feldesmantucker.com

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April 17, 2008

Office of Commissioner Kevin Martin
Federal Communications Commission
445 12th Street SW
Washington, DC 20554
Attn: Dan Gonzalez

Re: *In the Matter of SAMHSA Petition for Permanent Reassignment of Three Toll Free Suicide Prevention Hotline Numbers*, CC Docket No. 07-271.

To Whom It May Concern:

I am writing to you at the request of my client, Kristin Brooks Hope Center ("KBHC"), in connection with the application of the U.S. Substance Abuse and Mental Health Services Administration ("SAMHSA") permanently to reassign all rights and control over the 1-800-SUICIDE hotline from KBHC to SAMHSA. My office has represented KBHC in its dispute with SAMHSA over reimbursement for services provided and costs incurred by KBHC under a SAMHSA grant to support suicide crisis center hotline services and certification. KBHC has asked that I provide for your consideration an account of certain actions taken by SAMHSA in response to KBHC's efforts to resolve that dispute.

By way of brief background, KBHC was a subgrantee to the American Association of Suicidology ("AAS") under SAMHSA award no. SM54127 from 2001 through 2004. KBHC's responsibility under that grant consisted, among other things, of management and operation of the nation-wide 1-800-SUICIDE hotline, outreach to crisis centers to enhance participation in the nation-wide network, developing technology-based approaches to suicide prevention services, assisting crisis centers in accessing such technologies, and educating the suicide prevention community on matters relating to maintaining and publicizing suicide hotlines. KBHC's dispute with SAMHSA revolves around the latter's refusal to compensate KBHC for over $300,000 in expenses incurred in carrying out activities relating to the SAMHSA grant.

From April 2004 forward, KBHC made numerous attempts to communicate with SAMHSA regarding these unpaid claims. For much of that time, SAMHSA would not discuss the matter with KBHC, asserting that SAMHSA had no contractual relationship with KBHC and directing KBHC to address any complaints to AAS as the responsible entity. AAS, however, disclaimed any payment responsibility. KBHC therefore filed suit against AAS to recover its

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grant-related costs. KBHC and AAS settled that litigation through an agreement whereby AAS authorized KBHC to pursue its claims in AAS's name directly against SAMHSA. When notified of this arrangement, SAMHSA still refused to deal with KBHC on the ground that the agreement allegedly was not binding on SAMHSA. It was only after Senator Ted Kennedy's office intervened on KBHC's behalf that SAMHSA indicated a willingness to consider KBHC's claims.

SAMHSA's conduct in the ensuing negotiations belied any sincere intention of resolving the dispute on a consensual basis. Most significantly, on August 25, 2006 - - the same day that representatives of both SAMHSA and KBHC held a telephone conference (at SAMHSA's request) to discuss a SAMHSA settlement proposal which included a transfer of KBHC's rights in 1-800-SUICIDE to SAMHSA - - SAMHSA filed its application with the FCC to waive its regulations and to direct the assignment of 1-800-SUICIDE to SAMHSA. SAMHSA gave KBHC no advance notice of its petition, instead leaving KBHC to rely on SAMHSA's assurances that it would give KBHC's claims fair and reasonable consideration. Indeed, it was not until December 14, 2006 that KBHC independently became aware of SAMHSA's *sub rosa* actions, by which time KBHC had already agreed to permit SAMHSA to assume temporary control over (but not ownership of) 1-800-SUICIDE. Shortly thereafter, KBHC received SAMHSA's final decision on KBHC's reimbursement request. That decision indicated that SAMHSA would pay only $10,000 of the total costs claimed. KBHC has yet to receive any such payment.

I bring the foregoing to your attention in order that you might have a more complete understanding of the events surrounding SAMHSA's efforts to divest KBHC of its ownership of its hotlines. At a minimum, it reveals the role SAMHSA has played in bringing about the financial circumstances it now asserts as a basis for its petition to the FCC. If principles of equity have any bearing on KBHC's entitlement to relief under its "Application for Review," then it is more than fair to say that the doctrine of "unclean hands" would preclude SAMHSA from availing itself of the fruits of its own misfeasance toward KBHC to deprive KBHC of its interest in its hotlines.

If you have any questions or require any further information, please do not hesitate to contact me at (202) 466-8960 or via electronic mail at rgraham@feldesmantucker.com. Thank you for your attention in this matter.

Sincerely,

Robert A. Graham

cc: U.S. Senator Tom Coburn
Sec'y Michael Leavitt, U.S. Dep't of Health and Human Servs.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Mental Health Services
Center for Substance Abuse Prevention
Center for Substance Abuse Treatment
Rockville MD 20857

DEC 13 2006

Robert Graham
Feldesman Tucker Liefer Fidell, LLP
2001 L Street, NW
Second Floor
Washington, DC 20036-4910

Re: Notice of Final Decision Regarding Reimbursement Claim
SAMHSA Grant No. – SM54127

Dear Mr. Graham:

The purpose of this letter is to notify you of the Substance Abuse and Mental Health Services Administration's (SAMHSA) final decision regarding the American Association of Suicidology's (AAS) September 15, 2006 reimbursement claim for $424,067 submitted on behalf of the Kristin Brooks Hope Center (KBHC). Specifically, SAMHSA's Division of Grants Management (DGM) determined that $7,895 of the $424,067 reimbursement claim was for allowable costs under AAS' SAMHSA grant, and an additional $2,163 is allowable and will be paid if KBHC's executive director, Reese Butler, submits a signed copy of his July 2004 timesheet.

In response to your September 15, 2006 reimbursement claim (attached), SAMHSA issued a letter September 22, 2006 (attached) informing you that it deemed $191,312 of the reimbursement claim to be for unallowable costs, but would consider the remaining $232,755 for reimbursement if additional documentation were provided by October 2, 2006 to support the following items:

- ✓ Virginia & Connecticut Unemployment Costs - $4,408
- ✓ Mendellssohn - $1,121
- ✓ Rogers and Company – dollar amount not listed
- ✓ Rubin Postar & Associates - $279
- ✓ Salary and Benefits - $226,947

We received additional documentation from you on October 17, 2006, and reviewed the documentation submitted in support of the above-referenced claims. Accordingly, we have determined that $7,895 of the $424,067 claimed is for allowable costs under AAS' SAMHSA grant, and an additional $2,163 is allowable if KBHC's executive director submits a signed copy of his July 2004 timesheet. We have detailed our findings as follows:

- ✓ Virginia & Connecticut Unemployment Costs ($4,408) – We requested invoices, bills, and/or documentation of payments (bank statements and cancelled checks) be submitted to support the unemployment costs being claimed, but no additional documentation was submitted.

- ✓ Medellssohn ($1,121) – We requested that travel vouchers or expense reports, receipts, and documentation of the EASNA conference's inclusion in the approved travel budget be submitted. We were provided a KBHC Invoice Payment Request, a Mendelssohn Invoice and various other documents, and a note from AAS' executive director denying the expense as grant related. The note further indicated the conference occurred May 13-15, 2004, which was after the grant was classified as high risk in late April 2004. Travel was a prohibited activity after the grant was classified as high risk.

- ✓ Rogers & Company (dollar amount not listed on claim) – We requested a copy of the audit report as well as invoices or documentation supporting payments (bank statements and cancelled checks) KBHC made for the audit, but no additional documentation was submitted.

- ✓ Rubin Postar & Associates ($279) – We requested invoices, bills, or documentation of payments (bank statements and cancelled checks) as well as an explanation of how the expenditure related to the grant, but no additional documentation was submitted.

- ✓ Salary & Benefits ($226,947) – We requested documentation (i.e. – salary distribution reports, timesheets, reimbursement requests submitted to AAS, etc.) to substantiate the difference between the actual salary & benefits (S&B) KBHC believes it earned and the S&Bs it received from AAS for the 19 months in question (October 2002 through April 2003 and October 2003 through September 2004). In response, we were provided copies of timesheets for KBHC's Executive Director, Reese Butler, for 14 of the 19 months. According to your September 15, 2006 reimbursement claim, KBHC was reimbursed for S&Bs at the following levels during the three-year grant period as compared to the amounts proposed in AAS' grant applications:

Period	Reimbursed	Proposed
Sept 30, 2001 – Sept. 30, 2002	100%	100%
Oct. 1, 2002 – April 30, 2003	80%	80%
May 1, 2003 – Sept. 30, 2003	100%	80%
Oct. 1, 2003 – Sept. 30, 2004	60%	60%

From the review of the timesheets, we found that KBHC was able to adequately document that it was due an additional $7,895 for S&Bs for 4 of the 19 months and another $2,163 will be considered allowable if Bulter submits a signed copy of his July 2004 timesheet as follows:

Month	Year	Reimbursed	Determination	Amounts Due
April	2003	80%	Adequately documented – Entire 206 hours charged to grant project on T/S	$1,116
October	2003	60%	Adequately documented – Entire 216 hours charged to grant project on T/S	$2,299
November	2003	60%	Adequately documented – Entire 243 hours charged to grant project on T/S	$2,299
December	2003	60%	Adequately documented - 98% of time charged to grant project on T/S	$2,181
July	2004	60%	T/S not signed as required; 98% of time worked on grant project	$2,163

For the remaining 14 months, Mr. Butler's time & effort was either at a level less than the amount reimbursed and/or not adequately supported per the requirements of Attachment B Section 8.m. of OMB Circular A-122[1] as follows:

Month	Year	Reimbursed	Determination
October	2002	80%	Not adequately documented - 80% of Butler's total time charged on T/S, rather than actual time worked
November	2002	80%	No hours charged to grant project on T/S
December	2002	80%	No hours charged to grant project on T/S
January	2003	80%	Not adequately documented - 5% of Butler's total time charged on T/S, rather than actual time worked
February	2003	80%	Not adequately documented - 5% of Butler's total time charged on T/S, rather than actual time worked
March	2003	80%	Not adequately documented - 5% of Butler's total time charged on T/S, rather than actual time worked
January	2004	60%	Not adequately documented - T/S not provided
February	2004	60%	Not adequately documented - T/S not provided
March	2004	60%	Not adequately documented -T/S not provided
April	2004	60%	Not adequately documented - T/S not signed as required; Only 49% of time worked on grant project
May	2004	60%	Not adequately documented -T/S not signed as required; Only 45% of time worked on grant project
June	2004	60%	Not adequately documented - T/S not signed as required; 60% of time worked on grant project
August	2004	60%	Not adequately documented - T/S not provided
September	2004	60%	Not adequately documented - T/S not provided

Pursuant to 45 Code of Federal Regulations (CFR) Part 16 and 45 CFR §74.90, SAMHSA's final decision, as detailed in this letter, will be the Department's final decision as well, unless a written notice of appeal is submitted to the Departmental Appeals Board at the following address, via registered or certified mail, within 30 days after receiving this letter:

DHHS; Departmental Appeals Board; MS 6127
DAB Chair & Appellate Division
330 Independence Avenue, SW
Cohen Building, Room G-644
Washington, DC 20201

Further, the written notice of appeal must: include a copy of this final decision letter; note that you intend to appeal SAMHSA's final decision, state the amount in dispute, and briefly describe why you think SAMHSA's final decision was wrong. Copies of the pertinent regulations are attached for your convenience.

[1] Salary and wages charged to Federal awards must be supported by timesheets that reflect each employee's total time worked and separately report the actual time worked on Federally funded programs, other programs, and leave. The timesheets must be signed by the employee or a supervisor familiar with the employee's actual activities. Budget estimates do not qualify as adequate support for salary and wages.

If you have questions or concerns regarding SAMHSA's final decision, please contact Dan Spears, Financial Advisory Services Officer, at (240) 276-1403 or dan.spears@samhsa.hhs.gov.

Sincerely,

Christine Chen

Christine Chen, Director
Division of Grants Management

Enclosures

cc: Alan Berman, Ph.D., Executive Director
American Association of Suicidology
5221 Wisconsin Avenue, NW
Washington DC 20015

Reese Butler, Executive Director
Kristin Brooks Hope Center
615 7th Street NE
Washington, DC 20002

Rina Hakimian, DHHS/Office of General Counsel

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: American Association of Suicidology
Docket No. A-07-44
Decision No. 2108

DATE: August 22, 2007

DECISION

The American Association of Suicidology (AAS), through the Kristin Brooks Hope Center (KBHC), appealed a decision by the Substance Abuse and Mental Health Services Administration (SAMHSA) disallowing claims for reimbursement filed by AAS on behalf of KBHC. KBHC claimed these funds as a subrecipient under a cooperative agreement (SAMHSA Grant No. SM54127) awarded by SAMHSA to AAS pursuant to section 520(a) of the Public Health Service Act. The total amount in dispute in this appeal is $190,236.

Based on the evidence and arguments presented in this appeal, we uphold this disallowance.

Applicable Law

As a non-profit organization and subrecipient of federal funds under this cooperative agreement, KBHC is subject to the uniform administrative requirements set forth at 45 C.F.R. Part 74. 45 C.F.R. §§ 74.1(a), 74.5. Additionally, KBHC is subject to the cost principles set forth in Office of Management and Budget (OMB) Circular A-122, *Cost Principles for Non-Profit Organizations,* located at 2 C.F.R. Part 230 and made applicable by 45 C.F.R. § 74.27(a). Finally, this agreement, by its own terms, is subject to the Public Health Service Grants Policy Statement. SAMHSA Ex. 1, at 1. These authorities require, among other things, that costs charged to federal awards be reasonable, necessary, allocable, adequately documented. See e.g. OMB Circular A-122, Att. A, ¶ A.2. Specifically, 45 C.F.R. § 74.21(b)(7) requires that grantees have "accounting records, including cost accounting records, that are supported by source documentation."

When a cost is disallowed by the grantor agency, the burden is on the grantee to prove, with appropriate documentation, that the cost is allowable under the cost principles and other relevant program requirements. Marie Detty Youth and Family Services Center, Inc., DAB No. 2024 (2006); Northstar Youth Services, DAB No. 1884 (2003).

Background

At all times relevant herein, KBHC was a non-profit organization committed to suicide prevention and the founder and operator of the Hopeline Network at 1-800-SUICIDE. The Hopeline Network is a national suicide prevention telephone hotline that links crisis centers certified in suicide prevention. KBHC Ex. C, at 4, 16.

In 2001, SAMHSA entered into a three-year cooperative agreement with AAS under section 520(a) of the Public Health Service Act.[1] SAMHSA Ex. 1; KBHC Ex. D. The Notice of Grant Award identified AAS as the grantee and AAS's executive director as the director of the project (Project Director). SAMHSA Ex. 1, at 1.

The purposes of the grant were to "increase the number of crisis centers/hotlines certified in suicide prevention," to "increase the number of crisis programs offering hotline services that are certified in suicide prevention which are networked through a single, nationally accessible telephone number," and to "coordinate, collect and analyze outcome data for a number of

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[1] Section 74.11(a) of 45 C.F.R. discusses the distinction between a grant and a cooperative agreement made by the Federal Grant and Cooperative Agreement Act, 31 U.S.C. §§ 6301-08. It states -

> [t]he statutory criteria for choosing between grants and cooperative agreement is that for the latter, 'substantial involvement is expected between the executive agency and the . . . recipient when carrying out the activity contemplated in the agreement.

Because the parties use the term 'grant' in referring to this cooperative agreement and because a cooperative agreement is treated like a grant for purposes of the applicable requirements, we use that term. The fact that the award was a cooperative agreement is relevant, however, since it justifies SAMHSA's greater involvement in determining what project activities would be funded.

specifically identified crisis programs in order to evaluate their effectiveness." KBHC Ex. D, at 9.

In its application to SAMHSA, AAS identified KBHC as a subcontractor under the grant. KBHC Ex. C, at 16; see also SAMHSA Ex. 2 (Subcontract Proposal Factsheet).[2] The application set forth tasks to be performed by AAS and by KBHC, and separate staffing plans and budget justifications for both organizations. KBHC Ex. C, at 15, 19-20, 25-28.

"Over the course of the grant," KBHC represents, "the relationship between and among SAMHSA, AAS, and KBHC became strained. Disputes over payment responsibilities, proper roles, and authorized activities became increasingly frequent . . . ." KBHC Br. at 3. This strain is apparent from the following evidence in the record, which provides relevant context to the dispute before us and explains how KBHC came to represent AAS in this appeal.

- KBHC was not fulfilling one of its principal tasks under the grant -- enrolling additional crisis centers in the 1-800-SUICIDE network call system. Under the grant's goals, KBHC was to enroll 80 centers in Year 1, 70 in Year 2 and 50 in Year 3. KBHC C, at 15, as modified in KBHC Ex. E, at 16. However, it is apparent from AAS's correspondence with KBHC that, as of April of Year 2, this goal was far from being met. See KBHC Ex. F, at 3.

- Under the terms of the grant, KBHC was authorized to support only part of its operation with grant funds. See KBHC Ex. C, at 26-28 ; KBHC Ex. F, at 4 (stating, for each job position, the percent of salary to be covered by the grant). In applying for the award, KBHC made representations about its intention and ability to secure independent funding for itself and the 1-800-SUICIDE network, both during the award period and subsequently. See KBHC Ex. C, at 18; Ex. E, at 13-14. It is apparent from the record that, as of April 2003, those intentions had not been realized. See KBHC Ex.

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[2] In its Response Brief, SAMHSA argued that KBHC was a "subcontractor" under the grant. SAMHSA Response Br. at 5. Citing the definition of "subaward" at 45 C.F.R. § 74.2, KBHC responded that the relationship between AAS and KBHC was based on a subaward. KBHC Reply Br. at 2. From the record before us, it appears that KBHC received a subaward of this grant from AAS and was a subrecipient, as that term is defined in 45 C.F.R. § 74.2. KBHC Exs. C; E.

F, at 5. AAS determined KBHC had spent restricted funds (i.e., grant funds) for unrestricted expenses and requested KBHC to adopt "procedural safeguards . . . to prevent all possibility of further misappropriation." Id.

- To address KBHC's funding problems, AAS authorized 100% support from the grant for KBHC from May 1 to July 1, 2003 so that KBHC could "aggressively implement" a development plan to generate funds to pay for expenses that were not funded by the grant. Id. Thereafter, AAS again restricted the share of KBHC expenses that were to be funded by the grant. Id. at 5-6. Such restriction was consistent with the terms of the grant, which provided for only partial support of KBHC's total activities, whether or not they could be viewed as furthering the purposes of the grant. KBHC Ex. C, at 26-27.

- SAMHSA established a formal process for payment whereby KBHC submitted invoices to AAS with a request for payment and AAS would review and approve or deny (with explanation); KBHC could appeal denied payments to SAMHSA by submitting a letter to AAS that AAS would forward to SAMHSA. KBHC Ex. I, at 1. KBHC does not dispute the statement of the Project Director that "Mr. Butler [KBHC's Executive Director] has been informed of this procedure many times, but has rarely followed it." Id.

- On March 24, 2004, SAMHSA issued a Revised Notice of Grant Award placing the grant on high risk status and stating that "the funds [are] restricted and may not be used without the prior approval of [SAMHSA]." SAMHSA Ex. 4, at 2. On April 23, 2004, SAMHSA notified AAS that AAS was not in compliance with the terms of the grant agreement because KBHC had fired all of its staff but its Executive Director, Reese Butler, and both AAS and KBHC had entered into contracts for work under the grant without seeking SAMHSA prior approval. KBHC Ex. H. SAMHSA placed additional specific restrictions on the grant while it "conduct[ed] a complete review of the activities and expenditures of this grant." Id. at 2.

- By July 16, 2004, the communications over this grant had become so disruptive that SAMHSA informed AAS that future contact was to be in "writing, allocating at least two weeks for response." KBHC Ex. I, at 12.

- As of March 2005, KBHC had sued AAS in the District of Columbia Superior Court for $285,205.94. Id. at 1.

In July 2005, KBHC and AAS settled the litigation by executing a "Claim and Appeal Agreement" wherein "AAS authorized KBHC to pursue its claims for reimbursement in AAS's name and directly to SAMHSA." KBHC Br. at 5, citing KBHC Ex. B. On September 15, 2006, AAS, on behalf of KBHC, submitted to SAMHSA a list of costs, totaling $424,067, for reimbursement. KBHC Ex. A, at 5-10. On September 22, 2006, SAMHSA denied some of these costs but agreed to review the remainder if KBHC submitted additional documentation. Id. at 11-14. KBHC did so. On December 13, SAMHSA issued a final decision in which it disallowed all but $7,895 of the $424,067 claimed. Id. at 1.

KBHC filed this appeal as to $190,236 of the disallowed costs.[3]

Discussion

A. We deny SAMHSA's request to dismiss this action.

In its Response Brief, SAMHSA for the first time requested the Board to dismiss KBHC's appeal on the ground that the appeal does not meet the requirements of 45 C.F.R. §§ 16.3 and 16.16(a). SAMHSA Response Br. at 15-16.

These sections address, among other things, who may initiate and participate in an appeal before the Board. Section 16.3(a) provides that an appellant must have received a final written determination involving a program that uses the Board for dispute resolution. Such a determination was provided to KBHC's counsel by SAMHSA (at KBHC Ex. A, at 1-4) in response to reimbursement requests he submitted to SAMHSA "by [AAS] on behalf of [KBHC]" (Id. at 5). When KBHC filed the appeal, it stated that "per the instructions in the Agency's determination letter" it was appealing SAMHSA's disallowance "as a subrecipient of [AAS]" and that "AAS, as the grantee, has authorized KBHC to pursue this appeal in its name." Appeal letter dated January 1, 2007. With the appeal file, KBHC filed the "Claims and Appeal Agreement" executed by AAS that authorized KBHC to present KBHC's claims for reimbursement directly to SAMHSA and to appeal SAMHSA's determination to the Board. KBHC Ex. B. Thus, KBHC's role here is as an authorized representative of AAS, the award recipient with the right to appeal.

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[3] The record of this case consists of: KBHC's initial brief (KBHC Br.) and an appeal file containing exhibits labeled A through O; SAMHSA's response brief (SAMHSA Response Br.) and an appeal file containing numbered exhibits 1 through 23; and KBHC's reply brief (KBHC Reply Br.) and one additional exhibit (P).

We also note that section 16.16(a) provides that, "if the Board determines that a third person is the real party in interest . . . the Board may allow the third person to present the case on appeal for the appellant." KBHC has demonstrated that it is a real party in interest because it is undisputed that the appeal involves funds allegedly expended or obligations allegedly incurred by KBHC, not AAS, under this grant. Therefore, this appeal is properly before the Board because it meets the requirements of 45 C.F.R. §§ 16.3 and 16.16(a).

B. We uphold SAMHSA's disallowance of the costs at issue.

The categories of costs at issue on appeal are (1) $73,760 for space and support services provided to KBHC by the National Mental Health Association (NMHA), (2) $982 for forwarding KBHC's Verizon telephone and fax line to the NMHA location, (3) $53,625 for hotel expenses associated with a conference, (4) $1,121 for shipping an exhibit to a conference, (5) $4,408 for unemployment compensation for terminated KBHC employees, (6) $2,340 for expenses for telephone conference calls, and (7) $54,000 for services provided by an independent contractor. Below we discuss why we uphold the disallowance of each of these costs.

1. Costs for office space and administrative support services provided by the NMHA

SAMHSA disallowed $73,760 claimed by KBHC as owed to the NMHA. KBHC Ex. A, at 11. According to KBHC, these costs were incurred for "three months of administrative and general support services contracted for the period April 2004-December 2004 to maintain the essential administrative and support operations." KBHC Ex. A, at 6; see also SAMHSA Ex. 12.

These costs resulted from KBHC's decision to restructure its operation, effective April 1, 2004, by terminating all employees except its executive director and moving to office space belonging to NMHA. KBHC Br. at 7. Thereafter, KBHC contracted with "NMHA personnel to carry out the day-to-day bookkeeping and administrative tasks." Id. KBHC represents that this action was intended to reduce its costs. Id.; see also KBHC Ex. A, at 10.

In its initial appeal file, KBHC submitted no agreement with NMHA, no bills/invoices from NMHA, and no records of payment to NMHA to support its assertion that it incurred $73,760 in costs to NMHA for "three months of administrative and general support services."

In its response brief, SAMHSA argues, among other things, that "KBHC failed to show how expenses reached the amount of $73,760" and that there was a "lack of documentation supporting the amount of the expenditure." SAMHSA Response Br. at 19. In its exhibits, SAMHSA includes an unsigned "Memorandum of Agreement" between KBHC and NMHA. SAMHSA Ex. 12. At the top of the agreement, the typed words "March 1, 2004 (Amended April 1, 2004)" appear along with a date stamp of "April 13, 2004." The agreement states that, from April 1, 2004 through September 30, 2004, KBHC will pay NMHA $15,000 a month for "administrative support," "financial compilation and reporting," "meetings and travel support," and "office space." Additionally, the agreement provides that KBHC will reimburse NMHA for KBHC's actual copying costs, long distance charges, and postage and delivery charges.

With its Reply Brief, KBHC submits a cover letter from NMHA dated March 2005 with eight attached invoices for bookkeeping services and an undated document titled "National Mental Health Association KBHC Contract for Administrative Support Addendum A Budget Justification" (addendum). KBHC Ex. P. KBHC cites these invoices as proof that SAMHSA was aware that KBHC "continued to occupy space at and receive services provided by NMHA throughout the relevant period." KBHC Reply Br. at 5. KBHC never explains the role of the addendum or how it related to its agreement with NMHA.

Both the recipient and subrecipient of a federal award bear the burden of adequately documenting the allowability of costs charged to the award. 45 C.F.R. §§ 74.21(b)(7), 74.27(a); Delta Foundation, Inc., DAB No. 1710, at 29 (1999), aff'd 303 F.3d 551, 568-570 (5th Cir. 2002); Action for Youth Christian Council, Inc., DAB No. 1651, at 8 (1998) and cases cited therein; Mexican American Unity Council, DAB No. 1341, at 13 (1992), aff'd United States v. Mexican American Unity Council, No. 5A-95-CA0320 (W.D. Tex. June 25, 1996).

For the following reasons, we agree with SAMHSA that KBHC failed to document the costs claimed here. First, KBHC does not point to any evidence to support its assertion that it owes or paid $73,760 to NMHA, such as invoices from NMHA totaling this amount or any record of payments to NMHA. Moreover, KBHC characterizes the unsigned copy of the agreement with NMHA submitted by SAMHSA as a "draft agreement" but submitted no copy of the final agreement.[4] KBHC Reply Br. at 4, citing SAMHSA Ex. 12.

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[4] KBHC represents --

(continued...)

Second, KBHC's assertion that $73,760 is owed for three months of services and space is inconsistent with both the draft agreement and the addendum.

- The draft agreement states that KBHC would pay NMHA a monthly fee of $15,000 plus charges for actual long distance calls, copying and postage. SAMHSA Ex. 12. We cannot reasonably infer that KBHC incurred $28,760 ($73,760 minus three months at $15,000) for copying, telephone, and postage over three months. This is particularly true since KBHC charged the grant separately for conference calls and KBHC did not identify any grant-funded activity that would result in extraordinary copying or mailing costs.[5]

- The addendum appears to include KBHC's copying, telephone, and postage in the $15,000 monthly charge and estimates those costs to be $1,395 per month. KBHC Ex. P, at 10.

Third, the inconsistencies between the NMHA bookkeeping invoices, KBHC's assertions, and KBHC's draft agreement with NMHA underscore the inadequacy of KBHC's evidence in support of this claim.[6] KBHC Exhibit P contains eight NMHA invoices for

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[4](...continued)
While the draft agreement attached as Exhibit 12 to SAMHSA's brief indicates an amendment effective as of April 1, 2004, the original agreement was executed prior to March 24, 2004 and had an effective date of March 1, 2004. No amendment was ever entered into by the parties.

KBHC Reply Br. at 4.

[5] AAS had been specifically instructed by SAMHSA in April 2004 that KBHC should stop all work on the publication "Suicide Prevention: The National Journal." KBHC Ex. H, at 2. SAMHSA concluded that its production "exceeds the scope of approved activities and is not essential to the operation of the hotline network." SAMHSA Ex. 6, at 1.

[6] In addition to being inconsistent with KBHC's assertions, the invoices have other evidentiary shortcomings. For example, they are all dated March 22, 2005 and are, therefore, not contemporaneous with KBHC's incurring these costs. See North Dakota Children's Services Coordinating Committee, DAB No. 1399, at 8 (1993) (Board generally reluctant to find non-contemporaneous documentation meets applicable record keeping

(continued...)

bookkeeping services for the months May 2004 through December 2004.[7] The invoices total $53,126.05, not $73,760. The charge method set out on the invoices is not consistent with the draft agreement at SAMHSA Exhibit 12 or the addendum on the last page of KBHC Exhibit P, both of which call for a fixed monthly charge. The draft agreement calls for a monthly charge of $15,000 for all support services and space. The addendum calls for a monthly charge of $15,000 but identifies the bookkeeping component of the $15,000 as $8,000. However, the invoices billed bookkeeping costs at $45 per hour, and the monthly charges on the invoices for five of the eight months are either more or less than $8,000.

Finally, for the following reasons, the record does not support an award of a lesser amount to KBHC, such as three months of the $15,000 monthly payment.

- The record does not contain the actual agreement so we are uninformed as to its actual terms.

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[6](...continued)
requirements, holding that such documentation must be closely scrutinized, citing Second Street Youth Center Foundation, Inc., DAB No. 1270, at 5 (1991)). Additionally, the invoices all contain a typed section stating "Approved for billing" with a signature line for "Catherine M. Stewart, NMHA CFO," but they are unsigned.

KBHC should have been able to produce contemporaneous documentation for these charges. 45 C.F.R. § 74.21(b). This is particularly true here because SAMHSA put this grant on high risk status on March 24, 2004. SAMHSA Ex. 4. As a condition of that status, SAMHSA required that "[a]ll requests to draw down funds awarded under this grant must be submitted to [SAMHSA] for prior approval before funds can be released." SAMHSA Ex. 4, at 2. If KBHC had been complying with this special condition on a timely basis, contemporaneous documentation of the costs comprising the $73,760 allegedly owing to NMHA should have been readily available for presentation to the Board.

[7] KBHC does not rely on the NMHA invoices to prove that it was never reimbursed and/or continues to owe NMHC $73,760 for three months of services/space costs. Rather, KBHC states only that the invoices show that "SAMHSA is fully aware that KBHC continued to occupy space and receive services provided by NMHA throughout the relevant period, and that NMHA continued to bill pursuant to the agreement. See KBHC Exh. P." KBHC Reply Br. at 4-5.

- The record supports a reasonable inference that SAMHSA previously reimbursed KBHC for some costs that were included in the $15,000 monthly payment set forth in the draft agreement. The combination of the fact that KBHC does not rely on the NMHA bookkeeping services invoices (KBHC Exhibit P) and the statement in a September 2004 SAMHSA letter that "the bookkeeper requested for KBHC is approved" (SAMHSA Exhibit 23) raise the question of whether SAMHSA previously approved and reimbursed AAS for some bookkeeping costs reflected in the NMHA invoices.[8] Alternatively, if SAMHSA was approving some other bookkeeping arrangement, then we question whether it would reasonable to also pay NMHA for bookkeeping costs under the agreement during this time period. See OMB Circular A-122, Att. A, ¶¶ A.2.a; A.3.

- Even if KBHC had proved that it incurred the unreimbursed amounts under the NMHA agreement, it has failed to prove how those amounts should be allocated between its work that was funded by this grant and its other work that was not funded by the grant. See KBHC Ex. F, at 4 (AAS correspondence stating that in 2004 KBHC would be funded at "80% level of effort for year 3 of the grant.") To be allowable under a grant, cost must be allocable to it. OMB Circular A-122, Att. A, ¶ A.2.a.

Therefore, we conclude that KBHC failed to adequately document that it incurred $73,760 or any other amount for "administrative and general support services" that have not been reimbursed by SAMHSA and that are properly allocated to this grant.

SAMHSA also asserted that KBHC was required to obtain prior approval of its agreement with NMHA. SAMHSA Response Br. at 16. KBHC disagrees and argues additionally that SAMHSA retroactively approved the agreement, and that, if SAMHSA did not retroactively

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[8] We note that KBHC states in its brief that "SAMHSA refused to cover any costs related to the KBHC/NMHA contract." KBHC Br. at 6. However, this statement is not consistent with the fact that KBHC is claiming only three months of costs for support services and space provided by NMHA while also representing that it received such benefits from NMHA from April through December. KBHC Reply Br. at 5, citing KBHC Ex. P. Further, KBHC does not deny SAMHSA's assertion that "SAMHSA already provided AAS with approximately $14,000 for services performed by NMHA for KBHC during April 2004." KBHC Ex. A, at 11.

approve the agreement, its refusal to do so was arbitrary and capricious. KBHC Br. at 8; KBHC Reply Br. at 4-6. We conclude that under 45 C.F.R. §§ 74.25(b)(1), (2), and (7), KBHC was required to obtain SAMHSA's prior approval for its arrangement with NMHA. The NMHA agreement was a central component of the KBHC's plan to completely restructure its capacity to implement the grant. The plan involved KBHC's terminating all staff (except for its Executive Director) -- including staff that it had represented in the grant application as necessary for grant implementation. KBHC Ex. C, at 26-27. In light of KBHC's failure to document these costs before the Board, however, it is not necessary for us to address whether (as KBHC asserts) SAMHSA retroactively approved the NMHA agreement, or whether (as SAMHSA asserts) SAMHSA reasonably denied retroactive approval of these expenses.

2. Forwarded Telephone and Fax Line

KBHC claims $982 for --

> expense reimbursement for payment to Verizon in order to forward the existing phone and fax line to the [NMHA office] and ensure local crisis centers could contact the new office location. KBHC felt that given the nature of the crisis hotline, it was important to provide the crisis centers with this service in case they did not receive notice of the move. The amount requested for reimbursement represents 6 months of service from Verizon.

KBHC Ex. A, at 7.

In its brief, SAMHSA disputes this claim on the ground, among others, that "KBHC never provided an itemized, chronological breakdown of the expenses that would have allowed SAMHSA to review which portion of this amount, if any, was appropriately incurred prior to the March 24, 2004 notice." SAMHSA Br. at 20.

We uphold SAMHSA's disallowance of these costs because KBHC failed to adequately document the costs before the Board. KBHC cites no exhibit containing bills from Verizon or other documentation of payment, nor do we see any documentation. Further, KBHC has failed to show why it was reasonable to pay such costs for six months after relocating.

3. Hotel expenses associated with a conference

SAMHSA denied KBHC's claim for $53,625 in hotel expenses associated with an April 2003 Crisis Center Conference in Santa

Fe, New Mexico. KBHC Ex. A, at 11. In claiming these expenses, KBHC stated to SAMHSA that --

> [the conference] was held in collaboration and partnership with the Grants Project Officer and AAS to recruit new crisis centers into the network and educate existing crisis centers. The hotel was contracted to hold this conference, however the bill was only partially paid by the grant. To date, this amount remains due to the El Dorado Hotel.

KBHC Ex. A, at 6.

In the letter disallowing these costs, SAMHSA stated that its determination was based on "written correspondence dated August 5, 2005 [wherein] AAS' executive director [the Project Director] indicated that KBHC's El Dorado Hotel expenses in question related to a 2003 Crisis Center Conference that was not grant related." Id.

KBHC argues on appeal that the conference was grant related, pointing to promotional materials that stated the conference was "geared to crisis center workers . . . in conjunction with the 36th AAS Conference." KBHC Br. at 9, citing Ex. J, at 3. KBHC argues that "[t]his activity clearly falls within the grant purpose of dissemination of information and training of crisis center workers." KBHC Br. at 9.

The events leading up to this dispute with AAS were described in a July 2004 memo by the Project Director, the contents of which KBHC does not dispute. See KBHC Ex. I, at 13-18. The memo stated as follows:

- In May 2002, Mr. Butler of KBHC told AAS that KBHC proposed to sponsor a "shadow conference" for crisis centers in New Mexico in April 2003 to coincide with AAS's annual conference. KBHC Ex. I, at 13. AAS objected that further discussions about this proposal were needed. Id.

- In July 2002, Mr. Butler signed a contract on behalf of KBHC with the El Dorado Hotel in Santa Fe to hold a conference there in April 2003. Id.

- In November 2002, after a series of discussions, AAS, KBHC, and Contact USA (CUSA) entered into a Memorandum of Understanding (MOU) for planning, funding and producing a crisis center conference in conjunction with the AAS annual conference. Id. at 14; SAMHSA Ex. 16 (MOU). In the MOU, KBHC agreed to contribute $50,000, which it represented it

was raising from outside donors, to support the conference. Id. at 14. On the basis of this commitment, AAS and KBHC agreed that KBHC would also contribute an additional $41,000 that would come from the SAMHSA grant. Id.; SAMHSA Ex. 16, at 2.[9] AAS explained that the $41,000 was from "KBHC's grant-marketing budget . . . [for] support monies in order to lower registration fees for the conference" to attract more crisis centers to the conference. KBHC Ex. I, at 13-14. Additionally, in the MOU, KBHC agreed to independently fulfill all its contractual agreements with the El Dorado Hotel (and AAS agreed to independently fulfill all its contractual agreements with two different hotels.) Id.; SAMHSA Ex. 16, at 2. The MOU set out the conference budget and the parties' other responsibilities for production and funding of the conference.

- The conference occurred in April 2003, although KBHC never contributed the $50,000 it promised from non-grant funds.[10] KBHC Ex. I at 4, 17-18.

- In December 2003, AAS received "an invoice from the Eldorado Hotel with a cover letter stating that KBHC had informed the hotel that AAS was responsible for payment. The invoice was for $56,625.14." Id. AAS informed the El Dorado that it was not responsible for the bill.

- The El Dorado bill was reviewed by AAS. AAS sent KBHC $1,831.51 for "Eldorado Expenses Covered by the MOU" and $1,000 for the "KBHC Eldorado Deposit Reimbursement." Id. (Per the MOU, KBHC was also paid $3,367.43 as one-third of the profits realized from the conference even though KBHC had failed to contribute the $50,000 it was obligated to contribute under the MOU. Id.)

We uphold this portion of the disallowance for the following reasons. KBHC acknowledges that, in concluding that the expenses were not grant-related, SAMHSA relied on AAS's description of the course of dealing and resulting MOU among the conference

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[9] The MOU provides, "KBHC will contribute $41,000 in SAMHSA grant funds and an additional $50,000 (to a total of $91,000) as revenue toward Conference support or reduced registration fees." SAMHSA Ex. 16, at 2.

[10] The conference registration fees and $41,000 contributed from the grant were adequate to pay for the actual costs of the conference. KBHC Ex. I, at 17-18.

organizers. See KBHC Br. at 9, citing KBHC Ex. I. The undisputed facts described therein and the MOU support AAS's and SAMHSA's conclusion that these expenses were not grant-related because they were never approved, by AAS or SAMHSA, to be paid from the grant in support of this conference. The grant's contribution of $41,000 to this conference was clearly set forth in the MOU with AAS, and KBHC agreed that the additional $50,000 was to be paid from non-grant funds. Thus, even assuming, for the sake of argument, that KBHC was able to engage in grant-related activities at the conference (by, for example, recruiting crisis centers to be members of the Hopeline Network), KBHC was not authorized to spend grant funds to actually sponsor the conference beyond those authorized by AAS to be contributed from the grant. In other words, the fact that the conference provided KBHC with an opportunity to market the Hopeline Network (as did other conferences KBHC personnel attended) is not a basis for concluding that the grant should fund this conference beyond the amount that had been previously approved.

4. Shipping costs

KBHC claims $1,121 incurred for shipping a trade show display booth to the conference of the Employee Assistance Society of North America in Ottawa, Canada. KBHC Ex. A, at 7. SAMHSA disallowed this cost because the conference occurred May 13-15, 2004, which was after SAMHSA's April 23, 2004 notice to AAS that, as a high risk grantee, "marketing activities for the 1-800-Suicide [line] including use of . . . the exhibit booth and travel to conferences" should "cease immediately." KBHC Ex. H, at 2. KBHC argues that the shipment invoice shows that KBHC "incurred the obligation underlying the $1,121.00 expense prior to SAMHSA's imposition of the high risk designation on April 23, 2004." KBHC Br. at 9, citing KBHC Ex. K, at 5.

We uphold SAMHSA's disallowance of this cost. The order form for this shipment shows KBHC placed this order on April 13. KBHC Ex. K, at 5. While this action was prior to the express ban on travel imposed by SAMHSA on April 23, 2004, the exhibit was not shipped until May 3, 2004. Id. at 8. Thus KBHC had sufficient time after the April 23 letter to have avoided or, at a minimum, mitigated this expense by canceling the shipment order. Instead, KBHC chose to have the display booth shipped to Canada to its "Rep At The Event: Reece Butler." KBHC Ex. K, at 5.

5. Unemployment compensation paid to terminated KBHC employees

KBHC claimed $4,408.12 for "unemployment costs related to grant staff." KBHC Ex. A, at 6.

In response to KBHC's request for reimbursement, SAMHSA wrote -

> SAMHSA will consider these costs for reimbursement if invoices, bills, and/or documentation of payment (bank statements and cancelled checks) are provided to support the unemployment costs paid. Please note that KBHC chose to administer self insurance, rather than pay unemployment insurance premiums to the State and have it cover unemployment compensation payments. This practice is uncommon, but not prohibited. According to Attachment B Section 8.g.(b) of OMB Circular A-122, *Cost Principles for Non-profit Organizations*, payments made for unemployment compensation under a self-insured program are allowable in the year paid with the prior approval of the awarding agency. SAMHSA already reimbursed AAS for unemployment costs incurred by KBHC totaling $19,373 for the period April through September 2004.

KBHC Ex. A, at 12.

In a letter dated December 13, 2006, SAMHSA stated that KBHC did not provide SAMHSA with "invoices, bills, and/or documentation of payment" and, as a result, SAMHSA denied these costs. KBHC Ex. A, at 1.

In this proceeding, KBHC submitted bills from the Virginia Employment Commission and the Connecticut Department of Labor for unemployment compensation paid to individuals who SAMHSA does not dispute were previously employed by KBHC.[11] KBHC Ex. L. KBHC cites OMB Circular A-122, Att. B, ¶ 8.g.(3)(b) as the basis for these charges to the grant. KBHC Reply Br. at 8. That section provides --

> Where an organization follows a consistent policy of expensing **actual payments** to, or on behalf of, employees or former employees for unemployment compensation or workers' compensation, **such payments are allowable in the year of payment** with the prior approval of the awarding agency, **provided they are allocated to all activities of the organization.**

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[11] KBHC states that "SAMHSA had received the invoices on numerous occasions" and that KBHC "believes it submitted it again in response to SAMHSA's September 22 letter." KBHC Br. at 10.

OMB Circular A-122, Att. B, ¶ 8.g.(3)(b) (emphasis added).

We uphold SAMHSA's disallowance of these costs because KBHC failed to demonstrate that these expenses satisfy the requirements of OMB Circular A-122. Attachment B, paragraph 8.g.(3)(b) of the Circular provides that "actual payments . . . on behalf of . . . former employees for unemployment compensation" are "allowable in the year of payment . . . provided they are allocated to all activities of the organization."[12] While KBHC Exhibit L contains bills from the Virginia Employment Commission and the Connecticut Department of Labor, there is no indication in the Virginia documents that the amounts billed were paid by KBHC, much less what year they were paid. KBHC Ex. L, at 3-4. There is some indication of partial payment of the Connecticut bills, but we cannot tell when the payment was made or whether the payment was for amounts SAMHSA had previously reimbursed KBHC. Id. at 6-12. Further, KBHC fails to show that the amounts billed by Virginia and Connecticut were "allocated to all activities of the organization" as required by OMB Circular A-122, Att. B, ¶ 8.g.(3)(b), and Att. A, ¶ A.4.

6. Telephone expenses for conference calls

KBHC claimed $2,340 for "AccessLine" costs for "weekly conference calls with the technology team to discuss current activity, implementation goals and barriers, and next steps." KBHC Ex. A, at 8. SAMHSA denied this claim on the ground that KBHC "never provided purposes or minutes for the conference calls to

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[12] We do not discuss the requirement of prior approval by the awarding agency imposed by this section. KBHC argues that SAMHSA's letter of September 29, 2004 (SAMHSA Ex. 22) stating "Request to reimburse unemployment costs for terminated KBHC employees is approved" constituted sufficient approval. KBHC Reply Br. at 8, citing SAMHSA Ex. 23, at 1.

substantiate that they related to the grant."[13] KBHC Ex. A, at 13.

We uphold SAMHSA's disallowance of these costs because KBHC has failed to provide documentation adequate to show that all (or part) of these expenses were incurred for grant-funded work. In its brief, KBHC relies on KBHC Exhibit M, stating that "as is evident from a sampling of the minutes prepared for these conference calls over the course of the grant, such conference calls were, in fact, related to funded purposes." KBHC Br. at 10.[14] However, KBHC Exhibit M does not appear to be a "sampling of minutes prepared for these conference calls." Rather, Exhibit M contains two sets of charts of "open issues" and "closed issues" with columns for "open," "close," "issue," "originator," "assigned," and "current status/resolution." One set is dated January 20, 2004 (pages 1-11), and one set is dated February 2004 (12-16). KBHC filed no statement from a participant in these calls explaining the link between the charts and the calls and how the charts establish that all (or even some part) of the charges for these calls were for work funded by the grant.

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[13] As KBHC points out (KHBC Br. at 10), SAMHSA relied on AAS's explanation for why it had not paid these costs. AAS stated that -

> these bills allegedly were for monthly conference calls. This was never denied; rather simply returned for clarification as to who was on the call and what was the purpose of the call, e.g., minutes of the conference call would suffice, as SAMHSA would not allow me to pay such an invoice as submitted without such documentation. There simply is/was no way for me to know that these calls were grant-related without such verifiable back-up; and since Butler has consistently put in requests for payments for items not grant-related, he knows that this is required.

KBHC Ex. I, at 3.

[14] KBHC failed to include any bills from AccessLine, or any other documentation of the amount of the AccessLine bills, in its exhibits. SAMHSA did include a set of AccessLine bills under the name of "Henry Butler." SAMHSA Ex. 19. KBHC represented that the AccessLine bills were on a personal credit card because "payment had to be made as you go with a credit card. Therefore, since KBHC did not have a business credit card all of these calls were placed on Reese Butler's personal credit card." KBHC Ex. A, at 8.

7. Costs for independent contractor

On March 31, 2004, KBHC entered into a contract with an independent contractor, Edward Scofield, a computer programmer. KBHC Ex. N, at 1-6. KBHC represented to SAMHSA that Mr. Scofield "was hired to provide technology oversight, program development and launching and maintenance of the network system." KBHC Ex. A, at 7. The contract called for KBHC to pay Mr. Scofield $12,000 a month. KBHC Ex. N, at 1. SAMHSA approved payment of $6,000 per month and, pursuant to that approval, AAS "paid $6,000 for each and every month of his work submitted by invoice and summary of his activities since 1 April." KBHC Ex. I, at 3. KBHC claims $54,000 (an additional $6,000 per month) is owed under this contract "for work directly and solely related to the grant activities." KBHC Ex. A, at 7.

SAMHSA stated that it was disallowing the $54,000 because -

> KBHC had already been reimbursed for Scofield's time worked on the grant at the SAMHSA approved level of effort, 50 percent, for the period in question. Please note that because AAS' grant was classified as high risk by SAMHSA in April 2004 all subsequent expenditures had to be pre-approved by SAMHSA. Accordingly, SAMHSA notified both AAS and KBHC that Scofield's time on the grant was only approved at a 50 percent level of effort. In a June 4, 2004 email, KBHC's executive director indicated that Scofield had reduced his time worked to approximately 50 percent since the April 23, 2004 restrictions.

KBHC Ex. A, at 12-13; see also KBHC Ex. I, at 11, and SAMHSA Ex. 23.

KBHC argues that it was not required to obtain SAMHSA's prior approval for this contract because the contract was consummated prior to SAMHSA's April 23, 2004 letter instructing KBHC that such contracts should be pre-approved. KBHC Br. at 11. We do not reach the question of the impact of SAMHSA's April 2004 letter (or of the March 24, 2004 notice of Special Terms and Conditions) on the contract because, as noted in SAMHSA's April 2004 letter, prior approval of contracts with independent

contractors is required by 45 C.F.R. § 74.25(c)(7).[15] Prior approval is also required by the PHS Grants Policy Statement.

Section 74.25(c)(7) provides:

> (c) For nonconstruction awards, recipients shall obtain prior approvals from the HHS awarding agency for one or more of the following program or budget related reasons.
>
> * * *
>
> (7) Unless described in the application and funded in the approved award, . . . contracting out of any work under an award.

KBHC does not identify any description in the grant application or award approval of any of its work that was to be contracted out under the award, nor do we see any.[16] Thus, section 74.25(c)(7) required KBHC to obtain SAMHSA's prior approval for this contract.

In addition, the PHS Grants Policy Statement, which also governed this grant (SAMHSA Ex. 1, at 1), required prior approval of this contract. The PHS Grants Policy Statement requires prior approval of "[t]ransferring to a third party, by contracting or any other means, the actual performance of substantive programmatic work." PHS Grants Policy Statement, § 8, "Prior Approval Authorities." Scofield contracted to provide "project management and telecommunications engineering for the National Hopeline Network 1-800-Suicide Hotline Evaluation Linkage Project." KBHC Ex. N, at 1. Such work is substantive programmatic work, and the grant application stated that it would be performed by a KBHC employee. KBHC Exs. C, at 26-27; E, at 12-13.

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[15] In the April 2004 letter, SAMHSA cited the uniform administrative requirements for grants to state, local and tribal governments found at 45 C.F.R. Part 92, specifically 45 C.F.R. § 92.30(d)(4). KBHC Ex. H, at 1. The applicable uniform requirement for non-profit grantees is found at 45 C.F.R. § 74.25(c)(7).

[16] Indeed, it appears that the work Mr. Scofield was performing was to be performed by KBHC staff identified in the grant application as the Web Systems Administrator and the Web Systems Technician. KBHC Ex. E, at 13, 40.

Finally, KBHC's assertion that Mr. Scofield's "work under the grant is well documented in his payment invoices to KBHC" (KBHC Br. at 12) is not supported by the record. KBHC cites its Exhibit N, at 10-11 (task/hour statement for 5/3-5/14); at 14-15 (task/hour statement for 5/17-5/28); at 18 (task/hour statement for 6/1/-6/15); at 27 (duplicate of statement at 18); at 36-37 (duplicate of statement at 10-11), and at 43-43 (duplicate of statement at 14-15). Thus, KBHC has submitted statements for only one and one-half months of an apparent nine-month payment period. To the extent that the work was undocumented, it was clearly unallowable. OMB Circular A-122, Att. A, ¶ A.2.g. Further, some of the task statements describe work on projects that SAMHSA had told KBHC in April that it would not fund. For example, KBHC Exhibit N, at 10 lists hours for work on the Resource Information and Evaluation System (RIES), even though SAMHSA stated in its letter of April 24, 2004 that grant-funded work on the RIES was to "cease immediately on receipt of this letter." KBHC Ex. I, at 9. Payments for such work were not allocable to the grant.

Conclusion

Based on the preceding analysis, we uphold SAMHSA's disallowance in full.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member