

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL  
CASE NO. 1988-16

IN RE: PROTEST OF WILLIAMSBURG )  
COUNTY COUNCIL ON AGING )

O R D E R

APPEALED

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on December 7, 1988, on the protest by Williamsburg County Council on Aging (WCCOA) of the decision by The South Carolina Health and Human Services Finance Commission (HHSFC) not to consider WCCOA's proposals for Social Services Block Grant (SSBG) funds to provide homemaker services and home-delivered meals to low-income elderly persons for fiscal year 1988-89.

Present at the hearing before the Panel were the protestant WCCOA, represented by E. N. Zeigler, Esq.; HHSFC, represented by its Assistant General Counsel Richard G. Hepfer, Esq.; and the Division of General Services, represented by its General Counsel, Wayne Rush, Esquire. Also present with counsel though not a party was the South Carolina Commission on Aging, represented by James Ryan, Esq., of the South Carolina Attorney General's Office.

FINDINGS OF FACT

Every fiscal year HHSFC issues Requests for Proposals for two contracts funded by SSBG funds: one to provide homemaker services to low-income persons, the other to provide home-delivered meals to low-income elderly persons. For several years, both contracts for the Williamsburg County area have been awarded to the protestant WCCOA.

Mrs. Jean W. McCabe, the Executive Director of WCCOA, testified that, in addition to SSBG money, WCCOA receives Williamsburg County Council funds, federal funding pursuant to the Older Americans Act, funding under the Long Term Care for the Elderly program, funds from the South Carolina Commission on Aging, and money generated from contributions and fund-raising projects.

On or about July 26, 1988, WCCOA submitted proposals for the homemaker services and home-delivered meals SSBG contracts for fiscal year 1988-89. (Record, p. 120). On August 9, 1988, HHSFC notified WCCOA that its 1987-88 contract for home-delivered meals was terminated because of Williamsburg's alleged breach of one provision of the contract. The notice further informed WCCOA that, even though no irregularities existed with respect thereto, its 1987-88 contract for provision of homemaker services was also terminated because "an agency with a single administrative structure cannot be responsible and accountable in one program and not in the other."<sup>1</sup> (Record, p. 391).

On September 14 and 15, 1988, HHSFC notified WCCOA that its 1988-89 proposals for homemaker services and home-

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1. WCCOA protested the decision to terminate the 1987-88 contracts. That protest is pending before HHSFC and is not before the Panel in this case.

delivered meals would not be considered because of the termination of the previous year's contracts. (Record, p. 57). The services formerly being provided by WCCOA are now being provided by the Sumter County Council on Aging on an emergency procurement basis.

At issue in this case is the conduct of WCCOA as it relates to section G of the contract for home-delivered meals which states:

G. Payment in Full

Payment by HHSFC for services to a recipient under this contract shall constitute payment in full to the Provider and the Provider shall not bill, request, demand, solicit, or in any manner receive or accept payment from any person, family member, relative, organization or entity for care or services to a recipient except as may otherwise be allowed under federal regulations or in accordance with HHSFC policy. Any collection of payments or deposits in violation of this section shall be grounds for termination of this contract . . . .

(Emphasis added). (Record, p. 264).

HHSFC issued a Policy Clarification of section G on May 15, 1987.<sup>2</sup> The clarification states, in part:

Recently it has come to our attention that some contractors who are not participating in the Fee Pilots are requiring SSBG clients to share in the cost of SSBG services. . . .

Some staff and clients are confused in that they do not understand the difference in a voluntary contribution and a payment for services. The terms contribution, donation,

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2. The Policy Clarification was put into the record for the first time at the hearing before the Panel and was not made available to the Chief Procurement Officer at the hearing before him.

fee and payment are being used interchangeably.

Voluntary contributions or donations are "gifts, freely given, without persuasion, coercion or legal obligation. Fees or payments for service are legal obligations and are required in order to receive the service. Contractors may not bill, request, demand or solicit fees or payments for services from any SSBG client, family member, relative or organization. SSBG clients may be allowed to make voluntary contributions provided it is truly "voluntary". SSBG clients should not be made to feel as if they must contribute in order to receive the service . . . .

(Emphasis added). (Record, Pltf.'s Ex. 1).

There is no question that WCCOA accepted money from SSBG clients. The question is whether such funds were contributions freely given or fees required for service.

Mrs. McCabe testified that prior to October 1986, WCCOA received only contributions from its SSBG clients. In 1986, HHSFC initiated a Fees Pilot program in which SSBG clients, in order to receive service, were required to pay either a flat fee or a fee determined by a sliding scale based on income. If a client qualified, he or she could obtain a waiver to continue receiving meals at a reduced rate or at no charge.

According to Mrs. McCabe, WCCOA elected to participate in the Fees Pilot program in October 1986 and charge a flat fee. WCCOA withdrew from the program within the month, however, because, according to Mrs. McCabe, the clients were complaining about the amount of the fees charged and were confused as to why some people had to pay (SSBG clients) and others did not. Because of this confusion, WCCOA went back to accepting

contributions from its SSBG clients.<sup>3</sup> Mrs. McCabe testified that, other than the Fees Pilot program, WCCOA never at any time directed that SSBG clients had to pay money or face termination of their services and WCCOA never at any time terminated a SSBG client for nonpayment.

Contradicting Mrs. McCabe are two letters introduced into evidence. One letter dated June 5, 1987, signed by Bernice Barr, Homemaker Service Supervisor for WCCOA, and addressed, "Dear Recipients" states as follows:

Beginning July 1, 1987, Williamsburg County Council on Aging will be implementing a fee program for all clients receiving homemaker services.

This program is 75% federally funded, we must match this with local dollars in order to continue your services. Due to a reduction in funds this fee is necessary so that we may continue to serve you in your homes.

We are requesting a fee of \$1.00 per visit. Each client who receives services from a homemaker will be required to pay this fee.

(Record, Def.'s Ex. 3). Mrs. McCabe testified that she believes that the above letter was directed to clients other than SSBG clients. Several other witnesses testified, however, that the SSBG program was the only WCCOA program that was 75% federally funded at the time. (See, Testimony of David R. Smith and Alice Eddings). In addition, Mr. Charles Fulton of the Williamsburg County Department of Social Services testified that some of his

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3. Ms. Libby Chapman of HHSFC's Division of Program Development, testified that Mrs. McCabe informed her on October 10 that WCCOA was withdrawing from the program because it did not want to give clients waivers.

clients, all of whom were SSBG clients of WCCOA, told him they felt compelled to pay for services after receiving the June 5, 1987 letter. The Panel finds that the June 5, 1987 letter was directed to WCCOA's SSBG clients.

The second letter is in memo form, undated, from Mrs. McCabe to "All Recipients of Council on Aging Meals". This memo states:

As you know all federal monies require matching dollars. The only way to obtain these matching dollars is by participants contributions.

In order to keep our programs going, we must increase our contribution or cut the number of meals served.

As of July 1, 1987 the WCCOA is asking a 50c contribution from each individual who receives a meal. We are required to put this money into the budget, where it is recorded and used for program expenses.

If you value your meal program let us know by your support. If not let others have a chance to eat.

(Record, p. 408). Mrs. McCabe testified that this memo was distributed only to meal sites where no SSBG clients were present. Mrs. McCabe admitted that it was possible that some SSBG clients may have seen the memo.

At page 79 of the Record is a ledger sheet captioned "SSBG Home Delivered Meals Fees Collected" with a month date of October 1986. There is a specific column for "Balance Owed". The dates of the entries range from September 29 to November 8. Ms. Shelia Dicks, a former employee of WCCOA, who claims authorship of the form could not remember how long the form was in use. She does remember that at some point she stopped using the "Balance Owed" column.

In July 1987, Waccamaw Regional Planning and Development Council forwarded to WCCOA a complaint that several unnamed clients were being charged for services. (Record, p. 409). In reply, Mrs. McCabe stated in a July 14, 1987 letter:

No Title III participants are being charged for services, nor have they ever been charged. They are, however, strongly urged to make a fair contribution.

(Record, p. 410). Title III participants are not the same as SSBG participants. Under the Title III program (Older Americans Act) fees are prohibited but participants must be encouraged to contribute.

On August 7, 1987, WCCOA received through the South Carolina Commission on Aging another complaint, forwarded by Congressman Tallon's office, that unidentified recipients were being charged for meals. Again, WCCOA responded:

WCCOA does not currently nor have we ever charged for Older Americans Act services. We do not make a charge in order to provide or continue service. We do, however, actively solicit contributions and donations for services provided in part by Older Americans Act Funds (Title III). . . . I believe that there has been some confusion among clients and staff in that the terms contributions, donations, fee and payment are being used interchangeably.

(Record, p. 412). The letter goes on to advise that clients are being contacted and informed that contributions are voluntary and do not affect service.

Mrs. McCabe testified that after receiving notice of the complaints she sent letters advising all participants that there were no mandatory charges for WCCOA services. These letters appear in the Record at pages 414 through 416. One of the

letters dated August 25, 1987, specifically refers to the SSBG program and states:

There has been some misunderstanding concerning our Social Services Block Grant programs.

\* \* \*

WCCOA does not charge a fee for our SSBG services. You are currently receiving service through an SSBG program and there is no charge for this service.

(Record, p. 415). The letters have a blank at the bottom for the client to acknowledge receipt and understanding of the letter. Mrs. McCabe testified that WCCOA collected acknowledgments from 33 of 35 SSBG clients.

Mrs. Ruth Geddings and Mrs. Florence Caster, staff members of WCCOA, and Mr. Julius Oliver, a Board member of WCCOA, testified that they had always made it clear when they visited clients that all payments were voluntary and that service would continue whether or not payment was made.

Mrs. Sarah Singletary, a recipient of WCCOA's services, stated that she contributed when she could but when she could not her service had always continued. Mr. Dozier, another recipient, testified that he could not afford to pay at all and that he still received service. Neither witness knew whether he or she was an SSBG client.

As part of its being eligible to receive funds through HHSFC, WCCOA is reviewed every year by the South Carolina Commission on Aging. Ms. Alice Eddings, Senior Accountant for the South Carolina Commission on Aging, testified that on July 21-24, 1987, she performed the financial assessment summarized as

"SCCOA findings" at pages 65-78. Part of her report indicates that:

Participants are being charged for services and advised that they will not be served if they can no [sic] pay. What are apparently charges for congregate and home delivered meals were increased from \$5.00 a month (or \$.25 a day) to \$10.00 a month (or \$.50 a day). Homemaker Service was increased to \$1.00 per visit from \$.50 per visit.

\* \* \*

The Social Services Block Grant participants also pay for the meals they receive on the basis of \$.25 a day or \$.50 a day beginning July 1, 1987.

(Record, pp. 68-69). Ms. Eddings testified that she did not personally interview the clients,<sup>4</sup> however, she did observe receipts for payment of meals by SSBG clients. Ms. Eddings admitted that she could not tell by looking at the receipts whether the payments were voluntary or not.

Ms. Eddings also testified that she requested the minutes of the WCCOA Board and received, among others, minutes which indicated:

Starting July 1, 1986, we requested a fee of .50¢ per meals for SSBG clients. Also beginning July 1, 1987 a donation/contribution of .50¢ will be suggested for other meals."

(Record, Def.'s Ex. 5). Ms. Eddings testified that another version of these minutes was discovered by a member of the

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4. The person who interviewed the clients, Mr. Arliss Epps, is deceased.

Commission on Aging staff. These minutes stated:

Starting October 1, 1986, we requested a fee of .50¢ per meal for SSBG clients. Also, beginning January 1, 1987, all meals will be .50¢. There will definitely be no more "free-bies."

(Record, Def.'s Ex. 6). Mrs. McCabe testified that the October 1 minutes were a corrected form of the July minutes.

According to Ms. Eddings, as a result of her findings the South Carolina Commission on Aging requested the State Auditor's Office to commission an independent audit of WCCOA. David R. Smith, a Certified Public Accountant, testified that he was retained by the State Auditor's Office to perform an expanded audit of WCCOA for fiscal year 86-87. According to Mr. Smith, his expanded audit was conducted much like an investigation in that the Auditor's Office gave him a specific list of suspected problems to look into. One of the problem areas was the alleged payment of fees by SSBG and other clients.

Mr. Smith testified that he personally interviewed clients and in his report he concludes, "Based on my site visits and visits by officials of the South Carolina Commission on Aging there appears to be some confusion as to the application of the [contribution] policy. Some clients were of the opinion that they must make contributions and that lists are maintained of those who paid. Other clients stated that they were not required to pay and would still receive meals." (Record, p. 374).

Based on its financial assessment and Mr. Smith's audit findings, the South Carolina Commission on Aging recommended to HHSFC that WCCOA not be considered a responsive and acceptable

provider. (Record, p. 61). Several months after it received the Commission's recommendation, HHSFC conducted its own investigation of WCCOA on July 27, 29, and August 2, 1988.

Mr. Robert L. Coffey of HHSFC's Program Monitoring Department, and a member of his staff, Mr. Randy Jenkins, testified that they personally interviewed SSBG recipients of both homemaker and home-delivered meals services. Their survey results were introduced into the Record as Def.'s Ex. 9 and 10. As summarized by Mr. Coffey, the findings indicate that of 17 homemaker services clients, 12 paid fees, 3 paid contributions and 2 pay nothing. Of 14 meal recipients, 7 paid fees, 3 paid contributions, 3 paid nothing and 1 was unclassified.

Under cross-examination, Mr. Coffey and Mr. Jenkins both admitted that some of the recipients they classified as paying fees actually stated that they used to pay money but were recently informed that all payments were voluntary. The survey is unclear whether any of the clients surveyed had actually been terminated for failure to pay.

As a result of its findings and the Commission on Aging and David Smith's findings, HHSFC made the decision to terminate WCCOA's 1987-88 contracts and not to consider its proposals for the 1988-89 year. HHSFC did not give WCCOA the opportunity to respond to its findings prior to termination. HHSFC did have in its possession WCCOA's response to David Smith's audit.

#### CONCLUSIONS OF LAW

HHSFC refused to consider WCCOA's proposals because it found that WCCOA had violated its home-delivered meals contract by

charging a fee for delivering meals to its clients. WCCOA takes the position the funds it received were voluntary donations to enhance the program and not fees for services.

The Chief Procurement Officer (CPO) in his Decision dated October 28, 1988, found that, under section G of the meals contract, even receiving donations was prohibited and that, therefore, WCCOA was in violation of the contract no matter how the funds it received were classified. As stated earlier, the CPO reached his decision without benefit of the Policy Clarification. In light of the Clarification, the determination by the CPO that even donations were prohibited is clearly erroneous.

The question presented to the Panel which the CPO did not reach is whether funds received by WCCOA from its SSBG clients were voluntarily given or, in the words of the Policy Clarification, whether WCCOA's SSBG clients were "made to feel as if they must contribute in order to receive service." Weighing all the evidence, the Panel holds HHSFC was justified in concluding that WCCOA's conduct was coercive and amounted to soliciting payments for services in violation of its 1987-88 contract.

In late July 1987, the South Carolina Commission on Aging found that WCCOA was charging its SSBG clients for meals. Its conclusions were based on client interviews and inspection of WCCOA's Board meeting minutes. In October 1987 David R. Smith completed an investigative audit that confirmed the Commission's findings. Again, the conclusions were based on client interviews

and inspection of WCCOA's internal documents. HHSFC in July 1988 found evidence that at least some SSBG meal clients were still under the impression that they had to pay to eat. Admittedly, some of the clients surveyed stated that they had recently been informed that payment was voluntary.

Also supporting HHSFC's position are various WCCOA documents presented to the Panel. The memo, which appears at page 408 of the Record, is addressed to "All recipients of Council on Aging Meals" and by Mrs. McCabe's own admission could have been seen by SSBG clients. That memo contains the language, "In order to keep our programs going, we must increase our contributions or cut the number of meals served. . . . If you value your meal program let us know by your support. If not, let others have a chance to eat." The Panel finds this language coercive in that it could easily cause a recipient to feel that meals would be cut and others would "have a chance to eat" if he did not make a contribution.

Also the ledger sheet appearing at page 79 shows "fees" collected from SSBG clients starting September 29, 1986 and continuing through November 8, 1986. All of the testimony before the Panel indicated that WCCOA was in the Fees Pilot program no earlier than October 1 and no later than October 31. One witness placed WCCOA's withdrawal from the program as early as October 10.

While it is clear that, by July 1988, WCCOA was taking remedial steps to clarify the contribution policy, it is equally clear that WCCOA violated that policy during the 1987-88 contract

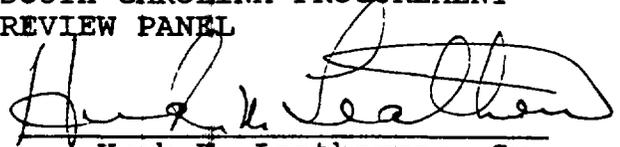
year. Section G of the contract states that violation of that section is grounds for termination. It is proper under the Procurement Code to consider past violation of a contract when determining responsibility of a provider. S. C. Code Ann. §11-35-1810 (1976). HHSFC was justified in terminating the contract and was, therefore, justified in not considering WCCOA's proposals for 1988-89.

Although HHSFC did not give it as a grounds for termination, the Panel notes that WCCOA also violated its homemaker services contract. The Panel finds that the June 5, 1987 letter directed to SSBG clients uses coercive language to collect funds. Specifically, the letter states, "Beginning July 1, 1987, [WCCOA] will be implementing a fee program for all clients receiving homemaker services. . . .Due to a reduction in funds this fee is necessary so that we may continue to serve you in your homes. . . . Each client who receives services from a homemaker will be required to pay this fee." An SSBG client receiving this letter could easily conclude that he would risk losing service if he did not pay the fee. The testimony of Charles Fulton that his clients felt compelled to pay after they received the letter supports this conclusion.

For the reasons stated above, the Panel holds that HHSFC was justified in refusing to consider WCCOA's proposals for 1988-89 fiscal year. The Panel also holds that the decision of the CPO, though right in result, is erroneous in reasoning.

IT IS THEREFORE ORDERED that the decision of the CPO dated October 28, 1988 is reversed as to everything but result and the protest of WCCOA is dismissed.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL



Hugh K. Leatherman, Sr.  
Chairman

Columbia, S. C.  
12-14-88, 1988