

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Abstinence for Singles/
Urban Community
Action Network
Docket Nos. A-08-85 and
A-08-86
Decision No. 2217

DATE: December 29, 2008

DECISION

Abstinence for Singles/Urban Community Action Network (AFS/UCAN) appeals the April 2008 decisions of the Administration for Children and Families (ACF) terminating discretionary Grants Nos. 90AE0186 (awarded under the Community Based Abstinence Education Program) and 90FE0114 (awarded under the Healthy Marriage Demonstration Program). ACF determined that the grantee materially failed to comply with the terms and conditions of the awards because it did not meet the grantee eligibility requirements when it applied for the awards and because it did not obtain required, prior approval by ACF for post-award organizational changes. Since the appeals involve the same issues, they were consolidated with the consent of the parties.

For the reasons discussed below, we uphold the terminations. We conclude that the grantee undertook a series of organizational changes for which it was required, but failed, to secure advance approval by ACF. We further conclude that the grantee's failure to obtain the requisite agency approval constituted a material failure to comply with the terms and conditions of the awards and, consequently, was a sufficient basis for ACF to terminate the grants. Therefore, we do not reach the separate question whether the grantee met the grantee eligibility requirements when it applied for the awards.

Applicable Legal Authority

Community Based Abstinence Education (CBAE) grants are authorized under sections 510 and 1110 of the Social Security Act (Act).¹ CBAE grants are awarded to promote "abstinence from sexual activity outside marriage," consistent with the definition of "abstinence education" at section 510(b)(2) of the Act. The statute provides that grants under section 1110(a)(1) may be awarded to "States and public and other organizations and agencies."

Under the authority of section 1110 of the Act, ACF issued an announcement on January 25, 2006 that it was "accepting applications to provide support to public and private entities for the development and implementation" of the CBAE program. ACF Ex. A at 1, 38. ACF "invite[d] applications for five-year project periods" Id. at 14. The announcement stated that the grants would be awarded on a competitive basis in the first year. Id. Continuation funding would be considered on a noncompetitive basis for each subsequent year, "subject to: availability of funds; satisfactory progress of the grantee; and a determination that continued funding would be in the best interest of the Federal government." Id. The announcement further provided a list of "eligible applicant" categories, which included "[n]on-profits having a 501(c)(3) status with the IRS, other than institutions of higher learning," "[n]on-profits that do not have a 501(c)(3) status with the IRS, other than institutions of higher learning," and "[s]mall businesses." Id. at 15.

Healthy marriage promotion and responsible fatherhood grants are authorized under section 403(a)(2) of the Act. Section 403(a)(2) states that funding may be used "for the purpose of conducting and supporting research and demonstration projects by public or private entities, and providing technical assistance to States, Indian tribes and tribal organizations, and such other entities as the Secretary may specify"

Pursuant to section 403(a)(2) of the Act, on May 4, 2006, ACF announced the availability of funding to support Healthy Marriage

¹ The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

Demonstration (HMD) projects in eight priority areas. ACF Ex. B, at 1-3, 77. Like the CBAE grant announcement, the HMD notice stated that ACF was accepting "applications for five-year project periods" and that "[i]n the first year of the project, grants [would] be awarded on a competitive basis." *Id.* at 12, 17, 22, 27, 32, 37, 43, 47. Funding for subsequent years would be awarded on a non-competitive basis, "subject to the satisfactory progress of the grantee, availability of funds, and a determination that continued funding would be in the best interest of the Federal Government." *Id.* Like the CBAE grant announcement, the HMD notice included among lists of "eligible applicants," "[n]on-profits having a 501(c)(3) status with the IRS, other than institutions of higher education," "[n]on-profits that do not have a 501(c)(3) status with the IRS, other than institutions of higher education," and "[s]mall businesses." *Id.* at 13, 18, 23, 28, 33, 38, 43-44, 48.

Both the CBAE and HMD grant announcements stated that awards to non-governmental grantees would be subject to the requirements in 45 C.F.R. Part 74. ACF Ex. A, at 37; Ex. B at 74; see also ACF Ex. C, at 1; ACF Ex. D, at 1. The regulations incorporate the uniform administrative requirements for awards and subawards to institutions of higher education, hospitals, other nonprofit organizations and commercial organizations, established under OMB Circular A-110. 59 Fed. Reg. 43,760 (1994). Among the requirements of Part 74, section 74.21(b) establishes that grantee financial management systems must provide for "[a]ccurate, current and complete disclosure of the financial results of each HHS [Health and Human Services]-sponsored project or program" Further, award recipients must maintain "[e]ffective control over and accountability for all funds" 45 C.F.R. § 74.21(b)(3).

Section 74.25 sets forth the requirements relating to budget revisions and program changes. Subsection 74.25(c)(7) of the regulation states:

(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, the subaward, **transfer** or contracting out **of any work under an award**. This provision does not apply to the

purchase of supplies, material, equipment or general support services.

(Emphasis added.)

Under 45 C.F.R. § 74.61(a)(1) an award may be terminated if the grantee "materially fails to comply with the terms and conditions of an award." Section 74.62(a)(3) of the regulations provides that if a grantee "materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute or regulation, an assurance, an application, or a notice of award, the HHS awarding agency may . . . suspend or terminate the current award."

Interpreting the requirements of the regulations, the HHS Grants Policy Statement sets out the general terms and conditions applicable to HHS discretionary grants.² The policy statement provides a detailed explanation of post-award changes for which a grantee must obtain agency prior approval. It includes:

OPDIV [Operating Division] prior approval is required for the **transfer of the legal and administrative responsibility for a grant-supported project or program from one legal entity to another** before the expiration of the approved project period (competitive segment for grants where there may a competing continuation for the same project). For other changes in organizational status, e.g., a name change, the recipient must notify the awarding office as specified in "Changes in Organizational Status."

ACF Ex. M at II-53 (emphasis added).

² The HHS Grants Policy Statement currently available was published January 1, 2007. ACF Ex. M. It is available at http://www.hhs.gov/grantsnet/docs/HHSGPS_107.doc. Prior to the publication of the Grants Policy Statement, the HHS Office of Human Development Services, Discretionary Grants Administration Manual provided policy guidance relating to the administrative terms and conditions of HHS discretionary grants, including the prior approval requirement for transferring grant work to entities other than the grantee. See HHS Discretionary Grants Administration Manual at I-9 to I-13.

Under the "Changes in Organizational Status" requirements, grantees must give HHS advance notice of mergers, successor-in-interest transactions, and name changes. The policy statement defines a successor-in-interest transfer as the "process whereby the rights to and obligations under an HHS grant are acquired incidental to the transfer of all of the assets of the recipient or the transfer of that part of the assets involved in the performance of the grant." Id. at II-82. A name change is defined in the policy statement as an "action whereby the name of an organization is changed without otherwise affecting the rights and obligations of that organization as a recipient." Id. The Grants Policy Statement also provides that if an action "would be considered a change of grantee organization as described in [the] 'Prior-Approval Requirements . . . [section of the policy statement],' the recipient must obtain that approval rather than simply notify[] the OPDIV of its intent." Id.

Relevant Factual Background

On March 24, 2006, AFS submitted an application for federal assistance in response to ACF's January 2006 CBAE grant announcement. ACF Ex. F at 1. The application was signed by Darren L. Washington, as the authorized representative of the applicant, and listed AFS's Internal Revenue Service (IRS) employee identification number (EIN) as 35-XXXX349.³ Id. at 1, 80. Describing the "organizational profile of the applicant," the application stated that AFS "began in 2000 as a small business with Darren Washington serving as the Founder and CEO AFS is currently pursuing nonprofit status, and will be established as a 501c3, by the fall of 2006." Id. at 18.

On June 29, 2006, AFS filed an application for federal assistance in response to ACF's May 2006 HMD grant announcement. ACF Ex. G at 1. Like AFS's CBAE application, the HMD application listed AFS's EIN as 35-XXXX349 and was signed by Darren L. Washington as the applicant's authorized representative. Id. at 1, 59. The document represented that AFS was the "applicant," prospective "grantee," and "fiscal agent" for the proposed project. Id. at 1, 22.

By notices dated September 22, 2006, and September 25, 2006, ACF awarded AFS federal funding for, respectively, AFS's proposed CBAE project and AFS's proposed HMD project. ACF Exs. C, D; AFS/UCAN Ex. 10. Both notices showed that the "recipient

³ For privacy purposes, we replace the middle four digits of the EIN with the letter X.

organization" of the grants was AFS, that the "principal investigator or program director" of the projects was Darren Washington, and that the grants were subject to the requirements at 42 C.F.R. Part 74. Id. The notice of the CBAE award (HHS Award No. 90AE0186/01) listed the applicant's EIN as 1-35XXX349-A1, while the notice of the HMD award (HHS Award No. 90FE0114/01) listed the applicant's EIN as 1-31XXXX433-A1.⁴ Id.

On September 23, 2006, Darren Washington, Michelle Lee, and Kenya Jones, as incorporators, executed articles of incorporation for AFS as a non-profit corporation under Indiana law. AFS/UCAN Ex. 8. The Indiana Secretary of State certified the incorporation of AFS effective September 26, 2006. AFS/UCAN Ex. 9.

On December 13, 2006, a request for a new EIN for AFS was submitted to the Internal Revenue Service. AFS/UCAN Ex. 12. The application indicated that the "reason for applying" was "changed type of organization," and that the "new type" of organization was "nonprofit." Id. The application also showed that AFS's "previous EIN" was 35-XXXX439.⁵ By notice dated December 27, 2006, the IRS assigned AFS a new EIN, 20-XXXXXXX.⁶ AFS/UCAN Ex. 13. On January 18, 2007, AFS requested ACF to update its files with the new EIN. AFS/UCAN Ex. 17.

On January 17, 2007, employees of ACF and an ACF contractor, Calvin Edwards & Company, conducted a site visit of AFS. The

⁴ Neither ACF nor AFS/UCAN explain the discrepancy in the EIN numbers on the September 22 (1-35XXX349-A1) and September 25 (1-31XXXX433-A1) award notices. We also note that the September 25, 2006 document, introduced into the record by ACF, shows that the HMD award was initially issued with the restriction that the funding was subject to release within 30 days "in order to finalize the programmatic and budgetary aspects of the grant award." ACF Ex. D. The award document that AFS/UCAN introduced into the record is the amended HMD notice of award, dated November 14, 2006, which was "issued to remove [the] restriction on draw down of Federal funds," and showed the applicant's EIN as 1-35XXXX349-A1. AFS/UCAN Ex. 11.

⁵ Neither ACF nor AFS/UCAN address or explain the discrepancy between the last three digits of the EIN listed on the IRS application form (35XXXX439) and the last three digits of the EIN listed on AFS's grant applications (35XXXX349).

⁶ For privacy purposes, we replace all but the first two digits of the EIN with the letter X.

site visit report, a copy of which was provided to AFS following the visit, noted that AFS "was incorporated as a nonprofit in September 2006" and that "AFS operated as a for-profit sole proprietorship for six years before changing to a non-profit corporation" AFS/UCAN Ex. 16, at 4. While the report showed that "program, administration and finance checklist" elements were all found "satisfactory," it described numerous observed problems, including: Board of Directors oversight and governance vulnerabilities; a project director's lack of experience; failure to retain legal counsel "which has caused the program team to improvise in areas such as writing the corporate bylaws[;]" the need for more sophisticated human resources management; lack of strategic and operating plans; the absence of "comprehensive fundraising" or "financial sustainability" strategies; insufficient check authorization procedures; and concern that the "Abstinence for Singles" "corporate brand" did not accurately reflect the purpose of the HMD grant. Id. at 8-9.

Minutes of the April 17, 2007 AFS Board of Directors meeting state that at the meeting, Darren Washington told the Board that it "needed to change the name of the organization due to the recommendation of ACF from their site visit in February [sic]." AFS/UCAN Ex. 19. According to the meeting minutes, Darren Washington stated that the name should reflect both CBAE and HMD programs, and he recommended the name "Urban Community Action Network." Id. The minutes also show that the Board members then voted in favor of a "motion to change the name of 'Abstinence for Singles' to 'Urban Community Action Network.'" Id.

According to Darren Washington's August 20, 2008 affidavit (executed in the course of this appeal), the Board also discussed at the April 17, 2008 meeting "on-going problems with CBAE Project Director Michelle Lee and her recent threat to dissolve the organization through her role as an incorporator." AFS/UCAN Ex. 53 ¶¶ 9-11. Darren Washington further states in the August 2008 affidavit:

Since the Board had just approved a changing [sic] the organization's name to UCAN and since the Board desired to remove Michelle Lee as an incorporator, Board attorney Ragen Matthews advised the Board that, rather than file "doing business as" UCAN which would not remedy the Michelle Lee issue, the Board should instead dissolve the AFS and then immediately reorganize as UCAN without Michelle Lee listed as an incorporator. The Board unanimously agreed.

Id. ¶ 12; see also AFS/UCAN Exs. 54, 55.

In mid-May 2007, Darren Washington undertook to dissolve AFS corporation and to incorporate UCAN. AFS/UCAN Exs. 20, 21, 53-55. On May 17, 2007, the Indiana Secretary of State issued a certificate of dissolution of AFS and a certificate of incorporation for UCAN. AFS/UCAN Exs. 20, 21.

The IRS assigned UCAN a new EIN by notice dated May 29, 2007. AFS/UCAN Ex. 22. Nearly three months later, on August 15, 2007, the IRS notified UCAN that UCAN had been determined to be exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code. AFS/UCAN Ex. 28.

In July and August 2007, non-competing continuation award applications were filed for the CBAE and HMD projects. ACF Exs. HH, II. The applications showed the legal name of the applicant as "Abstinence for Singles, Inc." and listed the applicant's EIN as 20-XXXXXXX (the EIN formerly assigned to AFS). Id. In September 2007, ACF awarded continuation funding for the projects. AFS/UCAN Ex. 29. The award notices stated that the funding was subject to the requirements of 42 C.F.R. Part 74 and the HHS Grants Policy Statement. Id.

In mid-October 2007, Calvin Edwards & Company and ACF employees conducted a second site visit to the grantee. AFS/UCAN Exs. 31, 32, 35, 37. In the course of the visit, ACF "discovered that AFS was dissolved" and that UCAN had been incorporated "to continue the operations of AFS." AFS/UCAN Ex. 35, at 1; AFS/UCAN Ex. 37, at 1. The consultant sent ACF an advisory memorandum dated November 13, 2007 reflecting this and other site visit findings. AFS/UCAN Ex. 35. While a copy of the memorandum was not provided to the grantee, the report documented that "[u]pon completion of the site visit, an [ACF program specialist] communicated to UCAN that, due to the seriousness of the organizational and programmatic issues, continued CBAE funding for UCAN's program was in question." Id. at 2.

The Calvin Edwards & Company memorandum detailed twenty-nine "findings and recommendations" from the October 2007 site visit. Id. at 3-11. The report identified "[s]everal circumstances rais[ing] the question of whether Mr. Washington's actions in dissolving AFS were appropriate and legal." Id. at 3. Additional findings included:

- No record of the board of directors' approval of the dissolution;

- AFS never filed for 501(c)(3) status;
- After the dissolution of AFS, UCAN continued to conduct AFS operations under AFS' name and EIN, though UCAN had been assigned its own EIN;
- AFS' bank accounts, which reflect the EIN of the dissolved organization, were utilized for all of UCAN's financial transactions. CBAE grant funds designated for AFS were direct deposited into one account based on drawdown requests submitted by UCAN in AFS' name;
- UCAN did not notify the appropriate ACF offices of the dissolution of AFS and the incorporation of UCAN, though UCAN immediately assumed responsibility for AFS' ACF grant funds and operations.

Id. at 3-4.

The memorandum further stated that no legally sufficient documentation recorded a proper transfer of assets and liabilities from AFS to UCAN; "[n]o final balance sheet for AFS was prepared" at dissolution, nor was an initial balance sheet prepared for UCAN when it was incorporated; the balance sheet for the CBAE grant did "not balance, and most of the numbers in assets and liabilities [were] negatives [and consequently] it [was] incoherent; the contractor was "unable to identify any AFS contractual arrangements, such as rent, employment agreements, utilities . . . that had been terminated and then reinstated or renegotiated by UCAN;" the "Bylaws of UCAN contain[ed] many incorrect, incoherent, or unorthodox statements for a nonprofit organization;" and documentation contained inconsistent information about the composition of the UCAN Board of Directors and its independence. Id. at 5-8.

In mid-November 2007, ACF conducted a third site visit of AFS/UCAN. AFS/UCAN Exs. 36-37. Although there are ACF notes from the visit, no memorandum or report on the visit was prepared. The notes show that during the visit ACF questioned grantee employees about internal controls, reviewed grantee documents (including timesheets, personnel policies, and financial statements), and visited a middle school grant program presentation given by grantee employees. AFS/UCAN Ex. 36. The notes additionally show that ACF conducted an exit interview with the grantee that addressed budget revisions, project

descriptions, timesheets, bank statements, and a corrective action plan. Id. at 3.⁷

On January 9, 2008, AFS was reincorporated under Indiana law. AFS/UCAN Ex. 38. By notices addressed to UCAN and dated February 6, 2008, and February 26, 2008, the IRS notified UCAN that, in response to UCAN's request, UCAN was now assigned EIN 20-XXXXXXX (previously assigned to AFS). AFS/UCAN Ex. 39. On February 13, 2008, the Indiana Secretary of State issued a certificate of assumed business name, providing that AFS would be doing business under the UCAN name. AFS/UCAN Ex. 40.

In April 2008, ACF terminated AFS/UCAN's CBAE and HMD grants. ACF Exs. H, I. The termination notices stated that ACF's actions were based on information and evidence obtained during the three site visits and from the IRS, review of the grant applications, and a March 20, 2008 conference call with Darren Washington, other grantee representatives, and ACF staff. ACF Ex. H at 1; ACF Ex. I at 1. According to ACF's findings, AFS was not eligible for funding at the time the applications were submitted. Specifically ACF found, "AFS submitted [its] application[s] as a for-profit entity," but "there was no documentation that demonstrated that AFS was recognized by the State of Indiana as a corporation [or that] the EIN was valid at the time of submission" ACF Ex. H at 2; ACF Ex. I at 2. In addition, the notices provided, during the March 20, 2008 conference call Darren Washington had stated that the EIN used on the applications "was assigned to [him] as an individual/sole proprietor." Id. However, ACF wrote, "ACF does not award grants to individuals or sole proprietors." Id.

ACF further stated in the termination notices that the May 17, 2007 dissolution of AFS and concurrent incorporation of UCAN was a "grant replacement action" or "organizational change" for which the grantee was required, but failed, to obtain prior approval from ACF. ACF Ex. H at 3; ACF Ex. I at 3. ACF wrote that it "considers the dissolution of a recipient organization and the incorporation of a new organization with the intent of becoming the recipient of record a grant replacement action." Id. In addition, "[a]pproval of a grant replacement action is not guaranteed; the request must be thoroughly reviewed by the

⁷ The notes also indicate that ACF did not accept AFS/UCAN's progress report for the April 1, 2007 through September 29, 2007 period because it contained the same information as the report for the prior period. AFS/UCAN Ex. 36, at 3.

appropriate authority within the ACF program office and the Office of Grants Management." Id. "Without official approval," ACF stated in the termination notices, "AFS could not transfer the grant awards to UCAN." Id.

Analysis

As set forth above, the administrative requirements for HHS grants codified at 45 C.F.R. Part 74 provide that grantees must "obtain prior approval[] from the HHS awarding agency for . . . the subaward, transfer or contracting out of any work under an award." 45 C.F.R. § 74.25(c)(7). Based on our review of the record, we find that AFS/UCAN violated the transfer provision by transferring work under the CBAE and HMD awards from the grantee to a different legal entity without ACF's prior knowledge or approval.

First, we find that the May 17, 2007 organizational changes and UCAN's assumption of the grant project activities after that date effectively transferred the responsibilities for the CBAE and HMD projects from one legal entity to another. Specifically, the evidence shows that on May 17, 2007, CBAE and HMD grantee, AFS, was dissolved as a legal corporation, and a new legal entity, UCAN, was incorporated by the Indiana Secretary of State. AFS/UCAN Exs. 20, 21. In the days and weeks that followed, the new legal entity, UCAN, assumed responsibility for the grant projects, at times operating under the name of the defunct corporation, AFS, and at times operating under the name of the new corporation. As reflected in the memorandum documenting the second site visit, after AFS had been dissolved, "UCAN continued to conduct AFS operations under AFS' name . . . , and AFS' bank accounts . . . [we]re utilized for all of UCAN's financial transactions," including deposits of ACF grant funds. AFS/UCAN Ex. 35, at 3-4; see also ACF Ex. KK.⁸ In another variation, the minutes of a May 31, 2007 "Executive Session," at which the suspension of the CBAE and HMD project directors was discussed, show that the "Name of [the] Organization" was "Urban Community Action Network f/k/a Abstinence for Singles." AFS/UCAN Ex. 24.

Second, we find that the evidence of record plainly establishes that the grantee failed to obtain prior approval from ACF for the

⁸ Even now AFS/UCAN seems oblivious to the significance of continuing to maintain accounts and conduct business in the name of a defunct corporation. AFS instead suggests this misleading continuity demonstrates that the dissolution of one entity and the incorporation of a new entity with a different name and EIN should be viewed as merely cosmetic.

organizational changes and transfer of grant project work from AFS to UCAN, or even to give advance notice to ACF of the UCAN name. In the four and one-half month period following the dissolution of AFS and the incorporation of UCAN, Darren Washington and successor Board Chairman, Anthony Thigpen, continued to use the AFS moniker and AFS letterhead in correspondence with ACF concerning the CBAE and HMD projects. See, e.g., ACF Ex. W at 1-3; ACF Exs. X, Y, Z, AA, BB, CC, DD, EE. Further, during this period Anthony Thigpen certified as correct financial status reports and applications for continuing federal assistance designating "Abstinence for Singles, Inc." as the grant "recipient organization" and applicant "legal name." ACF Exs. FF, GG, HH, II. In addition, the copy of the minutes of the May 31, 2007 meeting forwarded by Darren Washington to ACF show the "Name of the Organization" to be "Abstinence for Singles," which was not the name that appears on the copy of the same meeting minutes that AFS/UCAN submitted on appeal. ACF Ex. Z; AFS/UCAN Ex. 24.

Not until October 2007, the record shows, was ACF made aware of any aspect of the changes that had transpired more than four months earlier. By memorandum dated October 2, 2007, Darren Washington notified the ACF contractor, Calvin Edwards & Company, that there had been a "[n]ame change for the Abstinence Education Program," and showed the organization's new name to be "Urban Community Action Network." ACF Ex. LL. Not until mid-October 2007, however, when ACF and its contractor undertook the second site visit, did ACF learn the full extent of the organizational changes and transfer of grant responsibilities that had taken place. AFS/UCAN Ex. 37, at 1. As memorialized in the November 13, 2007 Calvin Edwards & Company advisory memorandum, "[t]he [October] site visit was initially focused on AFS. During the course of our work, we discovered that AFS was dissolved on May 16, 2007. Urban Community Action Network, Inc. (UCAN) was incorporated on May 17, 2007 to continue the operations of AFS." AFS/UCAN Ex. 35, at 1. Accordingly, we find that ACF did not give advance approval for, or even have knowledge of, the organizational changes and transfer of grant project responsibilities from one legal entity to another that transpired in May 2007.

AFS/UCAN argues that ACF's termination of the CBAE and HMD grants was "unjustified, arbitrary and capricious." AFS/UCAN Br. at 1. With respect to ACF's determination that the grantee undertook a grant replacement action or organizational change without prior ACF approval, AFS/UCAN submits that it "reorganized around a problem employee" in order to "manage the legal risk to the organization and continue uninterrupted program delivery." Id.

AFS/UCAN acknowledges that "[o]n May 17, 2007 D[arren] Washington dissolved AFS and simultaneously incorporated UCAN" and that "ACF did not have prior notification of these specific transactions." AFS/UCAN Br. at 9. However, AFS/UCAN submits, ACF had "directed" AFS "to change the organization's name. . . , [a]nd, in effect, a name change is all that occurred." Id. Further, AFS/UCAN contends, it "met the [advance] notification requirement[] for a name change" insofar as "ACF had recommended (and thus approved of) Appellant's name change." Id. at 10.

These arguments are unavailing. Regardless of the underlying motive or intent of the organizational change, the dissolution of AFS, incorporation of UCAN, and assumption of grant project operations by UCAN transferred the work of the CBAE and HMD grant projects from one legal entity to another. Further, the evidence of record contradicts AFS/UCAN's assertions that ACF "directed" the name change. Following the January 2007 site visit, ACF and its contractor made a recommendation to the grantee that it "**consider** renaming the organization" to accurately reflect the objectives of both the abstinence and healthy marriages grant projects. AFS/UCAN Ex. 16, at 10 (emphasis added). This recommendation cannot reasonably be characterized as a directive or order to change the name of the grantee to "Urban Community Action Network," or a tacit prior approval of that name. ACF had no reason to assume AFS would make such a change without at least notifying ACF of the results of its consideration of ACF's suggestion.

Moreover, a name change was **not** "in effect . . . all that occurred." The dissolution of AFS and contemporaneous incorporation of UCAN terminated the legal existence of the award recipient and created an entirely new legal entity. ACF had no assurance that the remaining new entity would, without proper authorization or formal transfer, undertake and be answerable for the operating responsibilities of the grantee or maintain "effective control over and accountability for all funds." 45 C.F.R. § 74.21(b)(3). Furthermore, the May 2007 dissolution of AFS and incorporation of UCAN did not constitute a proper corporate name change under Indiana law, which requires a name change to be effectuated by an authorized amendment to the corporation's articles of incorporation. Indiana Code § 23-17-17-4(b); see ACF Exs. Q, S, T. In this case, no amendment to AFS's articles of incorporation to change the name of AFS was submitted. Rather, a request to wholly dissolve the corporation was made, and granted.

Prior agency approval for an organizational change like that made by AFS/UCAN is not a mere technicality but a necessary mechanism

for HHS to ensure that grant recipients responsible for implementing award projects or programs, and transferees, can satisfy their administrative and legal responsibilities. See generally, HHS Grants Policy Statement at II-53 to II-55, II-82 to II-84. By requiring grantees to secure advance approval for a transfer of grant work from one legal entity to another, HHS can take the necessary actions internally to timely reflect the change and can ensure that the transfer will be properly effected in accordance with applicable law. For example, the prior approval requirement affords HHS opportunity to ensure that the transferee will meet the grant program's eligibility requirements; the original grant recipient properly relinquishes all rights and interests in the affected grants; the HHS awarding office modifies its records to reflect the transferee as the recipient of record; and the transferee has and uses the appropriate IRS identification information. In this case, as ACF discovered during the second site visit, these necessary steps for a proper organizational change and transfer of grant work were not taken, which, consequently, put federal funds at risk of misuse.

AFS/UCAN additionally argues that if ACF considered the May 17, 2007 transactions a "grant replacement action" or organizational change requiring prior approval, ACF should have alerted AFS/UCAN of this conclusion at the time of the second and third site visits. AFS/UCAN Br. at 10. Further, AFS/UCAN questions why, if it "committed some fatal error" in undertaking the May 17, 2007 transactions, ACF officials instructed AFS/UCAN to seek a consolidation of the AFS and UCAN EINs, reincorporate AFS, and file "Doing Business As" documents in Indiana. Id. at 11, citing AFS/UCAN Exs. 33, 53. Moreover, AFS/UCAN submits, given AFS/UCAN's "strong program performance" and its "regular cooperation with ACF," the more appropriate action would have been to provide AFS/UCAN an opportunity to respond to ACF's findings and undertake corrective actions. Id. at 1, 10.

We reject these arguments. It is well-settled that "[a]lthough an awarding agency may, as a matter of policy or prudence, give an award recipient the opportunity to correct noncompliance before imposing termination . . . [the awarding agency is not] precluded from terminating the award at a later date on the same basis on which it could have previously terminated the award." Away from Home, DAB No. 2162, at 19 (2008); see also Native Village of Kotzebue, DAB No. 2207, at 23-34 (2008). Here, merely because ACF could have terminated the grants when it discovered AFS/UCAN's transfer of grant project work from the recipient of the awards to another legal entity did not preclude it from doing so later. Indeed, it was altogether reasonable for ACF not to

take formal action until after it had undertaken the comprehensive evaluation of the information and evidence obtained during the three site visits and from the IRS, reviewed the grant applications, and conducted the March 20, 2008 conference call with AFS/UCAN. These steps merely show that ACF acted advisedly and not arbitrarily in exercising discretion on how to respond to AFS/UCAN's improper actions.

While AFS/UCAN makes the affirmative argument that ACF's actions are unjustified in light of AFS/UCAN's success in delivering abstinence education services, it has provided no evidence to support its claim of "strong program performance." On the contrary, as detailed above, the first site visit report and memoranda and notes from the following two site visits evidence pervasive and persistent problems in AFS/UCAN's operations. These problems included insufficient organizational and financial controls, inadequate recordkeeping, accounting irregularities, and a lack of legally sufficient documentation to support AFS/UCAN's activities. AFS/UCAN does not dispute these findings, even though ACF relied on them when arguing, in response to AFS/UCAN's arguments on appeal, that AFS/UCAN had numerous organizational and fiscal deficiencies that posed "significant risk to federal funds and justif[ied] termination." ACF Br. at 26-28. Moreover, given AFS/UCAN's failure to apprise ACF of its organizational changes until after more than four months had passed while, during this period, representing that the original grantee was still in existence, AFS/UCAN can hardly be deemed a cooperative grantee. In sum, in light of the circumstances and the grantee's past performance, ACF reasonably concluded that AFS/UCAN's material failure to meet the terms and conditions of the awards warranted termination.

Accordingly, we conclude that the May 17, 2007 dissolution of AFS, the concurrent incorporation of UCAN, and the subsequent assumption of grant program operations by UCAN effected an unauthorized transfer of legal and administrative responsibilities for the CBAE and HMD awards. These actions violated regulatory requirements governing the awards and constituted a material failure by the grantee to comply with the terms and conditions of the grants. Accordingly, ACF properly terminated the grants under 45 C.F.R. § 74.61(a)(1) and 45 C.F.R. § 74.62(a)(3).

Finally, as described above, ACF also cited as a basis for terminating the awards its findings that AFS was ineligible to receive the CBAE and HMD grants when the grant applications were submitted. ACF argues that at the time Darren Washington filed the applications, AFS was operating as a sole proprietorship, and

a sole proprietorship "is no different from an individual." ACF Br. at 7-8. Since, according to ACF, "individuals are not eligible for CBAE or HMD grants," AFS was not an eligible recipient of the awards. Id. ACF also contends that "Darren Washington provided a non-existent EIN number on his applications." Id. at 13. In the appeal proceedings, ACF additionally argues that AFS/UCAN misused federal award funds to pay the salaries of two employees who had full-time jobs elsewhere. Id. at 6, 24-26.

In response, AFS/UCAN argues that it was eligible and applied for both awards as a small business. AFS/UCAN submits that it applied for the grants as a sole proprietorship, that a sole proprietorship is a type of small business, and that the grant announcements themselves plainly stated that small businesses were eligible award recipients.⁹ AFS/UCAN Reply at 1-3. Further, AFS/UCAN argues, the EIN used on the applications existed at the time of the grant applications. Finally, AFS/UCAN submits, the two employees who worked other jobs fulfilled their responsibilities to the grantee and AFS/UCAN did not violate federal cost principles by employing them. Id. at 4-5.

Since we conclude that AFS/UCAN's failure to obtain the requisite pre-approval for the May 2007 organizational changes constituted a material failure to comply with the terms and conditions of the awards, we find it unnecessary to resolve the sufficiency of the other grounds cited by ACF to support the terminations.

⁹ Notwithstanding AFS/UCAN's arguments on appeal, we note that on the first page of each of AFS's grant applications, a standard form 424 (Application For Federal Assistance), AFS was required to designate its "type" using alphabetical codes corresponding to different organizational categories listed on the back of the form. AFS listed its type as "M." Although a copy of the back of the form is not included in the record, we note that code M corresponds to "Nonprofit with 501C3 IRS Status (Other than Institution of Higher Education)" on the publicly available standard form 424 instructions. http://www07.grants.gov/agencies/approved_standard_forms.jsp. Further, while there is a code for "small business," R, and while the instructions permit the applicant to "select up to three applicant type(s)" AFS did not select code R on its application. This casts some doubt on AFS/UCAN's current claims about the status under which it applied.

Conclusion

Governing regulations, program policies, and the evidence of record fully support ACF's determinations that AFS/UCAN materially failed to comply with the terms and conditions of its CBAE and HMD awards. Accordingly, we sustain the ACF determinations to terminate the grants.

_____/s/_____
Judith A. Ballard

_____/s/_____
Constance B. Tobias

_____/s/_____
Leslie A. Sussan
Presiding Board Member