

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Professional Counseling Resources, Inc.
Docket No. A-11-79
Decision No. 2448
March 26, 2012

DECISION

Professional Counseling Resources, Inc. (PCR) appeals the April 20, 2011 determination by the Administration of Children and Families (ACF) to disallow costs claimed by PCR under the Mentoring Children of Prisoners (MCP) grant for calendar year 2006. ACF disallowed \$454,948.00 but subsequently reduced the disallowance to \$253,651.47 after determining that the difference was attributable to other grants. The amount now in dispute represents the salaries and fringe benefits of PCR's Executive Director and PCR's Financial/Human Resources Administrator, as well as the costs of a contract between PCR and the Nonprofit Development Institute (NDI). ACF Ex. 3 (Disallowance Recalculation Chart); PCR Br. at 6; ACF Br. at 2-3. Based on a 2008 audit report, ACF found that PCR was not in material compliance with the conflict of interest provisions applicable to the MCP grant. ACF Ex. 6 (Disallowance letter dated April 20, 2011), at 1; ACF Br. at 6.

The Board has previously addressed PCR's failure to comply with the same conflict of interest provisions in carrying out a Community-Based Abstinence Education (CBAE) grant for fiscal years 2005 through 2007. In *Professional Counseling Resources, Inc.*, DAB No. 2213 (2008) (*PCR I*), the Board upheld ACF's disallowance of the salaries and fringe benefits of the Executive Director and her daughter-in-law, the Financial/Human Resources Administrator, concluding that the familial relationships within PCR constituted a material failure to comply with the conflict of interest provisions. *PCR I* at 4. The Board also upheld the disallowance of the costs of a contract between PCR and NDI to perform tasks associated with the CBAE grant, concluding that the familial relationships of individuals in the two organizations violated the conflict of interest provisions. *Id.* at 7-8.

The familial relationships at issue in *PCR I* are the same relationships at issue here. In its current appeal, PCR does not dispute that *PCR I* was correctly decided. PCR argues, however, that we should reverse the disallowance with respect to the Executive Director's salary because here, unlike in *PCR I*, her salary was approved by the "disinterested board of directors" and a non-family member was "primarily responsible for oversight of her work in 2006." PCR Br. at 7; PCR Reply Br. at 2-3. PCR further

argues that we should reverse the entire disallowance because it is not “an appropriate enforcement action” under the circumstances of this case. PCR Br. at 8. For the reasons explained below, we uphold the disallowance of \$253,651.47 in full.

Legal Background

The 2001 Promoting Safe and Stable Families Amendments to the Social Security Act (Act) established the MCP grant program. Pub. L. No. 107-133, § 121 (amending Act § 439(c)).¹ Congress found that “mentoring is a potent force for improving children’s behavior across all risk behaviors affecting health,” and that “[q]uality, one-on-one relationships that provide young people with caring role models for future success have profound, life-changing potential.” Act § 439(a)(1)(E). Congress authorized grants to “State or local governments, tribal governments or tribal consortia, faith-based organizations, and community-based organizations in areas that have significant numbers of children of prisoners” in order to “support the establishment or expansion and operation of programs using a network of public and private community entities to provide mentoring services for children of prisoners.” Act § 439(a)(2), (c).

The Act directs the Secretary for the Department of Health and Human Services (HHS) to administer the award and oversight of MCP grants. Act § 439(d)-(g). Accordingly, when an MCP grant is awarded to a nonprofit organization such as PCR, it is subject to the uniform administrative requirements for HHS grants found in 45 C.F.R. Part 74. 45 C.F.R. § 74.1(a)(1). Here, ACF disallowed a portion of PCR’s 2006 MCP grant costs based on the conflict of interest provisions in section 74.42. ACF Ex. 6, at 1. That section provides in relevant part:

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, or any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award.

¹ The current version of the Act is available at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. On this website, each section of the Act contains a reference to the corresponding chapter and section in the United States Code.

45 C.F.R. § 74.42. If the grant recipient “materially fails to comply with the terms and conditions of an award,” then --

the HHS awarding agency may in addition to imposing any of the special conditions outlined in § 74.14, take one or more of the following actions, as appropriate in the circumstances:

* * *

(2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

45 C.F.R. § 74.62(a)(2).

With its application for the MCP grant PCR submitted a completed SF-424B, “Standard Assurances (Non Construction),” which included an assurance (Assurance 3) that if selected for the grant, PCR will “establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.” *Assurances – Non-Construction Programs*, SF-424B, ¶ 3 (Rev. 7/97); ACF Ex. 1 (SF-424B signed May 4, 2006 by Lulu Mae Nix as “President” of PCR); *see also* 45 C.F.R. §§ 74.12, 74.17.

Case Background

Except where noted, the following facts are undisputed. PCR is a nonprofit organization in Wilmington, Delaware. It assists in the development and implementation of programs for community and faith-based organizations. *See* PCR Ex. 2 (Declaration of Lulu Mae Nix), at 3. In 2006, the period at issue in this case, Lulu Mae Nix served as the Executive Director of PCR, Jacqueline Greenidge Nix served as its Financial/Human Resources Administrator, and Theophilus Nix served on PCR’s Board of Directors. In addition, in 2006, Reverend Sheldon Nix was the Chief Executive Officer of PCR’s contractor, NDI. ACF Ex. 4 (OIG Clearance Document), at 1. Lulu Mae Nix is the mother of Theophilus and Sheldon Nix, and is the mother-in-law of Jacqueline Greenidge Nix, who, in turn, is married to Sheldon Nix.

In May 2004, PCR applied for its first MCP grant, which ACF awarded to PCR for a three-year period commencing August 1, 2004. PCR Br. at 3. At that time, PCR administered “several ACF grants” including, as noted above, the CBAE grant. PCR Ex. 2, at 3. In 2007, ACF extended the MCP grant award for an additional three years commencing September 20, 2007. PCR Br. at 3. Based on a December 2007 onsite visit by an ACF contractor, ACF determined that PCR violated the conflict of interest

provisions applicable to the CBAE grant, and disallowed \$387,970.08 in costs claimed under that grant for fiscal years 2005 through 2007. *Id.* at 4; *see PCR I* at 2.

PCR appealed ACF's disallowance of the CBAE grant costs. PCR argued on appeal that it had addressed any conflicts of interest by following the procedures in its board policy manual. *PCR I* at 5. PCR claimed that "non-interested members of the [PCR] Board" approved the NDI contract "without any lobbying, influence, or voting by any member of the Nix family." *Id.* at 6. In support of its argument, PCR relied on the declaration of Eugene Wheeler, who asserted that whenever the PCR Board voted on salaries of PCR employees or on the contract with NDI, "all Nix family members – including Theophilus Nix, who was also a Board member, and Lulu Mae Nix, who attended Board meetings as Executive Director of PCR – would recuse themselves from the Board decision." *Id.* at 7. While PCR recognized Lulu Mae Nix's and Jacqueline Greenidge Nix's role in the NDI contract, PCR argued that the two women did not participate in the "administration" of the contract as that term is used in section 74.42. *Id.* at 9-10. Finally, PCR argued that disinterested PCR Board members approved the salaries of Lulu Mae Nix and Jacqueline Greenidge Nix based on industry benchmarks. *Id.* at 13. As support, PCR again relied on the declaration of Eugene Wheeler, which explained the Nixes' recusals during PCR Board decisions such as salary approvals. *Id.*

On December 16, 2008, the Board issued its decision upholding the disallowance in full. *PCR I*, at 16. The Board concluded that the PCR Board policy addressing conflicts of interest did not meet federal standards because it did not "require PCR to take reasonable steps to prevent such an entanglement in the administration of a contract where a conflict of interest has been identified by the Board" *Id.* at 9. The Board also concluded that the minutes of PCR's Board meetings did not contain "any indication of a rationale for the Board's approval of any NDI contract," which violated even the insufficient policy PCR had in place. *Id.* at 8. In further addressing the conflict of interest with the NDI contract, the Board stated that the approval of the contract, even if by disinterested PCR Board members, "had no bearing on the 'administration' of the contract." *Id.* at 9. Regarding the award and administration of PCR's contract with NDI, the Board concluded that "PCR failed to comply with the conflict of interest provisions in section 74.42 and Assurance 3 because a member of its Board and two key PCR employees were in a position to influence PCR's activities in a way that could have benefited their relatives in NDI but was contrary to PCR's best interests." *Id.* at 13.

The Board then addressed the salaries of Lulu Mae Nix and Jacqueline Greenidge Nix, noting preliminarily that there were no PCR Board minutes for 2007. The absence of these minutes, the Board concluded, meant PCR failed to show "that the [PCR] Board approved Lulu Mae Nix's and Jacqueline Greenidge [Nix's] salaries for the budget period beginning October 1, 2007." *Id.* at 14. The Board pointed out that even if disinterested PCR Board members approved their salaries for all periods relevant to the CBAE grant,

that would not have addressed the possible effect of these family relationships on the oversight of individuals in key management positions. As a Board member and then Board Chair, Theophilus Nix was responsible for overseeing Lulu Mae Nix's work as PCR's Executive Director. Because Lulu Mae Nix was his mother, Theophilus Nix might have provided less oversight than if the Executive Director had not been related to him. Lulu Mae in turn was responsible for overseeing the work of PCR's Financial/Human Resources Administrator, Jacqueline Greenidge [Nix]. Because Jacqueline was her daughter-in-law, Lulu Mae might have provided less oversight than if the Financial/Human Resources Administrator had not been related to her.

Id. at 14-15. The Board concluded that the relationships between these individuals "constituted conflicts of interest that could potentially lead to mismanagement of the grant" and violated Assurance 3. *Id.*

In April 2010, based on the results of an onsite review in March 2010, ACF disallowed \$342,201.00 in costs claimed under MCP grant between 2007 and 2010. PCR Ex. 5 (Disallowance letter dated Apr. 28, 2010), at 1. ACF determined that PCR had violated the same conflict of interest provisions at issue in *PCR I* based on the same familial relationships. *Id.* PCR appealed the disallowance of the MCP grant costs for 2007-2010 to the Board, but withdrew its appeal during the briefing stage. PCR Br. at 5; *see also* ACF Ex. 2 (Letter from the Board closing PCR's appeal).

In April 2011, ACF notified PCR that it was disallowing \$454,948.00 claimed under the MCP grant for 2006, the disallowance currently before the Board. ACF Ex. 6. ACF based this disallowance on an "A-133 audit" by McBride, Shopa and Company, P.A. performed in 2008.² *Id.* at 1. The auditors reported that PCR had violated the conflict of interest provisions in section 74.42 and Assurance 3 based on the same familial relationships described above. *Id.* PCR timely appealed to the Board the disallowance, which ACF later reduced to \$253,651.47.³

² An "A-133 audit" refers to an audit that is required under OMB Circular A-133, titled "Audits of States, Local Governments, and Nonprofit Organizations." Circular A-133 requires any non-federal organization that spends at least \$300,000.00 in federal funds in one year to undergo either a single or program-specific audit for that year. *See* OMB Circular A-133, at 8 (Rev. 6/07).

³ At the parties' request, the Board stayed the proceedings in this case for several months to allow the parties to pursue settlement negotiations.

Analysis

1. PCR did not have adequate safeguards to protect against the conflict of interest in the approval of the 2006 salary for Lulu Mae Nix and to prohibit Lulu Mae Nix from using her position for a purpose constituting a conflict of interest.

PCR argues that ACF's disallowance of Lulu Mae Nix's salary should be reversed because the circumstances surrounding the approval of her salary and oversight of her work are distinguishable from those in *PCR I*. Specifically, PCR argues that, unlike the situation in *PCR I*, disinterested PCR Board members approved Lulu Mae Nix's salary in an October 1, 2005 board meeting, and that Eugene Wheeler, the Chair of the PCR Board in 2006, who was not related to Lulu Mae Nix, was "primarily responsible" for supervising her work at that time. PCR Br. at 8; PCR Reply Br. at 2. PCR posits that these two factors were adequate safeguards against conflicts of interest that complied with Assurance 3. PCR Reply Br. at 4. We disagree.

The minutes from the October 1, 2005 PCR Board meeting state that Theophilus Nix was "recused for [the] decision" to approve Lulu Mae Nix's salary. PCR Ex. 7, at App. A. However, these minutes do not address the scope of his recusal, such as whether or not he was present for discussion of the salary level or in the room for the vote itself, or whether any other members of the Nix family were present for any discussions or the vote. Thus, it is not clear that the PCR Board's decision to approve Lulu Mae Nix's salary was free of any influence by the Nix family as PCR asserts it was.⁴

Even if this case were distinguishable from *PCR I* on this basis, it is insufficient to show that PCR complied with Assurance 3 or section 74.42 by having safeguards in place to ensure that Lulu Mae Nix did not use her position for a purpose that constituted a conflict of interest. *See PCR I* at 14-15 (stating that independent approval of salary levels "would not have addressed the possible effect of these family relationships on the oversight of individuals in key management positions").

PCR argues that there were sufficient safeguards in place because Eugene Wheeler was "*primarily* responsible for oversight of [Lulu Mae Nix's] work in 2006 due to his role as

⁴ PCR argues here, as it did in *PCR I*, that the PCR Board approved Lulu Mae Nix's salary "using industry established benchmarks." PCR Reply Br. at 2. The use of these industry benchmarks is not reflected in the minutes from the PCR Board meeting, but only in the subsequent declaration of Eugene Wheeler. PCR Ex. 7, at 3. Eugene Wheeler asserts that the PCR Board considered industry benchmarks before establishing the salary levels of PCR's managers, but does not specify what those benchmarks were. *Id.* His declaration, moreover, fails to clarify whether the Nixes were involved in the discussion of those salary benchmarks or the appropriate salary level within the benchmarks' range. In fact, Eugene Wheeler only generally claims that the Nixes were recused "[w]henver such matters were voted on" and from the "Board decision" of the salary levels, but does not address the discussion or other details leading up to that vote. *Id.*

board chair.” PCR Reply Br. at 2-3 (emphasis added).⁵ However, by stating that Eugene Wheeler was “primarily responsible” for supervising Lulu Mae Nix, PCR in effect admits that others, presumably the three other PCR Board members, were responsible for her supervision as well. Moreover, although Mr. Wheeler asserts in his declaration that his role as Chair of the PCR Board was to convene and run Board meetings, he does not assert he had any supervisory role over PCR’s Executive Director apart from his role on the PCR Board. *See* PCR Ex. 7, at 2-3. In fact, Eugene Wheeler states that it was “[a]mong the *Board’s* responsibilities to ensure that PCR and its staff complied with all applicable laws, grants, and Board policies, including the conflict of interest policy.” *Id.* at 2 (emphasis added).⁶

Even if Eugene Wheeler was the only individual within PCR responsible for overseeing Lulu Mae Nix in 2006, PCR has not explained how his supervision constituted an adequate safeguard under Assurance 3 or avoided a conflict of interest or the appearance of a conflict of interest within the meaning of section 74.42. PCR acknowledges that Lulu Mae Nix participated in the administration of the NDI contract, but fails to point to any evidence that Eugene Wheeler monitored or was otherwise “primarily responsible” for the actions of Lulu Mae Nix with respect to this contract. *See* PCR Reply Br. at 2. In addition, PCR does not deny that Lulu Mae Nix directly supervised her daughter-in-law, Jacqueline Greenidge Nix, or point to any evidence that Eugene Wheeler monitored that relationship. Thus, PCR has shown no basis for finding that PCR instituted safeguards against the actual or apparent conflicts of interest that the Board found in *PCR I* were caused by Lulu Mae Nix carrying out her duties as PCR’s Executive Director.

Accordingly, ACF properly disallowed Lulu Mae Nix’s salary for the MCP grant in 2006.

⁵ PCR asserts that Theophilus Nix was a member of the PCR Board in 2006 and that Eugene Wheeler was the Board Chair at that time. PCR Br. at 7. ACF argues that the evidence in the record shows that Theophilus Nix was Chair during 2006, citing the declaration of a Grants Management Specialist who asserts that Theophilus Nix had introduced himself to the ACF review team as the “Acting Board Chairman.” ACF Ex. 7, at 2. The minutes of PCR’s Board meetings, however, identify Eugene Wheeler as Chair in 2006. PCR Ex. 7. We assume for purposes of this decision that Theophilus Nix was a member of PCR’s Board of Directors rather than its Chair during 2006.

⁶ PCR suggests that the Board found in *PCR I* that the PCR Board Chair was solely responsible for oversight of Lulu Mae Nix. PCR Br. at 7 (“In its earlier decision, the Board reasoned that during periods of the CBAE grant administration, [Theophilus Nix] was PCR board chair, which made him responsible for oversight into [Lulu Mae] Nix’s work.”). PCR misreads the Board’s statement in that decision. In *PCR I*, the Board stated that as “a Board member and then Board Chair, Theophilus Nix was responsible for overseeing Lulu Mae Nix’s work as PCR’s Executive Director.” *PCR I* at 14. Thus, the Board viewed Theophilus Nix’s role as both a PCR Board member and Chair as contributing to his oversight of Lulu Mae Nix. The Board never stated or implied that Theophilus Nix was *solely* responsible for the oversight of Lulu Mae Nix simply because of his role as Chair.

2. The disallowance of \$253,651.47 is an appropriate enforcement action.

PCR argues that ACF's disallowance of \$253,651.47 under the MCP grant for 2006 is not an "appropriate enforcement action" under section 74.62 because PCR administered all federal grants "with the programs' best interest in mind" and the "repeated sanctions are inappropriate in this case and do nothing to further the goals of the federal rules." PCR Br. at 9. PCR points out that once ACF disallowed costs under the CBAE grant in 2008, "PCR terminated Jacqueline [Greenidge Nix's] position at PCR and its subcontracts with NDI." *Id.* PCR also asserts that it revised its conflict of interest policy in 2008 to one "that complies with federal standards," and claims that "it makes no sense to continue to penalize PCR for a five-year-old misunderstanding that it has long since corrected." *Id.* at 10. These arguments have no merit.

Although PCR denies that it is seeking equitable relief from the Board in this case, in essence PCR is asking the Board to reverse the disallowance on the equitable ground that it is not appropriate for ACF to penalize PCR by taking disallowances on three separate grants based on the same conflict of interest problem existing 2006, especially since PCR eliminated that problem after the Board's *PCR I* decision in 2008. The Board has previously held that equitable factors are not relevant to our review of a disallowance as the Board has no authority to waive a disallowance based on equitable principles. *Bedford Stuyvesant Restoration Corp.*, DAB No. 2141, at 5 (2008) ("The Board is empowered to resolve legal and factual disputes. We cannot provide equitable relief; we are bound by all applicable laws and regulations.").

Even if we do not view PCR's arguments as equitable in nature, they do not provide any basis under the regulation to overturn the disallowance in this case. For example, PCR argues that the disallowance here does not further the goals of the conflict of interest rules "to ensure that grantees make decisions driven by the best interest of the federal program." PCR Br. at 9. However, in *Bullock County Health Service, Inc.*, DAB No. 360 (1982), the Board stated:

While the federal requirements pertaining to less-than-arms-length transactions were certainly meant to prevent individual pecuniary gain, they clearly also have a broader purpose. Underlying the limitations is the idea that there should be no possibility that decisions made in management of a grant-supported project could be influenced by conflicts of interest and concerns not related to the best interests of that project.

Bullock at 2-3. Thus, we agree with ACF that the conflict of interest rules are intended not only to ensure that the grantee makes decisions based on the "best interest" of the program, but also to ensure that there is no *possibility* that such decisions are made for reasons other than the best interest of the program. ACF Br. at 11. Here, the Nixes' leadership roles within PCR clearly gave them an opportunity to influence decisions in

the management of the grant for reasons other than those of the “best interests” of the program. Thus, even assuming that PCR did always act in the best interests of the program in administering the 2006 MCP grant, it does not follow that there was no purpose to be served in enforcing the conflict of interest provisions. Without such agency enforcement of the applicable conflict of interest protections involving three separate grant awards, PCR and other organizations would have no incentive to eliminate the present and future possibility that they may make program-related decisions based on improper influences. Indeed, the agency has an obligation to take enforcement actions in situations as in this case in order to protect the integrity of the grant system as well as the public fisc. For this reason, we also reject PCR’s argument that a third disallowance based on the same relationships is “excessive.” PCR Br. at 10. The current disallowance was for a separate grant year than the prior disallowance of MCP grant costs and for a different grant than the first disallowance. Thus, PCR’s failure to comply with the applicable conflict of interest provisions in 2006 constitutes a distinct violation from those already enforced.

Moreover, PCR’s argument that the disallowance should be reversed because PCR has corrected the conflicts of interest in 2008 that gave rise to all three disallowances is without merit. As ACF points out, the disallowance here is for costs incurred in 2006 while PCR was not in material compliance with the conflict of interest provisions in Assurance 3 and section 74.42. *See* ACF Br. at 12. Any subsequent remedial action on the part of PCR simply brought it into compliance with the terms and conditions of later grant awards. PCR has not cited any authority that compels us to reverse a disallowance based on a grantee correcting a conflict of interest within the organization after the grant period is complete. Rather, Part 74 provides ACF with the authority to enforce violations of a grant’s terms and conditions found in an audit completed after that grant has been closed. 45 C.F.R. § 74.72(a)(1) (“The closeout of an award does not affect any of the following: (1) The right of the HHS awarding agency to disallow costs and recover funds on the basis of a later audit or other review.”). It is apparent under this regulation that any steps taken after a grant has been closed out are not factors that must be considered in the agency’s enforcement of the grant’s terms and condition.

Finally, in discussing the enforcement options available under section 74.62, the Board has stated that the “selection and timing of an enforcement action from among the lawful options is a matter committed to the discretion of the awarding agency.” *National AIDS Educ. & Servs. for Minorities, Inc.*, DAB No. 2401, at 17 (2011) (holding that a federal agency had discretion to terminate a grant immediately without an opportunity for correction). Thus, once ACF determined that PCR was no longer in material compliance with the applicable conflict of interest provisions, it had the discretion to select an enforcement option under section 74.62(a) that it determined was “appropriate in the circumstances.” Accordingly, we conclude that the disallowance of \$253,651.47 was an appropriate enforcement action that was authorized by the regulations.

Conclusion

For the foregoing reasons, we uphold in full ACF's disallowance of \$253,651.47 in costs claimed under the MCP grant awarded to PCR for calendar year 2006.

/s/

Judith A. Ballard

/s/

Constance A. Tobias

/s/

Stephen M. Godek
Presiding Board Member