

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Nebraska Department of Health and Human Services
Docket No. A-11-90
Decision No. 2413
September 22, 2011

DECISION

The Nebraska Department of Health and Human Services (Nebraska) appealed a determination by the Administration for Children and Families (ACF) to impose a \$487,694 penalty in the form of a reduction in federal funding based on Nebraska's Temporary Assistance for Needy Families (TANF) program under title IV-A of the Social Security Act (Act) for fiscal year 2012. ACF imposed the penalty for Nebraska's undisputed failure to sanction recipients of TANF assistance who did not cooperate with Nebraska's child support enforcement agency in the manner specified in the TANF statute. Nebraska does not dispute that ACF was authorized to impose a penalty based on Nebraska's failure to sanction such recipients. Instead, Nebraska asks that the penalty be waived or reduced. For the reasons explained below, we uphold ACF's penalty determination.

Applicable legal provisions

Title IV of the Act and its implementing regulations require states to deny or reduce, by at least 25 percent, TANF assistance to an individual who does not cooperate with a state's child support enforcement agency "in establishing paternity" or "in establishing, modifying, or enforcing a support order with respect to" the individual's child. Act § 408(a)(5); 45 C.F.R. § 264.30.¹ If ACF determines that a state violates this provision by failing to reduce or deny assistance to noncooperating individuals, ACF must reduce the state's "State Family Assistance Grant" (TANF funding) for the immediately succeeding fiscal year by not more than five percent, unless the state demonstrates that it

¹ The current version of the 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.

had “reasonable cause” for its failure.² Act § 409(a)(5), (b)(1); 45 C.F.R. §§ 262.5(a), 264.31(a). (Section 409(a) of the Act also authorizes the imposition of penalties on states for failure to comply with other TANF requirements.) Prior to imposing a penalty on a state that does not claim or demonstrate reasonable cause for its failure, ACF must afford the state an opportunity to correct the failure through a corrective compliance plan the state submits for ACF’s approval. 45 C.F.R. § 262.4(b), (c). ACF will impose the penalty if the state fails to submit an approvable corrective compliance plan or fails to completely correct or discontinue the violation within the period covered by the plan. 45 C.F.R. § 262.6(h), (i).

The regulations authorize ACF to reduce a penalty as follows:

Under limited circumstances, we may reduce the penalty if the State fails to completely correct or discontinue the violation pursuant to its corrective compliance plan and in a timely manner. To receive a reduced penalty, the State must demonstrate that it met one or both of the following conditions:

- (1) Although it did not achieve full compliance, the State made significant progress towards correcting or discontinuing the violation; or
- (2) The State’s failure to comply fully was attributable to either a natural disaster or regional recession.

45 C.F.R. § 262.6(j) (emphasis added).

A state may appeal ACF’s determination to impose the penalty to the Board within 60 days after receipt of notice from ACF and must submit its brief and supporting documents when it files its appeal. Act § 410(b); 45 C.F.R. § 262.7(b)(1).

Background³

By letter dated August 23, 2006, ACF informed Nebraska that based on an audit report covering the period July 1, 2004 through June 30, 2005, Nebraska was subject to a

² The “general factors a State may use to claim reasonable cause include:”

- (1) Natural disasters and other calamities (e.g., hurricanes, earthquakes, fire) whose disruptive impact was so significant as to cause the State’s failure;
- (2) Formally issued Federal guidance that provided incorrect information resulting in the State’s failure; or
- (3) Isolated problems of minimal impact that are not indicative of a systemic problem.

45 C.F.R. § 262.5(a).

³ The facts in this section are from ACF’s notice imposing the penalty dated April 19, 2011 and are not disputed by Nebraska.

penalty of \$487,694 because it failed to sanction TANF recipients who did not cooperate with child support enforcement requirements. Nebraska subsequently submitted a corrective compliance plan stating that Nebraska would correct or discontinue the violation by November 1, 2006. ACF informed Nebraska by letter dated April 20, 2007 that it accepted Nebraska's corrective compliance plan with the understanding that Nebraska would fully correct or discontinue the child support enforcement violation by the November 1, 2006 date specified in the plan.

Based on a second audit report covering the period July 1, 2006 through June 30, 2007, ACF determined that child support enforcement deficiencies still existed. ACF determined that of 45 TANF cases with "non-cooperation notices" tested, 34 received assistance during the individual's period of noncooperation, and that in four of those 34 cases assistance was not reduced by at least 25 percent. ACF also determined that the reduction in assistance for three of four cases was eventually completed, but not in a timely manner, and that additional procedures were still needed to ensure assistance payments are reduced in a timely manner. ACF therefore "determined that Nebraska remains subject to the child support enforcement penalty because it did not fully correct and discontinue the violation that led to the penalty by November 1, 2006," the deadline in Nebraska's corrective compliance plan. ACF stated that it would thus impose the \$487,694 penalty by reducing Nebraska's TANF grant authorization for FY 2012. Nebraska then appealed ACF's determination to the Board.⁴

Discussion

In its appeal, Nebraska did not assert any factual or legal error in ACF's determination that Nebraska was subject to a penalty. Nor did Nebraska contest the amount of the penalty or how the penalty was calculated. Nebraska instead requested "that the penalty be waived or, in the alternative, be reduced, pursuant to the federal agency's authority to do so as indicated in the Code of Federal Regulations." Nebraska Appeal (June 20, 2011). As grounds for those requests, Nebraska cited the various measures it says it took to correct the violation during the period January 2006 through September 2010, and argued that an audit for the year ending June 30, 2010 did not find any further violations. Nebraska also cited the "lapse of time due to complexities" of making changes to Nebraska's case intake system, and requested that the Board "consider the fiscal impact that reducing the TANF grant by \$487,694 would have" on the State. *Id.*

The Board requested Nebraska to clarify whether it was challenging the factual or legal bases of ACF's determination. The Board noted that Nebraska neither disputed the

⁴ In its appeal, Nebraska stated that it sent a copy of the appeal to the HHS Office of General Counsel.

penalty determination nor submitted any supporting documentation at the time it appealed as required by 45 C.F.R. § 262.7(b)(1). In response, Nebraska confirmed that it “did not intend to challenge the factual basis” of the penalty determination and stated that “[r]ather, Nebraska is requesting a reduction of the penalty” and that “[o]ur reading of 45 CFR 262 indicates that HHS has discretion to reduce or waive the penalty upon a showing of significant progress.” Nebraska e-mail to Board (July 15, 2011). Nebraska also contended that it “made significant progress towards correcting/discontinuing the violation pursuant to the corrective compliance plan and in a timely manner” and reiterated its position that the audit for the year ending June 30, 2010 “demonstrates that Nebraska has achieved compliance.” *Id.*

Because Nebraska did not appear to state any basis upon which the Board could grant the relief Nebraska requested, the Board ordered Nebraska to show cause why the penalty should not be summarily affirmed. Order (July 29, 2011).⁵ In the Order, the Board noted the following:

- Nebraska did not assert that it had “reasonable cause” under 45 C.F.R. § 262.5(a) for its failure to comply with the requirement to reduce TANF assistance to individuals who did not cooperate with the child support enforcement agency, or that it had attempted to demonstrate to ACF that it had reasonable cause.
- Nebraska did not assert that it satisfied the requirements at section 262.6(j) for reducing a penalty imposed on a state that “fails to completely correct or discontinue the violation pursuant to its corrective compliance plan and in a timely manner.” Although Nebraska claimed to have made significant progress toward correcting or discontinuing the violation by 2010, it nonetheless appeared to concede that it did not do so by the deadline in its corrective compliance plan, November 1, 2006. Nebraska acknowledged that the violation was not fully corrected until the year ending June 30, 2010, well after the audit periods on which ACF based the penalty (audit periods ending June 30, 2005 and June 30, 2007). Nebraska also asserted that by May 2008 the number of cases needing action by staff to impose a sanction had “dramatically dropped to 21” (from 94 in May 2007). Nebraska Appeal. However, this progress is not relevant because it occurred after the November 1, 2006 compliance deadline. Nebraska did not submit any documentation demonstrating that it made substantial progress by the compliance deadline, and did not even contend that it achieved significant

⁵ The Board sent a copy of the Order to the HHS Office of the General Counsel, and counsel for ACF thereafter entered an appearance in this proceeding.

progress before the November 1, 2006 deadline. Nebraska also did not allege that its failure to comply was attributable to either a natural disaster or regional recession.

- Section 262.6(j) permits ACF to reduce a penalty but does not provide authority for the Department to waive a penalty. Instead, as the preamble to the final rule indicates, this regulation reflects the wording of section 409(c) of the Act on the effect of failing to correct or discontinue a violation. 64 Fed. Reg. 17,720, 17,805-06 (Apr. 12, 1999). Section 409(c)(3) of the Act, “EFFECT OF FAILING TO CORRECT OR DISCONTINUE VIOLATION,” states that “[t]he Secretary shall assess some or all of a penalty . . . if the State does not, in a timely manner, correct or discontinue, as appropriate, the violation pursuant to a State corrective compliance plan accepted by the Secretary.” (Emphasis added.)
- Nebraska’s claim of financial hardship provides no basis to reverse a penalty. As the Board stated in another appeal of a TANF penalty, the financial hardship imposed by the penalty is not relevant to the Board’s consideration of any appeal of a penalty or disallowance, where it is not included as a factor for consideration in the applicable statute or regulations. *Indiana Family & Social Servs. Admin.*, DAB No. 2001, at 25 (2005), *aff’d*, *Alabama Dep’t of Human Resources v. U.S. Dep’t of Health & Human Servs.*, 478 F.Supp.2d 85 (D.D.C. 2007). The statute and regulations do not authorize the Board to forgive a properly imposed penalty on the basis of hardship.

Order at 3-4.

In response to the Board’s Order, Nebraska stated that “we do not have any additional evidence to present in response to the Board’s order to show cause. We respectfully submit the matter to Board at this time.” Nebraska Resp. (Aug. 30, 2011).⁶ Nebraska did not take issue with any aspect of the Board’s analysis of the applicable law, or with the Board’s tentative conclusion that Nebraska had not satisfied the requirements for reducing a penalty. Nor has Nebraska attempted to demonstrate that no penalty should be imposed based on the reasonable cause provision of the Act and regulations. Accordingly, we uphold ACF’s penalty determination without further discussion.

⁶ In its response Nebraska stated that it had provided a copy of the response to ACF as well as to HHS counsel.

Conclusion

For the reasons stated above, we uphold ACF's determination imposing a penalty on Nebraska of \$487,694 for failure to sanction recipients of TANF assistance who did not cooperate with the child support enforcement agency.

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Stephen M. Godek
Presiding Board Member