Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Teaching and Mentoring Communities, Inc.
Docket No. A-15-71
Ruling No. 2016-1
December 22, 2015

RULING ON MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, RECONSIDERATION

Teaching and Mentoring Communities, Inc. (TMC) has submitted a Motion for Clarification or, in the Alternative, Reconsideration (Motion) of Board Decision 2636. We deny the motion for the reasons stated below.

At issue in the underlying appeal was the Administration for Children & Families' (ACF's) disallowance of consultant and employee salary costs that TMC had pooled in its Risk Management Fund for reallocation to its Head Start (HS) and Migrant and Seasonal Head Start (MSHS) grants.[1] *See* DAB No. 2636, at 4-5, 8, 12. In its appeal brief, ACF argued that it had properly disallowed these costs because they were unrelated to risk management and therefore not allocable to the Risk Management Fund. *Id.* at 8. Conceding that the costs were unrelated to risk management, TMC contended that the dispositive issue was whether the costs benefited TMC's HS and MSHS programs, not whether the costs were related to risk management. *Id.* at 8-9.

The Board held that the costs' allowability "depend[ed] ultimately on whether, or to what extent, they were fairly or equitably assigned to" TMC's federal awards. *Id.* at 9. The Board further held that the methodology used to allocate the costs – pooling them in the Risk Management Fund and then reallocating them to its HS and MSHS grants (and to other final cost objectives) using a modified worker's compensation premium rate – was inappropriate under applicable federal cost principles. *Id.* at 9-11. In addition, the Board held that TMC had the burden to demonstrate that the costs had been equitably allocated "either because of, in spite of, the allocation methodology [actually] used" and that TMC had not carried that burden. *Id.* at 11-12. For those reasons, the Board concluded that ACF had properly disallowed the consult and salary costs (which totaled $665,100). *Id.*

[1] The other issue addressed in Decision No. 2636, but not implicated by the Motion, is whether TMC "overcharged" its Head Start awards for risk management activities. *See* DAB No. 2636, at 6-8.

After finding the disallowance lawful, the Board advised the parties that its decision "shall not preclude TMC from proposing to ACF a reallocation of" the consultant and salary costs. *Id.* at 12. The Board gave TMC 45 days to submit a reallocation proposal to ACF and stated that, if TMC does so, "ACF may then determine whether, or what extent, the proposed reallocation meets federal requirements and complies with TMC's negotiated indirect cost rate agreements." *Id.* Finally, the Board said that "[i]f ACF determines that TMC has proposed an acceptable reallocation, and that the reallocated costs are otherwise compliant with the terms and conditions of TMC's awards, then ACF may reduce the disallowance accordingly." *Id.*

TMC now asks the Board to "clarify or reconsider the mechanism whereby TMC may submit further information to ACF for purposes of reducing the disallowance." Motion at 2. TMC asserts that "the Board's *standard practice* in circumstances such as these is not to uphold the disallowance and leave it to the agency's discretion whether and to what extent to provide some relief from liability." *Id.* (italics added). Rather, TMC says, "the Board has deemed that the proper manner to resolve *questions left open in an appeal* or gaps in the agency record is to remand the matter to the agency for further consideration in light of the Board's decision and any additional evidence presented by the appellant." *Id.* (italics added). TMC further contends that the Board departed from its standard practice "(1) by *leaving intact a disallowance determination that by the Board's account is flawed* for its failure to address the relevant criteria for allocability, and (2) by permitting ACF to treat any information TMC may provide as it sees fit without any opportunity for future review." *Id.* (italics added). That alleged departure, says TMC, "runs afoul of the familiar rule that an agency decision-maker may deviate from standard policies and procedures only on a reasoned basis." *Id.* at 2-3 (*citing Motor Vehicle Mfrs. Assn. v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 42 (1983)). TMC states "[i]f it was not the Board's intention to abandon its established practices, it should clarify its decision to include language (1) staying the enforcement of the disputed portion of the disallowance pending ACF action on TMC's reallocation proposal and (2) providing TMC an opportunity to appeal any such action to the Board as appropriate." *Id.* at 3. "In the alternative," TMC proposes that "the Board . . . vacate the $665,100 disallowance . . ., remand the matter to ACF for further review and action taking into consideration additional materials to be presented by TMC within forty-five days, and, again, allow TMC to appeal any such action within thirty days of issuance to the Board."[2] *Id.*

[2] TMC asserts that these suggested approaches are "necessary both to ensure consistency with Board precedent and to protect TMC against collection activities while the reallocation review exercise is pending." Motion at 3.

TMC correctly asserts that when the Board leaves open an issue that is material to a complete resolution of the parties' disallowance dispute – because of the gaps in the federal agency's fact-finding, the agency's need to clarify or reconsider the legal grounds for its determination, or other reasons – the Board ordinarily issues a decision that remands the case to the federal agency for further action on the issue and provides the grantee with an opportunity to appeal the action taken on remand. *See, e.g.*, *Ca. Dept. of Health Servs.*, DAB No. 1015 (1989) (deferring adjudication concerning a portion of the challenged disallowance relating to Medicaid overpayment amounts and remanding the case to the federal agency with instructions to (1) consider additional evidence submitted by the state Medicaid agency that might support a reduction in the disallowance and (2) reaffirm or revise its disallowance determination based on its review of that evidence). In addition, the Board will remand a case for recalculation of the disallowance amount when it issues a decision partially favorable to the non-federal party or makes other findings that necessitate such a recalculation. *N. Cent. W. Va. Cmty. Action Ass'n*, DAB No. 1604, at 12 (1996) (remanding for "proper calculation" and permitting the grantee to appeal the recalculation); *Tex. Health & Human Servs. Comm.*, DAB No. 2112 (2007) (remanding for recalculation of the disallowance "consistent with the guidance" contained in a related Board decision and permitting the appellant to appeal the recalculation).

In TMC's appeal, the Board did not leave open, or incompletely resolve, any issues that were before it. The overarching question presented by the parties was whether ACF had lawfully disallowed the consultant and salary costs. The Board answered that question affirmatively and conclusively. Nowhere in Decision No. 2636 did the Board suggest that the disallowance's legality was contingent on additional fact-finding, clarification, or other action by the parties. In addition, the Board did not indicate that its findings necessitated a recalculation of the disallowance or that ACF was not free to implement the Board's decision.

Contrary to TMC's assertion, the Board did not find ACF's disallowance determination to be "flawed." The Board merely observed that the legal argument contained in ACF's appeal brief was "misplaced." DAB No. 2636, at 9. After making that observation, the Board found that the disallowance determination (and the audit findings expressly adopted by that determination) had "adequately notified" TMC that ACF was questioning "the appropriateness of using the Risk Management Fund to allocate" the disputed costs, that TMC had the burden to demonstrate that costs had been allocated in accordance with federal cost principles (including the basic principle, cited in the disallowance determination, that a cost allocation be in accordance with "relative benefits received" by a grantee's funding sources[3]), and that TMC had failed to carry that evidentiary burden.

[3] The disallowance determination cited the provision of OMB Circular A-122 which sets forth the general criteria for cost allocability. *See* ACF Ex. 6, at 5 (*citing* OMB Circular A-122, Appendix A, ¶ A.4, *codified in* 2 C.F.R. Part 230 (Jan. 1, 2013)).

Id. at 11. Based on those findings, the Board sustained the disallowance without qualification, holding that TMC's inappropriate use of the Risk Management Fund (and related worker's compensation rate) to allocate the disputed costs was a legally sufficient reason to disallow the costs. The Board did not find that further action was necessary by ACF to implement the disallowance.

Because the Board completely and conclusively resolved the dispute presented by the disallowance (whether TMC's allocation of costs through the Risk Management Fund complied with federal cost principles), the Board did not deviate from any standard practice by not "remanding" the case to ACF. To the contrary, the Board acted in accordance with decisions in which it notifies the appellant that the respondent federal agency may, *in its discretion*, reduce an otherwise legally valid disallowance (or take other action to mitigate its impact) based on information or argument not presented during the course of the appeal. In such cases, the Board does not remand the case or grant a further right to appeal the federal agency's act of discretion. *See, e.g.*, *Mental Health Assoc. of Oregon*, DAB No. 2590, at 10 (2014) (upholding the disallowance of certain costs while stating that the federal agency was not precluded from reducing the disallowance based on a backcasting analysis for which the grantee had provided no supporting evidence during the appeal); *Galveston Cmty. Action Council*, DAB No. 2514, at 4 n.1 (2013) (upholding a disallowance of consultant costs while noting that the decision did not preclude the federal agency from reducing the disallowance later based on a showing that the grantee did not charge the disputed costs to its federal grant); *Sw. Va. Cmty. Health Sys., Inc.* (2014), DAB No. 2605, at 10, 19 (concluding that certain costs claimed as indirect costs were not allowable but stating that the federal agency was not precluded from later determining that some portion of the disallowed costs was allowable "based on additional information or clarification provided by [the grantee] at the federal agency's request) and 14 (concluding that certain costs for which the grantee did not obtain prior approval were unallowable but stating that this conclusion did not preclude HRSA from exercising its discretion to approve the costs in the event the grantee requested "retroactive approval").

TMC cites two Board decisions in its motion: *Peoples Involvement Corp.*, DAB No. 1967 (2005) and *Philadelphia Parent Child Center, Inc.*, DAB No. 2297 (2009). In *Peoples Involvement Corp.*, the Board reviewed a disallowance of $527,098 in grant-financed costs incurred to construct a child day center in a building owned by the grantee.[4] DAB No. 1967, at 1-2, 4-5. The day care center was never completed, and the grantee sold the building. *Id.* at 4-5. The issue presented in the appeal was whether the grantee was required to credit the federal government with a share of the building sale's net proceeds. *Id.* at 13-17. The Board concluded that the government was entitled to a

[4] The Board separately sustained a disallowance of $317,901.58 in costs charged to an economic development grant. DAB No. 1967, at 7-13.

share of those proceeds but found that the record was "not fully developed on the issue of the accounting related to the disposition of project assets[.]" *Id.* at 17. The Board therefore remanded the case to the federal agency, permitted the grantee to submit an accounting of the real property sale for review by the federal agency, directed the federal agency to notify the grantee if the accounting did not "support the allowability" of the disputed costs, and permitted the grantee to appeal any adverse notice to the Board. *Id.* The Board stated that if the grantee did not submit an accounting, the disallowance would stand "without any further action on our part." *Id.*

In *Philadelphia Parent Child Center*, the Board "reverse[d] in part and affirm[ed] in part" a disallowance of costs that the grantee had claimed for its required non-federal share of Head Start program costs.[5] DAB No. 2297, at 1-2. In support of that holding, the Board determined that documentation submitted during the appeal "reliably establishe[d] the eligibility and amount" of some costs used by the grantee to meet its non-federal share obligation, that the documentation was "clearly inadequate" for other costs, that certain documentation might be adequate if "further explained," and that much of the federal agency's response to the documentation was "overgeneralized and did not clearly inform [the grantee] why the documentation was inadequate." *Id.* at 1, 2, 6, 9. Accordingly, the Board remanded the case to ACF to determine the "exact amount of [the grantee's] allowable non-federal share based on the documentation that [the grantee] provided, and the amount of any remaining disallowance, in accordance with our determinations . . . as to which items of documentation are acceptable or may be acceptable if further explained." *Id.* at 2; *see also id.* at 9-10 (affording the grantee the opportunity to provide ACF "additional verification that the documentation submitted with its appeal supports allowable contributions to the Head Start program, where the documentation already submitted contains indicia of reliability and is not clearly inadequate on its face"). The Board directed ACF to consider any information that the Board permitted the grantee to submit on remand and to issue a "written notice of its calculation of the amount of the non-federal expenditures and any resulting disallowance." *Id.* at 34.

As these summaries reveal, *People's Involvement* and *Philadelphia Parent Child* differ in a fundamental way from the decision in TMC's appeal. In both cases, the Board issued remand instructions (and granted limited post-remand appeal rights) because gaps in the evidentiary record or uncertainty about the federal agency's position left it unable to fully resolve issues (*e.g.*, the size of the federal government's share of proceeds from the sale of the grantee's real property in *People's Involvement*, and the sufficiency of cost documentation and the correctness of the disallowance calculation in *Philadelphia Parent Child*) affecting the amount and legal validity of the challenged disallowance. In contrast, the Board in TMC's appeal did not find the record inadequate to render a final

[5] The Board also sustained a disallowance of Head Start salary costs on the ground that the costs had not been documented adequately. DAB No. 2297, at 34.

decision, nor did the Board defer or withhold its adjudication of any issue material to a decision on the merits of the disallowance. Instead, the Board fully and conclusively sustained the disallowance of the consultant and salary costs. The fact that the Board advised TMC of a limited opportunity to seek discretionary relief from the federal agency does not render Decision No. 2636 provisional or unenforceable. Indeed, any decision that ACF might make with respect to a proposed reallocation would not invalidate (in whole or part) our conclusion that the costs in question were charged to TMC's grants in violation of federal cost principles and properly disallowed on that ground.[6] We are unaware of any statute or regulation entitling a grantee to appeal a decision concerning a reallocation proposal covering costs that the Board found to have been properly disallowed.

In sum, because Decision No. 2636 unqualifiedly sustained the disallowance of consultant and salary costs, the instructions in section III.D of that decision do not deviate from any Board practice. We therefore deny TMC's requests to "remand" the disallowance and to permit an appeal of any decision by ACF concerning its proposal to reallocate the disallowed costs.[7]

We also deny TMC's request to stay the enforcement of Decision No. 2636 pending the submission of, and action by ACF on, a reallocation proposal. We are unaware of any statute or regulation authorizing the Board to stay the implementation of the federal agency's determination when that determination has been affirmed by the Board on appeal. Title 45 C.F.R. § 16.22(a) provides that the respondent federal agency "shall take no action" to implement it determination "[u]ntil the Board disposes of an appeal" of that determination. The clear implication of section 16.22(a) is that the respondent federal agency may effectuate the challenged determination once the Board has taken final action on the appeal, as it has in this case. *See, e.g.*, Nov. 20, 2009 Order Denying Motion for Stay of Disallowance in *W. Va. Dept. of Health & Human Servs.*, Board Docket No. A-09-81 (attached to this Ruling).

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[6] The Board's instructions state that ACF may "reduce the disallowance" if it determines that TMC has proposed an acceptable reallocation and that the reallocated costs are otherwise compliant with the terms and conditions of TMC's Head Start grants. By stating that ACF may "reduce the disallowance," we did not intend to suggest that acceptance of a reallocation proposal would nullify (in whole or part) ACF's legal justification for the disallowance. The disputed costs were lawfully disallowed irrespective of the merits of any attempt to reallocate them. Our decision served to inform ACF that the effect of our conclusion was not to preclude ACF from exercising its discretion to allow some of the costs if TMC can later demonstrate that they can be properly allocated using a correct methodology (even if those costs were disallowed when improperly allocated). The 45-day limit for TMC to provide a reallocation proposal to ACF in an attempt to demonstrate a permissible alternative metholodogy simply provided ACF with closure regarding when it might be asked to determine if any of the costs may be reclaimed using an alternative methodology.

[7] TMC's motion is styled as a request for "clarification" or "reconsideration." The regulations governing this proceeding state that the Board will not "reconsider" a decision unless a party alleges a "clear error of fact or law." 45 C.F.R. § 16.13. Our discussion makes clear that TMC has not identified a clear legal or factual error in Decision No. 2636.

Conclusion

For the reasons explained above, we deny TMC's Motion for Clarification or, in the Alternative, Reconsideration of Board Decision 2636.

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member

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Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

West Virginia Department of Health and Human Services
Docket No. A-09-81
Board Decision No. 2278
November 30, 2009

ORDER DENYING MOTION FOR STAY OF DISALLOWANCE

On April 24, 2009, the West Virginia Department of Health and Human Resources (DHHR)appealed a determination of disallowance by the Centers for Medicare & Medicaid Services (CMS). On October 29, 2009, the Board issued a decision in that appeal, holding that CMS was entitled to disallow $2,732,968 in federal reimbursement for the State of West Virginia's Medicaid Program. West Virginia Dept. of Health and Human Resources, DAB No. 2278 (2009). The Board informed the parties that its October 29, 2009 decision constituted the "final administrative action" on DHHR's appeal.

On November 13, 2009, the West Virginia Department of Health and Human Resources (DHHR) filed a motion to stay the implementation of the disallowance pending judicial review of the Board's October 29, 2009 decision.DHHR cites no legal authority for its motion, and the Board is aware of no statute or regulation authorizing it to stay the implementation of its final decision pending judicial review of that decision. Title 45 C.F.R. § 16.22(a) provides that the respondent federal agency "shall take no action" to implement its determination "[u]ntil the Board disposes of an appeal" of that determination. The clear implication of this regulation is that the respondent federal agency may effectuate the challenged determination once the Board has taken final action on the appeal, as it has in this case.[1] In any event, CMS furnished evidence that it had implemented the disallowance before DHHR filed its motion for a stay, thus rendering the motion moot.

[1] The Board's decision in this case constitutes the final administrative action unless a party files a motion for reconsideration. See 45 C.F.R. § 16.13. Neither party has filed a motion for reconsideration in this case.

For these reasons, the Board denies DHHR's motion for a stay of the disallowance.

/s/
Constance B. Tobias
Chair, Departmental Appeals Board