Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

New York State Office of Temporary and Disability Assistance
Docket No. A-16-54
Decision No. 2732
September 2, 2016

DECISION

The New York State Office of Temporary and Disability Assistance (State or Appellant) appeals the February 1, 2016 determination of the Social Security Administration (SSA) to disallow $645,618 in costs related to Deficit Reduction Leave (DRL) payments the State made to its Division of Disability Determinations (DDD) employees during the period from January 18, 2012 to November 5, 2014.

For the reasons discussed below, we affirm the $645,618 disallowance in full.

Legal Background

The SSA pays benefits to disabled wage earners and their families under the Disability Insurance (DI) program. The DI program was established in 1954 under Title II of the Social Security Act (Act). Social Security Amendments of 1954, Pub. L. No. 83-761, Title I, § 106, 68 Stat. 1052, 1079 (1954), codified as amended at 42 U.S.C. § 220 *et seq.* and 42 U.S.C. § 420 *et seq*. The SSA Supplemental Security Income (SSI) program provides benefits to financially needy individuals who are aged, blind, or disabled. The SSI program was enacted in 1972 under Title XVI of the Act. Social Security Amendments of 1972, Pub. L. No. 92-603, Title III, § 301, 86 Stat. 1329, 1465 (1972), codified at 42 U.S.C. § 1601 *et seq.* and 42 U.S.C. § 1381 *et seq.* Under the DI and SSI programs, each state's disability determination services (DDS) makes disability determinations. Social Security Act §§ 221(a)(1), 1614(a)(3)(H)(i) (42 U.S.C. §§ 421(a)(1), 1382c(a)(3)(H)(i)); 20 C.F.R. §§ 404.1601 *et seq.* and 416.1001 *et seq.*

The SSA reimburses states for the cost to the states of making disability determinations. 42 U.S.C. § 421(e). At the end of each quarter of the fiscal year, each DDS that makes disability determinations submits a Form SSA-4513, *State Agency Report of Obligations for SSA Disability Programs*, to report program disbursements and unliquidated

obligations for personnel, medical, indirect, and all other non-personnel costs. *See generally* SSA Program Operations Manual System (POMS) Disability Insurance (DI), 39506.001 *et seq.* (March 12, 2002), available at https://secure.ssa.gov/apps10/poms.nsf/lnx/0439506000.

Based on audits, which may be performed by the SSA Office of the Inspector General (OIG), the SSA determines whether a state's expenditures for the period for which funds were made available comported with the cost principles in 48 C.F.R. Part 31, subpart 31.6, Office of Management and Budget (OMB) Circular A-87 and other applicable written guidelines in effect when the expenditures were made or incurred. 20 C.F.R. §§ 404.1626(e), 404.1627(b), 416.1026(e), 416.1027(b). The regulations in 20 C.F.R. §§ 404.1627(b)(1) and 416.1027(b)(1) provide in part that audits or reviews "will be conducted to determine whether the expenditures were made for the intended purposes and in amounts necessary for the proper and efficient administration of the disability programs." The State is required to comply with the SSA's written guidelines. 20 C.F.R. §§ 404.1602, 404.1603(c)(12), 404.1633, 416.1002, 416.1003(c)(12), 416.1033; POMS DI 39506.001. The SSA may require states to repay the funds the SSA determines were not expended consistent with the applicable requirements. 20 C.F.R. §§ 404.1626(f), 416.1026(f) (both stating, "Any monies paid to the State which are used for purposes not within the scope of these regulations will be paid back to the Treasury of the United States."); POMS DI 39506.001.

OMB Circular A-87, codified at 2 C.F.R. Part 225, sets forth general principles for determining allowable costs. 2 C.F.R. Part 225, Appendix (App.) A.[1] To be allowable, costs claimed must (among other general criteria) be "necessary and reasonable for [the] proper and efficient performance and administration" of the federal award. 2 C.F.R. Part 225, Appendix (App.) A, ¶ C.1.a. OMB Circular A-87 does not define the term

[1] In late 2013, OMB consolidated the contents of OMB Circular A-87 and several other circulars into one streamlined set of uniform administrative requirements, cost principles, and audit requirements for federal awards, currently published in 2 C.F.R. Part 200. 78 Fed. Reg. 78,590 (Dec. 26, 2013). The SSA issued a final regulation adopting the December 19, 2014 joint interim final rule implementing OMB's December 26, 2013 uniform rule on November 10, 2015. 80 Fed. Reg. 69,563 (2015) (codified at 2 C.F.R. § 2300.10 and 20 C.F.R. Parts 435 and 437). We note that the SSA's DDS financial management guidelines cite to OMB Circular A-87. POMS DI 39506.001. We also note that 20 C.F.R. § 404.1626 refers to Federal Management Circular A-74-4, but Federal Management Circular A-74-4 was later reissued as OMB Circular A-87.

"necessary,"[2] but states that a cost is "reasonable" "if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost." *Id.* ¶ C.2. To determine the reasonableness of a cost, consideration is given to factors like whether the cost is of a type generally recognized as ordinary and necessary for the operation of the governmental unit or the performance of the Federal award; whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the governmental unit, its employees, the public at large, and the Federal Government; and whether there are significant deviations from the established practices of the governmental unit which may unjustifiably increase the Federal award's cost. *Id.* ¶ C.2.a, d, e. In addition, in order to be allowable, a cost must be allocable to the award. *Id.* ¶ C.1.b. A cost "is allocable to a particular cost objective if the goods or services involved are chargeable or assignable to such cost objective in accordance with relative benefits received." *Id.* ¶ C.3.a. A cost must also "[c]onform to any limitations or exclusions set forth in [the cost] principles, Federal laws, terms and conditions of the Federal award, or other governing regulations as to types or amounts of cost items." *Id.* ¶ C.1.d. Claimed costs must also "[b]e consistent with policies, regulations, and procedures that apply uniformly to both Federal awards and other activities of the governmental unit" and "[b]e accorded consistent treatment." *Id.* ¶¶ C.1.e, f. OMB Circular A-87, Appendix B enumerates specific items of cost, such as "[c]ompensation for personal services," and the principles to be applied to determine whether such cost items are allowable, regardless of whether such costs are direct or indirect costs.

Where the SSA issues a determination disallowing Title II DI program state expenditures following an audit, the state may appeal such a determination to the appropriate SSA Regional Commissioner. If the state disagrees with that determination, the state may file a written request for reconsideration through the Associate Commissioner, Office of

[2] The Board has stated, in the context of a grant program, that the term "necessary" means "the ordinary everyday use of the term, as something 'essential,' so that the grant programs could not be run properly and efficiently without it." *State of Oregon Mass Transit Assessment*, DAB No. 402, at 4 (1983); *see also Teaching and Mentoring Communities, Inc.*, DAB No. 2636, at 6 (citing applicable cost principles as "specifying factors relevant to a determination of a cost's reasonableness, including whether a cost is 'of a type generally recognized as *ordinary and necessary* for the operation of the organization or the performance of the award'")(italics added in DAB No. 2636)). "Necessary costs" include direct and indirect costs as defined in OMB Circular A-87. 20 C.F.R. § 404.1626(a).

Disability, to the Commissioner of Social Security, in writing, within 60 days of the date of the Regional Commissioner's notice of the determination. The decision on "monetary disallowances" resulting from reconsideration review are "final and binding" upon the state disputing the audit determination unless it appeals the decision on reconsideration in writing to the Board within 30 days after receiving the decision. 20 C.F.R. § 404.1627(b)(3). *See also id.* §§ 404.1681 ("Disputes concerning monetary disallowances will be resolved in the proceedings before the [Board] . . . ."), 404.1683 ("The rules for hearings and appeals before the Board are provided in 45 CFR part 16.").[3] "In an appeal of a federal agency's disallowance determination, the federal agency has the initial burden to provide sufficient detail about the basis for its determination to enable the grantee [i.e., the non-federal party] to respond." *Me. Dep't of Health & Human Servs.*, DAB No. 2292, at 9 (2009) (upholding a disallowance of federal reimbursement for certain expenditures made by a state Medicaid program), *aff'd*, *Me. Dept. of Human Servs. v. U.S. Dept. of Health & Human Servs.*, 766 F. Supp. 2d 288 (D. Me. 2011). If the federal agency (here, the SSA) carries this burden, which the Board has called "minimal," then the non-federal party (the State) must demonstrate that the costs are, in fact, allowable. *Mass. Exec. Office of Health & Human Servs.*, DAB No. 2218, at 11 (2008) (Medicaid disallowance), *aff'd*, *Mass. v. Sebelius*, 701 F. Supp. 2d 182 (D. Mass. 2010).

The Board defers to a federal agency's interpretation of the authorities under which it implements its program as long as the agency's interpretation is reasonable and the nonfederal party has had timely and adequate notice of that interpretation or did not rely to its detriment on another reasonable interpretation. *See, e.g., Blackfeet Tribe*, DAB No. 2675, at 11 (2016), citing *Missouri Dep't of Soc. Servs.*, DAB No. 2184, at 2 (2008).

[3] The SSA's determinations from which this appeal arises refer to the regulations in 20 C.F.R. § 404.1601 *et seq.* (Title II regulations in Part 404, subpart Q), and not the regulations in 20 C.F.R. § 416.1001 *et seq.* (Title XVI regulations in Part 416, subpart J). The State does not dispute that the regulations applicable to this appeal are the Part 404 regulations. In fact it states that the Board has jurisdiction over this appeal pursuant to the regulations in 20 C.F.R. §§ 404.1627(b)(3) and 404.1681. State's brief in support of the appeal (State Br.) at 4. Thus, the parties evidently agree that this dispute arises from a Title II disallowance. We do not and need not determine whether the DRL payments in dispute were made only for DDD employee work on Title II matters as opposed to Title XVI matters. (The State represents that DDD is responsible for making determinations on claims for disability benefits under both the DI and SSI programs in the State of New York. *Id.* at 5.). In any case, the procedural regulations in Part 404 and Part 416 are substantially similar. *See* 20 C.F.R. §§ 416.1027(b)(3) (language similar to section 404.1627(b)(3), providing for a 60-day opportunity to request SSA reconsideration review and a 30-day opportunity to appeal the reconsideration determination to the Board), 416.1081 (language similar to section 404.1681), 416.1083 (like section 404.1683, stating that 45 C.F.R. Part 16 procedural rules apply in proceedings before the Board).

Case Background

The State's Deficit Reduction Plan (DRP) and DRL Payments[4]

As noted earlier, the Appellant's DDD is responsible for making determinations on claims for disability benefits under the SSA's SSI and DI programs in the State of New York. The Appellant's DDD employees are New York state employees. In 2011, the State of New York enacted a budget that included provisions designed to save $450 million in recurring government-wide workforce expenditures. The payroll savings were to be achieved through negotiation with public employee unions, or, in the absence of such negotiations, through layoffs. To avoid layoffs, the State negotiated new collective bargaining agreements with DDD employees, most of whom belonged to one of two unions, Public Employees Federation, AFL-CIO (PEF) and The Civil Service Employees Association, Inc. (CSEA). The agreements credited the affected employees with a certain type of leave, called "Deficit Reduction Leave" or DRL, in consideration for concessions that included salary reductions and payments for the leave in future years.

Specifically, the agreement with PEF reduced the salaries of non-clerical DDD employees by 4.198% for 10 consecutive pay periods in fiscal year (FY) 2011-2012 and by 1.847% for all 26 pay periods in FY 2012-2013 and, in consideration of the payroll reductions, the employees were given nine days of DRL, which had to be used by March 31, 2013 or be forfeited. The affected PEF employees were required to obtain prior approval before taking their DRL as they would in taking other types of leave, such as personal or vacation leave. The State was required to repay the PEF employees the value of their nine-day reduction in equal amounts over 39 payroll periods, beginning April 1, 2015. Employees who separated from service prior to the full repayment of the nine days of DRL were paid the balance of the amount due upon separation.

Similarly, the agreement with CSEA reduced the salaries of non-professional DDD employees by the value of five days' pay for FY 2011-2012 and four days' pay in FY 2012-2013 and, in consideration of the payroll reductions, the State credited the employees with five days of DRL during FY 2011-2012 and four days of DRL during FY 2012-2013. Under the agreement with CSEA, the State repaid the affected employees the value of four days of DRL for FY 2012-2013 in equal installments over 39 payroll periods, beginning on March 24, 2016. Employees who were separated before receiving full repayment of four days of DRL were paid the balance due upon separation. The agreement with CSEA did not include a provision to repay the affected employees the value of five days of DRL for FY 2011-2012.

[4] This background is a summary largely taken from the background information the State provided in its brief in support of the appeal (State Br.), pages 6-9. The SSA does not raise any dispute concerning the State's description of the DRP or DRL payment provisions for background purposes.

The DRP also affected certain DDD employees – Management/Confidential (M/C) employees – not covered by either union agreement. The State reduced the salaries of M/C employees by 4.198% for the last nine pay periods of FY 2011-2012 and by 2.008% for all paychecks paid in FY 2012-2013. In consideration of these pay reductions, M/C employees were credited nine days of DRL to be used before March 31, 2013 to avoid forfeiting the DRL. The State agreed to repay the M/C employees the value of the nine-day reduction in equal amounts over 39 payroll periods beginning on April 1, 2015. M/C employees who separated from service prior to receiving full repayment of nine days of DRL were paid the balance owed at the time of their separation.

While nearly all DDD employees were subject to the DRP, not all earned the same amount of DRL. The amount of DRL credited depended on the employee's employment status at the time his or her respective DRP agreement went into effect. The State gave full DRL credits to full-time, annual-salaried employees who were fully employed through the DRL period. For example, a full-time, annual-salaried PEF employee earned the full nine days if the employee remained a full-time, annual-salaried PEF employee from November 4, 2011 through March 31, 2013, the employee's DRL period. Part-time employees, employees not employed through the full period, and all employees with otherwise reduced schedules were only eligible to use a reduced amount of DRL prorated to his or her employment percentage at the time his or her DRP agreement went into effect. For example, a part-time, annual-salaried employee whose 50% schedule required 37.5 hours of work in a biweekly pay period was credited only half the DRL that an equivalent full-time, annual-salaried employee earned.

Procedural History

This appeal stems from an audit performed by the SSA Office of the Inspector General (SSA OIG) of the DRL payments that the State made to its DDD employees during the period from January 18, 2012 to November 5, 2014. On April 14, 2015, the SSA OIG issued an audit report, *Deficit Reduction Leave Payment to New York State Division of Disability Determination Employees* (A-02-15-25036), finding that, during the period from January 18, 2012 to November 5, 2014, the State paid $418,379 in DRL payments and claimed $227,239 in related fringe benefits, for a total of $645,618, to reimburse 219 separating DDD employees.[5] The State reportedly included most of these payments as a cost of determining disabilities on Forms SSA-4513 submitted to the SSA for reimbursement, and the SSA released funds to the State based on the Forms SSA-4513. The audit report states that the SSA had reimbursed the State $614,349 of $645,618.

[5] Throughout this decision we refer to the DRL payments and related fringe benefits in the aggregate as "DRL payments" except where specific distinctions are needed.

State Br. Ex. A at "Office of Audit Report Summary" and 2. The SSA asked the SSA OIG only to "quantify the amount of DRL payments made . . . as of November 5, 2014" and therefore the SSA OIG's sole objective in auditing was to quantify the amount of DRL payments made. *Id.* at 4. The parties do not dispute the SSA OIG's calculation of the amount of DRL payments as stated in the audit report.

By a determination dated June 22, 2015, the SSA's Regional Commissioner, Region II, notified the State that the SSA was disallowing $645,618 in DRL payments on the ground that the State made DRL payments to its DDD employees for the time they spent out of the office and not for providing services in furtherance of the disability determination function. State Br. Ex. B at 1 (not paginated). The SSA's June 22, 2015 determination informed the State that it would have 60 days to request reconsideration pursuant to 20 C.F.R. § 404.1627(b)(3). *Id.* at 2. By letter dated October 30, 2015, the State requested reconsideration of the disallowance. State Br. Ex. C. By a determination dated February 1, 2016,[6] the SSA's Acting Commissioner notified the State of the SSA's final decision to affirm the disallowance of $645,618[7] on grounds similar to those cited in the June 22, 2015 determination and of the State's right to appeal the disallowance determination to the Board within 30 days of receipt of the SSA's February 1, 2016 determination pursuant to 20 C.F.R. § 404.1627(b). State Br. Ex. D. By letter dated February 26, 2016, the State timely appealed the SSA's February 1, 2016 determination to the Board. State Br. Ex. E. The parties filed their briefs and exhibits.[8]

---

[6] Section 404.1627(b)(3), cited in the SSA's June 22, 2015 determination, provides an opportunity to request reconsideration "in writing within 60 days of the date of the Regional Commissioner's notice of the determination." The October 30, 2015 letter request for reconsideration of the SSA's June 22, 2015 determination appears to have been filed after the 60-day period. However, nothing in the record indicates that the SSA rejected or dismissed the request for reconsideration as untimely, and neither party's filings discuss any dispute about the timing of the request. In any case, as noted herein, the SSA issued a February 1, 2016 reconsidered determination which the SSA informed the State was appealable to the Board pursuant to 20 C.F.R. § 404.1627(b).

[7] The SSA's February 1, 2016 determination states that the amount disallowed is $645,618. The February 1, 2016 determination and the audit report state, however, that the SSA had reimbursed the State $614,349 of $645,618. State Br. Exs. A at 2-3; D at 1. Before the Board, SSA asks that the Board affirm its disallowance of $614,349, the amount reimbursed. SSA Response at 4. According to the audit report, the State "plan[ned] to include the outstanding balance not yet reimbursed on the Form SSA-4513 it submits for the quarter ending December 31, 2014" (State Br. Ex. A at 2) and that, over the next three fiscal years, the State estimated that it would pay an additional $3 million in DRL payments and related fringe benefits to separating employees (*id.* at 3). The only determination presently on appeal is the February 1, 2016 SSA determination, which disallowed $645,618 (of which the State was reimbursed $614,349), for DRL payments made for the period from January 18, 2012 to November 5, 2014.

[8] On April 13, 2016, the State filed its initial brief in support of its appeal to the Board (State Br.), with 16 exhibits, Exhibits A through P. On May 13, 2016, the SSA filed its response brief (SSA Response), with two exhibits, Exhibits A and B. On May 27, 2016, the State filed a reply brief (State Reply), with one exhibit, Exhibit A. On June 9, 2016, the SSA filed a sur-reply (SSA Sur-reply), with one exhibit, marked Exhibit A. Lastly, on July 1, 2016, the State filed a response to the sur-reply (State Response to Sur-reply). We cite to the exhibits by reference to the party's filing and exhibit letter. *E.g.*, State Reply Ex. A; SSA Sur-reply Ex. A.

Discussion

The SSA reasonably interpreted and applied the authorities, cost principles, and agency interpretive guidance to disallow the DRL payments. The Board upholds the SSA's February 1, 2016 disallowance determination.

1. *The DRL payments were not costs necessary for the State's performance of its disability determination function, but rather were incurred in furtherance of a statewide budget balancing initiative.*

The SSA is obligated only to pay the State for "necessary costs in making disability determinations." 20 C.F.R. § 404.1626(a). "The State may not incur or make expenditures for items of cost not approved by [the SSA] or in excess of the amount [the SSA] make[s] available to the State." *Id.* § 404.1626(d). A state must also comply with the SSA's written guidelines, which include the POMS provisions. *Id.* §§ 404.1603(c)(12), 404.1633. The SSA considers expenditures necessary if they are incurred for the SSA disability determination process, in accordance with the standards and other written guidelines of the Commissioner of the SSA, approved by the SSA, and within the limits of the approved state budget. POMS DI 39506.001. As POMS DI 39506.001B.1 provides, the SSA generally considers any class or kind of administrative expenditure (in the proper amount for services, goods, or facilities) deemed essential to making SSA disability determinations to be properly chargeable to the SSA. The term "[d]isability determination function" is defined as "making determinations as to disability" and "carrying out related administrative and other responsibilities." 20 C.F.R. § 404.1602.

The State asserts that the DRL payments were necessary to avoid layoffs that would have "severely undermined" the DDD employees' ability to perform disability determinations. State Br. at 6. It writes, "As the centerpiece of the State's 2011 labor agreement, the DRP's implementation was necessary to avert a substantial layoff of workers, which would have greatly impacted DDD's ability to make disability determinations." State Br. at 12. According to the State, if the DRP had not been implemented -

> the State would have been forced to begin statewide layoffs, which would have significantly impacted DDD's ability to make disability determinations. While some DDD staff with unique titles may have possibly been excluded from such layoffs, most of DDD's staff would not have been so immune. Pursuant to the State's layoff rules, experienced DDD employees lost to layoffs most likely would have been replaced with

> inexperienced, higher seniority employees from other State agencies with no experience in the disability determination program. Furthermore, layoffs would have impacted other [State] departments such as human resources and payroll. The resulting turmoil would have caused significant service disruption for DDD. The DRP was, in a word, necessary.

State Reply at 6.

As the State's argument goes, the DRL policy, essentially crediting employees with leave hours during a period of two FYs in exchange for negotiated salary reductions, was necessary for making disability determinations for which the SSA pays the State because, otherwise, the State would have had to reduce its DDD staffing, which would have had a significant adverse impact on DDD's ability to fulfill its mission. The core premise underlying the State's position is that the fewer the staff resources DDD would have as a result of layoffs, if made, the more challenges DDD would experience in performing the tasks for which the SSA pays the State. In other words, the State theorizes, the greater the resources, the higher the likelihood of achieving more and/or better output; conversely, the fewer the resources, the lower the likelihood of achieving the desired output, in terms of quality or quantity or both.

Whatever appeal this premise might have is ultimately irrelevant. Since the State itself acknowledges that it avoided layoffs by achieving cost savings through negotiations with the unions and M/C employees, its argument about the adverse impact widespread layoffs would or could have had on DDD operations is based only on speculation about possible adverse consequences of personnel downsizing that never materialized. Such speculation does nothing to show how the DRL payments were necessary for performing the DDD function for which the SSA makes payment.

The State's premise is also flawed. The SSA already reimburses the State in full for expenditures incurred for administering the disability determination program, which includes DDD employee compensation.[9] 20 C.F.R. § 404.1626; POMS DI 39501.020.B.1 (at https://secure.ssa.gov/apps10/poms.nsf/lnx/0439501020) ("SSA pays 100 percent of necessary costs incurred by the States performing the disability determination function."); SSA Sur-reply Ex. A at 1 (declaration of Ms. Y.L., Director of the Division of Disability Determination Services Resources and Workload Management in the Office of Disability Determinations at the SSA in Baltimore, Maryland, who states that her office oversees the "$2 billion budget that funds 100% of the costs to operate 52 state DDSs (including Puerto Rico and the District of Columbia)"). The fact that the SSA

[9] The State also argues that the costs of administering the DDS program in the State of New York include the DRL payments. Specifically, it asserts that the costs are in the nature of fringe benefits that comport with all applicable cost principles and are therefore reimbursable. We will address this argument separately, below.

pays the State the costs of DDD employee salaries means that there would be, and should be, no need for layoffs of DDD employees, *at least not due to insufficient funds to pay those employees' compensation*. The State attempts to show that by implementing the DRP, avoiding layoffs, it somehow conferred a benefit on the SSA in terms of how the State makes optimal use of the money the SSA pays the State in furtherance of performing disability determinations, but these attempts are unconvincing.

The question here, ultimately, is whether the DRL payments were *necessary* to perform the DDD's disability determination function for which the SSA pays the State. The SSA reasonably determined based on the applicable authorities that the State has not established their necessity to the disability determination function. The State acknowledges that the impetus behind the implementation of its DRP was that the State was "[f]acing a serious financial crisis in 2011" that prompted the New York State legislature to enact a budget that included "'$450 million in recurring workforce savings designed to be achieved through negotiated savings with public employee unions, or, in the absence of such negotiated savings, through layoffs.'" State Br. at 6, quoting State Br. Ex. G (New York State Budget Bulletin B-1196). The State's representation strongly suggests that the driving force behind, and the purpose served by, the DRL policy was the need to close a budget shortfall affecting governance of the *entire State of New York*, of which DDD is only a part and for which the SSA pays the operating costs that include DDD employee compensation. The DRL policy, based on a quid pro quo agreement between the State and its employees (through union representation as applicable), is, in essence, structured in such a way that the State pays less in employee compensation earlier (i.e., FYs 2011-2013), thereby helping New York to achieve statewide personnel cost savings, in consideration for leave credits and the promise of payment of the value of the accrued leave or reduced compensation later (2015 or later). In short, the DRL policy helped the state manage its budget for two fiscal years by forestalling certain payroll obligations it otherwise would have had to meet during those years. The State's position that the DRL payments were therefore necessary is untenable because it assumes an SSA obligation to help a state balance its budget which the SSA does not have.

In its February 1, 2016 determination, the SSA stated that "the [State] paid the DRL payments to DDD employees for the time they spent outside the office and not for services furthering the Social Security disability determination function." State Br. Ex. D at 1.[10] In response, the State maintains that "DDD employees only earned DRL in

[10] We fully agree with the SSA's determination that the DRL payments were not necessary. Our agreement, however, does not mean that we would necessarily, or in all contexts, view costs charged for time employees are not on the job as somehow improper but, rather, means that statewide budget furloughs would not be routine costs of employment, would not be comparable to such routine costs of fringe benefits, and would not benefit the SSA DI program.

exchange for services they rendered during the DRL period" since the employees who separated from State service during the DRP period forfeited their unused DRL credits and those employees who left State employment during their DRP period who had used more DRL credits than they had earned had their vacation, holiday leave, and/or personal leave accruals reduced accordingly to recoup the expenses. State Br. at 9. According to the State, if any accrual was insufficient to cover the value of the excess DRL used, the State had authority to take appropriate action to recoup the value of the excess DRL used; conversely, employees who worked overtime hours were credited with extra DRL in proportion to any additional hours worked. *Id.* The State also emphasizes that the use of DRL is "subject to managerial approval and granted only after taking into consideration operational need" and that the "DRL could be lost if not used before the negotiated deadlines, and could not be transferred or substituted for its cash equivalency." State Br. at 12. All of this discussion arguably demonstrates that the State had in place provisions designed to prudently and efficiently manage the DRL policy and that it followed through in taking appropriate action in administering the policy consistent with those provisions. But, the fact the State may have efficiently managed its DRL policy does not prove the DRL payments were *necessary* to perform the disability determination function.

2. The State's argument that the DRL payments were reasonable is ultimately irrelevant because the State has not shown they were necessary.

The State argues that the DRL payments were reasonable because, for example, the DDD employees achieved quantifiable cost savings as measured by "cost per case" or CPC[11] during the time period the DRL policy was in place. State Br. at 13-14. However, before the question of whether the payments were reasonable even arises, the State must show that they were necessary for the performance of the SSA work for which SSA paid the State. As discussed in the previous section, the State has not done this. Moreover, the State has not shown that the payments were reasonable for the purposes at issue here. Specifically, the State points to the lower CPC during the two FYs in which the DRL accrual provisions were in effect (2011-2012 and 2012-2013), as compared to the higher CPC during the FYs immediately before and after the 2011-2013 period (i.e., 2009-2011 and 2013-2015), as evidence of the reasonableness of the DRL payments and prudent use of SSA funding. *Id.* at 13. The State also points to the "low mean [case] processing

[11] The State explains that "cost per case" or CPC is the standard method used by DDSs to determine the rate of cost for work performed. The CPC is determined by comparing total obligated funds within a fiscal year against production for that same fiscal year, i.e., by dividing the total obligations by total clearances. State Br. at 13 & 13 n.9.

time," which it asserts was nearly 20% lower than the national average, and "low percentage of pending cases over 120 days old during the years of DRL" as compared to the national average as further indicators of the State's "efficien[t]" and "extraordinarily prudent administration of DRL usage" during the two FYs. *Id.* at 14; State Reply at 7. During the DRL years, the State says, it "successfully cleared every case provided to it by [the SSA]." State Reply at 7.[12]

First of all, it is not, as the State suggests, the SSA's burden to prove that the State would have cleared more cases if the State had not instituted the DRL payment structure. State Reply at 6-7. The State initiated the discussion on the productivity issue, offering the data as evidence of productivity purported to be directly attributable to the DRL policy, but the data as presented do not demonstrate that to any reliable degree. It is the State's burden, ultimately, to prove that the DRL payments are reimbursable.

Second, the State's argument that the data show a direct cost-benefit relationship between the DRL payments and quantifiable productivity achieved by DDD employees while the DRL payment structure was in effect is not persuasive or well-founded. The State does not appear to take into account myriad factors, such as complex cases that could demand more extensive employee review and analysis time, that could affect productivity as measured by case output. National average statistics on mean case processing time and percentage of outstanding cases remaining pending for decision after 120 days for years 2012 and 2013 that show the State has shown better performance over other states that receive SSA funding (*see* State Br. at 14) arguably could show that, by one measure,, the State was more efficient than other states in managing disability determination caseload during those two years. But they are far from proving how the State's DRL payments directly contributed to improved productivity as the State maintains. The State itself alludes to the possibility that other factors may have contributed to its productivity during the time the DRL policy was in place, as it says that the lower CPC during this time "can be attributed to not only the lower total obligations incurred during these years, but also to the high rates of clearances [i.e., case closures] as well." State Br. at 13. The State also recognizes that there is an element of variability in the disability determination

[12] The SSA does not raise any specific dispute about the accuracy of the statistical data on which the State relies in furtherance of its arguments and the record does not present any specific contrary evidence that raises questions about the accuracy of the data. We therefore will accept the data as presented in the record for the purposes of discussion here.

process that could affect productivity, as it says that "developing medical and occupational files" and then "deciding cases is a time consuming endeavor" and that the process "generally" requires about three to five months. State Response to Sur-Reply at 2.[13]

Thus, we conclude that, even had the State shown the DRL payments to be necessary (which it has not), the State failed to show that the payments were reasonable for the purpose of the SSA funded activities.

3. The State has not shown that the DRL payments are allowable as fringe benefits.

The State further asserts that the DRL payments are in the nature of fringe benefits that OMB Circular A-87 recognizes as being included within the cost category of "compensation for personal services" that is reimbursable if it is "reasonable for the services rendered and conforms to the established policy of the governmental unit consistently applied to both Federal and non-Federal activities." State Br. at 15, citing OMB Circular A-87, App. B. ¶ 8.a. Fringe benefits, as the State points out, "are allowances and services provided by employers to their employees as compensation in addition to regular salaries and wages" and include "the costs of leave, employee insurance, pensions, and unemployment benefit plans." *Id.*, quoting OMB Circular A-87, App. B. ¶ 8.d.1. As the State further points out, OMB Circular A-87, App. B ¶¶ 8.d.1 and 8.d.2 provide that the cost of fringe benefits-like compensation paid to employees during authorized absences from the job, e.g., vacation leave, is allowable to the extent the benefits are reasonable and are required by law, governmental unit-employee agreement, or established policy of the governmental unit; provided under established written policies; equitably allocated to all related activities, including Federal awards; and the accounting basis selected for costing each type of leave is consistently followed by the governmental unit. *Id.* at 15-16. The State asserts that the DRL payments meet all of these OMB Circular requirements and are no different from any vacation, personal or sick leave, all of which the SSA "has a longstanding practice of providing with federal

[13] We are unable to draw any meaningful, definitive conclusions about the State's productivity data, let alone reach any conclusion specifically on the effect, if any, the DRL policy had on productivity as measured by standards like CPC or case clearances as compared to the years in which the DRL policy was not in effect. For instance, of the annual CPC data for years 2009 through 2015, the State reported the highest number of case clearances in 2015 (233,472), a year when DRL was not accrued and credited. The State achieved that productivity level in 2015 despite having had the highest total obligations of any year during the 2009-2015 period. State Br. at 13. If anything, these results tend to suggest that myriad factors affect productivity. We simply do not have enough information to know what the factors are and how they interact with one another.

funding" and are provided for under leave policies established through the agreements with the PEF and CSEA employees and M/C employees. *Id*. at 16. *See also* State Reply at 8 (asserting that DRL "fits neatly within the definition of fringe benefit under OMB [Circular] A-87, App. B"). The State emphasizes that the DRL payments were not a "gift to employees for which SSA received no benefit but rather an employee fringe benefit" that the employees received only "in exchange for services rendered." State Br. at 16-17.

The issue is not whether leave is in the nature of a fringe benefit that may be allowable if it otherwise conforms to the applicable cost principles. The SSA does not dispute that it pays the State for its DDD employees' salaries, which include compensation for authorized absences from the job, i.e., leave. SSA Response at 10 ("it is undisputed that the [SSA] compensates [the State] for its [DDD] employees' salaries"). However, the leave for which the DRL payments were made was not compensation for "services rendered." *See* OMB Circular A-87, App. B. ¶ 8.d.1. As the SSA correctly points out, the DDD employees were already required to perform their jobs in exchange for compensation that included fringe benefits like leave before the State adopted the DRP pursuant to which the DRL payments were made. SSA Response at 11. The State did not show that it had any basis for negotiating changes to the terms of the employees' compensation other than its desire to avoid a statewide budget shortfall.

The State emphasizes repeatedly that the employee agreements were the result of a "hard-fought, collectively negotiated compensation package." State Reply at 5. It construes the SSA's position to be that the State should have treated its DDD employees as "a separate and distinct entity from their counterparts within the [Office of Temporary and Disability Assistance] and in other state agencies and not provided them with the same DRL leave offered to . . . other public employees who belonged to the exact same bargaining units." *Id*. The State interprets the SSA's position to be that the State should have "exempted" the DDD employees from the DRP offered to all other state employees and asserts that the SSA's position is not only unreasonable but inconsistent with the applicable regulations and guidelines. State Reply at 5; State Response to Sur-reply at 1. The State argues that it was required to comply with all applicable state approved personnel standards in the selection, tenure and compensation of its employees performing disability determinations and could not "pick and choose" which contractually obligated benefits would be given to which employees. State Reply at 5-6, citing, inter alia, 20 C.F.R. § 404.1621(b) and POMS 39518.005 (at https://secure.ssa.gov/apps10/poms.nsf/lnx/0439518000); State Response to Sur-reply at 3.

We do not construe the SSA's position to be that the State should simply "disregard its contractual agreements" with its employees or "pick and choose" which contractually required benefits may apply to which class of employees in contravention of any state government unit-employee agreement or any applicable SSA authority. State Reply at 5-

6.[14] The point instead is that the SSA is not obligated to contribute toward the resolution of the State's budget deficit problem by paying for negotiated avoidance of furloughs in addition to paying the full costs of the DDD salaries and benefits.

4. The State continued to incur, and seek reimbursement for, the DRL payments despite early notice that the SSA would not reimburse the State for them.

The SSA cited the failure to comply with the regulation in 20 C.F.R. § 404.1626 as an additional reason for disallowing the DRL payments, stating that this regulation "prohibits [the State] from incurring expenses that SSA has not approved." State Br. Ex. D at 1, citing 20 C.F.R. § 404.1626. Relevant here, section 404.1626(d) provides, "The State may not incur or make expenditures for items of cost not approved by us [the SSA] or in excess of the amount we make available to the State."

The June 22, 2015 SSA determination, upheld on reconsideration by the February 1, 2016 determination, is not the first instance in which the SSA informed the State about the SSA's position that the DRL payments were not reimbursable. In fact, the SSA addressed the issue as early as 2012. By letter to the State dated October 18, 2012, of record as an appendix to the audit report, the SSA's Regional Commissioner informed the State that the SSA will not reimburse the State for DRL payments made pursuant to the State's "labor agreements" with PEF and CSEA. The Regional Commissioner wrote:

> I recently became aware that [the DRL payments] were already made to some [DDD] employees at the time of their separation from service. We want to inform you that SSA will not reimburse . . . the cost of any DRL payments . . . [because they] are not reimbursable under relevant SSA

[14] The SSA does say that the State could have negotiated with the unions to exempt federally funded DDS employees from the furlough provisions of the union agreements, considering that the SSA pays for the DDS salaries and benefits. It maintains that nothing in the SSA regulations precluded the State from exempting federally-funded DDS employees from the furloughs imposed on non-DDS employees and that the SSA regulations do not require states to furlough their DDS employees simply because they furloughed their non-DDS employees. SSA Sur-reply at 2. The SSA also makes the point that it consistently has advised and encouraged states that receive SSA funding for operating the disability determination programs to exempt their DDS employees from statewide furloughs and hiring freezes for state budget management reasons. SSA Sur-reply Ex. A at 2-3, citing 20 C.F.R. § 404.1621(d) ("Subject to appropriate Federal funding, the State will, to the best of its ability, facilitate the processing of disability claims by avoiding personnel freezes, restrictions against overtime work, or curtailment of facilities or activities."). *See also* 20 C.F.R. § 416.1021(d) (same provision).

We need not resolve the issue of whether the State should have exempted DDD employees from the DRP. Whether or not the SSA is correct as to this position, it is for the State of New York to determine what is appropriate or necessary in furtherance of managing its own budget, which could entail, as was the case here, bargaining with state employees to curb state employee payroll costs. The relevant issue for purposes of the dispute here not whether the DRP and DRL policy were necessary or appropriate for the State of New York to balance its budget; the issue, specifically, is whether the DRL payments comported with the applicable SSA authorities and cost principles such that the SSA is obligated to reimburse the State for them. We agree with the SSA that they are not reimbursable.

> regulations and guidelines . . . [They] are being made, and will be made, for time that [DDD] employees spent out of the office, and not for services furthering the disability determination function. Such costs would not benefit SSA's mission in any way. Rather, DRL takes [DDD] employees away from this critical work . . . [The State] was required to seek and obtain SSA approval for these costs before incurring them. *See* 20 C.F.R. § 404.1626. Despite apparently incurring this cost, [the State] has not sought or obtained approval from SSA.

State Br. Ex. A at C-1. (The SSA refers to this letter as an "advisory letter." SSA Response at 3.)

By a filing dated November 16, 2012, the State requested Board review based on the SSA's October 18, 2012 letter. By letter dated December 5, 2012, signed by Constance B. Tobias, Chair of the Board, and Leslie A. Sussan, Presiding Board Member, and acknowledging the State's request for review, the Board noted that the SSA's October 18, 2012 letter did not specifically discuss any appeal rights. The Board stated that there appeared to be no right to Board review based on the October 18, 2012 letter as "there appears to be no determination involving a monetary disallowance that is ripe for Board review." SSA Response Ex. A (Board's December 5, 2012 letter) at 2, citing 20 C.F.R. § 404.1681. The Board also said that "it appears that [the State] has no right to appeal the [SSA] Regional Commissioner's decision to the Board" under section 404.1627 and that the Board "is not aware of any other authority under which it could potentially review a determination regarding the allowability of DRL payments." *Id.* at 4. The Board asked the SSA to submit a statement of opinion on the issue of whether the State has a right to Board review based on the SSA's October 18, 2012 letter to the Board and stated that, "[u]nless SSA consents to Board review, the Board will reject the appeal." *Id.*

In addition to asking the Board to undertake review based on the October 18, 2012 SSA letter, the State evidently wrote the SSA a letter dated December 14, 2012, disputing the SSA's position that it would disallow the DRL payments.[15] By letter dated February 28, 2013, the SSA's Acting Commissioner stated that the SSA had not yet disallowed any

[15] The SSA attached a copy of the Board's December 5, 2012 letter as Exhibit A to its response brief. The State's December 14, 2012 letter to the SSA, however, is not of record. What we state about the December 14, 2012 letter is based on the State's discussion of it in its October 30, 2015 reconsideration request. State Br. Ex. C.

cost related to the DRL payments and agreed that the Board should not review the October 18, 2012 letter.[16] Thereafter, by letter dated March 5, 2013, the Chair of the Board rejected the State's appeal (Docket No. A-13-17).

The parties' earlier exchanges about the DRL payments establish that the State, contrary to section 404.1626, incurred, and sought SSA reimbursement for, expenditures the SSA had expressly disapproved. As the audit report indicates, and the State does not dispute, the State began making DRL payments in January 2012. By its October 18, 2012 letter, the SSA put the State on notice that the SSA did not approve the DRL payments and would not reimburse the State for them, for the same reasons given in its subsequent determinations from which this appeal arose. We also note that, in its February 1, 2016 decision on reconsideration, the SSA stated that it previously had "advised the State repeatedly not to furlough its DDD employees, especially when [the State] lacked a plan to maintain DDD productivity" and that the SSA "believe[s] the State acted imprudently with respect to its responsibilities to the Federal Government, and to the public, when it greatly reduced the number of hours spent on disability determinations against [the SSA's] specific advice and without a plan for continued productivity." State Br. Ex. D at 2. Despite notice of non-approval as early as in 2012, the State proceeded to seek reimbursement for the DRL payments and, as the SSA states, it "unknowingly reimbursed [the State] for $614,349 . . . based on expense forms [Forms SSA-4513] [the State] submitted that did not explicitly identify compensation costs as relating to furlough payments." SSA Br. at 3-4. The State offers nothing specific to counter the SSA's position that notwithstanding early denial of approval, it continued to incur and proceeded to seek reimbursement for the DRL payments.

[16] The SSA's February 28, 2013 letter is not of record, but the State discussed its contents to some extent in its reconsideration request, referring to it as a "dismiss[al]" of the State's "objections" to the SSA's October 18, 2012 letter as "procedurally premature." State Br. Ex. C at 1. The SSA states that, as of October 2012, the State claimed $84,319.15 in DRL payments, and that this amount was included in the $645,618 disallowed on February 1, 2016. SSA Response at 3.

Conclusion

For the reasons stated above, the Board sustains the $645,618 disallowance in full.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Susan S. Yim
Presiding Board Member