Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Owens Valley Career Development Center
Docket No. A-14-103
Decision No. 2628
March 27, 2015

DECISION

The Owens Valley Career Development Center (OVCDC)[1] is a Native American tribal organization governed by a consortium of three Indian tribes. On behalf of those three (and other) tribes, OVCDC operates a tribal family assistance program that is funded by a Temporary Assistance for Needy Families (TANF) grant issued by the Administration for Children and Families (ACF). In order to deliver the services offered by its TANF-funded program, OVCDC leases office space and other facilities at various locations, both on and off Indian reservations.

In March 2009, OVCDC entered into written agreements to lease buildings and other property from two Indian tribal economic development corporations. OVCDC then began using federal funds provided under its tribal TANF grant to pay the lessor corporations market-rate rent as provided in the leases. However, an auditor found, and ACF concurred, that both leases are "less-than-arms-length" transactions under federal "cost principles." Those principles dictate that when rental costs are incurred by a grantee under a less-than-arms-length lease, the amount of those costs that may be charged to its federal grant is based on allowable costs associated with ownership of the leased property and not on the property's fair-market-rental value. Accordingly, ACF determined that OVCDC had "misused" TANF funds to pay "fair market" rent under its leases with the tribal economic development corporations and was therefore subject to a $1,732,049 fiscal penalty (an amount equal to the rent payments made under the leases between July 1, 2008 and June 30, 2011).

OVDC now appeals ACF's less-than-arms-length finding on various grounds. For the reasons explained below, we conclude that the finding is substantiated by the evidence of record and consistent with applicable laws and regulations. Because OVCDC raised no

[1] As docketed, this appeal's name included the Owens Valley Board of Trustees, the governing board of the Owens Valley Career Development Center (OWCDC). Because OVCDC is the recipient of the grant to which this dispute relates and is therefore the proper appellant, our decision's caption omits the name of its governing board.

issue in this appeal concerning the amount of the penalty, we uphold ACF's determination to impose on OVCDC a fiscal penalty of $1,732,049 for misuse of tribal family assistance grant funds.

I. LEGAL BACKGROUND

Title IV-A of the Social Security Act, commonly known as the TANF statute, authorizes the Secretary of Health & Human Services to provide "eligible Indian tribes" with annual "tribal family assistance grants" that enable those tribes to offer employment, vocational training, and other welfare services that help needy families attain self-sufficiency. 42 U.S.C. § 612(a); *see also* 45 C.F.R. §§ 286.1, 286.15. An "eligible Indian tribe" includes an "intertribal consortium," a term defined to mean "a group of Tribes working together for the same identified purpose and receiving combined TANF funding for that purpose." 42 U.S.C. § 612(b)(3) (permitting "submission of a single tribal family assistance plan by the participating Indian tribes of an intertribal consortium"); 45 C.F.R. § 286.5 (defining "consortium").

TANF program regulations state that "[a] Tribe may not use Tribal Family Assistance Grant funds for services or activities prohibited by OMB [Office of Management and Budget] Circular A-87." 45 C.F.R. § 286.45(c). Those regulations further state that an Indian tribe "will be subject to fiscal penalties and requirements" if ACF determines that a tribe "*misused* its Tribal Family Assistance Grant funds[.]" *Id.* § 286.195(a)(1) (italics added); *see also* 42 U.S.C. § 612(g) (providing that statutory penalties applicable to states shall apply to Indian tribes "in the same manner"). The regulations expressly define "misuse" to include a grantee's use of TANF funds "in violation of" OMB Circular A-87. 45 C.F.R. § 286.200(b).

OMB Circular A-87 – which states that it applies to state, local, and Indian tribal governments – sets forth various "cost principles" for determining a governmental grantee's "allowable costs" (that is, costs eligible to be financed by federal grant dollars).[2] 2 C.F.R. Part 225, App. A, ¶ A.1 (Jan. 1, 2013); *West Virginia Dept. of Health*

[2] When the events that motivated ACF to penalize OVCDC occurred, OMB Circular A-87 was codified – in its entirety and format – in appendices to 2 C.F.R. Part 225. *See* 70 Fed. Reg. 51,910 (Aug. 31, 2005); 2 C.F.R. Part 225 (Jan. 1, 2013). This decision cites to, and quotes from, that codification. In December 2013, the OMB consolidated the content of OMB Circular A-87 and eight other OMB circulars into one streamlined set of uniform administrative requirements, costs principles, and audit requirements for federal awards, currently published in 2 C.F.R. Part 200. 78 Fed. Reg. 78,590 (Dec. 26, 2013); *see also* 79 Fed. Reg. 75,871, 75,875 (Dec. 19, 2014) (promulgating regulations in 45 C.F.R. Part 75 which make the cost principles and other requirements published in 2 C.F.R. Part 200 applicable, with certain amendments, to Department of Health & Human Services programs). The OMB cost principles at issue here – relating to the allowability of rental costs incurred under less-than-arms-length leases – have been carried forward from 2 C.F.R. Part 225 to the consolidated uniform administrative requirements and cost principles published in 2 C.F.R. Part 200. *Compare* 2 C.F.R. Part 225, App. B, § 37 (Jan. 1, 2013) *with* 2 C.F.R. § 200.465 (Jan. 1, 2014).

& Human Resources, DAB No. 2529, at 2-3 (2013). Section 37 of Appendix B to OMB Circular A-87 (which we will refer to simply as "section 37"), titled "Rental costs of real property and equipment," restricts the allowability of a grantee's rental costs when they are incurred under a "less-than-arms-length lease." 2 C.F.R. Part 225, App. B, § 37.c (Jan. 1, 2013). More specifically, section 37.c states that costs incurred by the grantee under a less-than-arms-length lease "are allowable only up to the amount (as explained in . . . section 37.b) that would be allowed had title to the property vested in the governmental unit" [that is, the grantee]." *Id.* Section 37.b indicates that allowable costs associated with ownership of property include "expenses such as depreciation or use allowance, maintenance, taxes, and insurance." *Id.* In addition, Section 37.c defines a less-than-arms-length lease as "one under which one party to the lease agreement is able to control or substantially influence the actions of the other." *Id.* § 37.c. In short, if a governmental grantee pays rent under a less-than-arms-length lease, then the grantee is treated as owning the leased property and may charge to its grant only the portion of its rental costs that do not exceed allowable ownership costs (such as insurance or depreciation expense).

In appealing a determination that its expenditure of federal funds is unallowable under the cost principles, the grantee bears the burden of demonstrating that the expenditures are, in fact, allowable. *See, e.g., Touch of Love Ministries, Inc*, DAB No. 2393, at 3 (2011); *Benaroya Research Institute*, DAB No. 2197, at 3 (2008).

II. CASE BACKGROUND[3]

OVCDC has operated a TANF-funded tribal family assistance program since 2001. ACF Ex. 1. OVCDC is governed by the Owens Valley Board of Trustees (OVBT). *See* App. Ex. 18B (art. IX). OVBT, an entity created in the 1930s to manage tribal land assignments and emergency relief funds, is a consortium of three federally recognized Indian tribes: the Bishop Paiute Tribe (Bishop Tribe), the Big Pine Paiute Tribe of the Owens Valley (Big Pine Tribe), and the Lone Pine Paiute-Shoshone Tribe (Lone Pine Tribe). *See* App. Exs. 15 (at 2), 18H, 60B-60D. The Bishop Tribe is represented on the OVBT by five "trustees" who are also members of the Bishop Paiute Tribal Council (the tribe's governing body). App. Ex. 15, at 2. The Big Pine and Lone Pine Tribes have one trustee each on the OVBT. *Id.* According to OVBT's 2010 by-laws, each trustee has a single vote, although the Board's "Chairperson" can cast a vote only to break a tie. App. Ex. 18B (art. XII, § 6). OVBT's three consortium tribes are among ten Native American tribes that have designated OVCDC to administer a tribal family assistance program to serve the tribes' members. App. Ex. 60H, at 2.

[3] The record of this appeal includes: OVCDC's appeal brief ("App. Br.) and exhibits ("App. Ex."), ACF's response brief ("Response Br.") and exhibits ("ACF Ex."), and a reply brief filed by OVCDC ("Reply Br.").

Rental costs have been a source of longstanding dispute between OVCDC and ACF. In 2006, ACF found that in prior years, OVCDC had improperly charged its tribal TANF grant for costs associated with certain less-than-arms-length leases involving OVBT and its member tribes. *See* ACF Ex. 2. That and other findings led ACF to impose a fiscal penalty, but the matter was later resolved (and the penalty withdrawn) when OVCDC submitted and implemented a corrective compliance plan. *See* ACF Ex. 1; App. Ex. 2; Response Br. at 5-7.

In early 2008, OVCDC asked ACF to confirm or clarify its position regarding the allowability of costs incurred by OVCDC to lease property owned by the Indian tribes whose members are served by its TANF-funded program. *See* App. Ex. 3, at 1. In a May 2008 letter, ACF responded:

> The "less-than-arms-length" restrictions [in OMB Circular A-87] apply to the three Tribes (Bishop, Lone Pine, and Big Pine) that constitute the [Owens Valley] Board [of Trustees]. Although Lone Pine and Big Pine Tribes do not enjoy representation equal to that of the Bishop Tribe, their Board membership confers voting rights and creates opportunity to substantially influence Board decisions regarding your Tribal TANF program. *Consequently only the value of applicable depreciation or use allowance can be charged to the Tribal TANF grant for rental of facilities owned by these tribes.* Other reasonable costs associated with the use of the building, such as insurance and maintenance, may also be charged. . . .
>
> We are affirming our previous statements that *this policy does not apply to what you have termed "client Tribes."* These are the seven Tribes [other than the three tribes that make up the OVBT] that have adopted formal resolutions to designate the OVBT to receive TANF funds for and provide services to their members. It is our understanding that these Tribes may advise the OVBT about their preferences but do not have representation on the Board, and cannot vote on OVBT actions. *Consequently, if OVBT rents facilities for the TANF program from one of these Tribes, the amount charged can be based on the fair market value of the property. . . .*

Id. (italics added).

In March 2009, OVCDC entered into separate – but, in material respects, identical – agreements with the Bishop Paiute Development Corporation (BPDC) and the Big Pine Paiute Development Corporation (BPPDC) to lease buildings and other property on the

Bishop Paiute and Big Pine reservations.[4] *See* App. Exs. 5, 5C, 5D. Both corporations are organized under tribal law and are wholly owned by the tribes after which they are named (the Bishop and Big Pine Tribes).[5] The leases call for the payment of rent that reflects "market rent" appraisals performed in 2006. *Id.*

In a letter dated August 27, 2009, ACF advised OVCDC that it considered the leases to be less-than-arms-length transactions. App. Ex. 6. ACF also advised OVCDC that the only costs that could be charged to its TANF grant concerning the leased properties were "costs of ownership, such as depreciation or use allowance, insurance, taxes, and maintenance." *Id.* Despite ACF's cautionary advice, the OVBT voted on August 31, 2009 to approve rent payments under the leases. App. Ex. 5D. Using tribal TANF grant funds, OVCDC made rent payments under the leases during fiscal years 2009, 2010, and 2011 (June 1, 2008 through June 30, 2011).

In accordance with the Single Audit Act, OVCDC undergoes an annual audit, conducted by an independent auditor, to assess its compliance with federal requirements.[6] For fiscal years 2009, 2010, and 2011, OVCDC's independent auditor determined that the "fair market" rent paid by OVCDC under its leases with BPDC and BPPDC was unallowable under section 37 of OMB Circular A-87 because the leases were, in the auditor's judgment, less than arms' length, having been made between "related parties." *See* App. Ex. 62 (page 41); App. Ex. 63 (page 40); App. Ex. 64 (page 41). The auditor calculated that OVCDC's unallowable rent payments totaled $442,817 in fiscal year 2009, $644,616 in fiscal year 2010, and $644,616 in fiscal year 2011 – or a grand total of $1,732,049 for the three years. *Id.*

OVCDC disagreed with the audit findings. In mid-2011, it asked ACF to enter into a formal consultation pursuant to the agency's Tribal Consultation Policy. *See* App. Exs. 16, 18 (at 4-5). During the ensuing consultation process, OVCDC argued that the leases were made at arms' length, emphasizing that it and its governing board, the OVBT, are "separate and distinct" from the Bishop and Big Pine tribes and that the tribal economic development corporations are distinct legal entities separate from their founding tribes.

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[4] Although OVCDC states that it has an office on the Lone Pine reservation, there is no evidence that OVCDC leases property from the Lone Pine Tribe or a Lone Pine tribal corporation.

[5] Available corporate records indicate that BPDC was formed in 1988. App. Ex. 18D (article XI). BPPDC was initially organized in November 2006. App. Ex. 18F (article XI). In 2011, BPPDC was re-incorporated under a tribal corporations ordinance. App. Ex. 60R.

[6] Under the Single Audit Act, 31 U.S.C. § 7501-7507, a non-federal entity whose expenditure of federal grant funds exceeds a specified threshold (currently $750,000) must undergo an annual financial and compliance audit of its programs. 31 U.S.C. § 7502(a)(1)(A); 2 C.F.R. §§ 200.100, 200.501.

App. Ex. 18, at 1-3. Alternatively, OVCDC asked ACF to "waive" OMB Circular A-87's strictures regarding rental costs, contending that ACF had ample legal authority, and good policy reasons, to do so. *Id.* at 3-4.

The formal tribal consultation process, which lasted several months, did not produce a favorable outcome for OVCDC. In June 2012, ACF notified OVCDC of its unwillingness to grant a waiver or seek OMB's approval for a waiver. App. Ex. 29. ACF communicated the same position to OVCDC at the end of the tribal consultation process in letters dated October 17 and October 21, 2013. *See* App. Exs. 44-45.

On February 7, 2014, ACF issued a formal written determination that OVCDC's leases with BPDC and BPPDC were less-than-arms-length agreements and that, pursuant to 45 C.F.R. § 286.195(a)(1), OVCDC was subject to a fiscal penalty of $1,732,049 for misusing TANF funds to pay fair market rents under those leases in violation of section 37 of OMB Circular A-87. *See* App. Ex. 48. In support of its less-than-arms-length finding, ACF stated that the Bishop and Big Pine Tribes, along with their respective economic development corporations, have the ability to "substantially influence the actions of the OVCDC." *Id.* at 3. ACF also stated that the "terms of the two lease agreements," including a provision calling for the payment of retroactive rent, "also indicate a less-than-arms-length relationship between the parties." *Id.* ACF advised OVCDC that it had various options to respond to the penalty determination, including the filing of a "corrective compliance plan." *Id.* at 4.

In April 2014, OVCDC submitted what it called a proposed corrective compliance plan. App. Exs. 54-54A. In addition to restating OVCDC's opposition to the less-than-arms-length finding, the compliance plan stated that OVCDC's independent auditor had recently changed its position about the allowability of the rent paid under the BPPDC lease. App. Ex. 54A, at 2-3. According to an April 1, 2014 report issued by the auditor (and attached to the proposed compliance plan), the change-of-position reflected the auditor's new-found understanding that the Big Pine Tribe's representative to the OVBT is selected by a vote of all of that tribe's members, rather than being appointed by the tribe's governing body. *See* App. Ex. 54B.

ACF remained unconvinced. On June 16, 2014, ACF rejected the proposed corrective compliance plan and reaffirmed its February 7, 2014 determination that OVCDC was subject to a penalty of $1,732,049 for misuse of its tribal family assistance grant funds. App. Ex. 58. OVCDC then filed this appeal.

III. DISCUSSION

OVCDC presents three main arguments on appeal. First, it contends that ACF's less-than-arms-length finding is inconsistent with the general trust obligation owed by the federal government to Indian nations. *See* App. Br. at 6-10. Second, OVCDC contends

that ACF "arbitrarily" failed or refused to grant or seek a "waiver" of the relevant limitations in section 37 of OMB Circular A-87 in order to permit the use of TANF funds to pay market-rate rent to BPDC and BPPDC. *Id.* at 10-13. Third, OVCDC argues that its leases with the tribal economic development corporations are arms-length transactions. *Id.* at 13-21. In support of the third argument, OVCDC asserts that its governing board – OVBT – "does not influence or control the actions of the two separate Tribal EDCs [economic development corporations]," that the EDCs do not "substantially control or influence OVBT," and that the EDCs are "distinct" entities – and "wholly separate" from the Bishop and Big Pine Paiute Tribes – with their own laws, governance structures, and legal counsel. *Id.* at 13-15.

We address OVCDC's third argument first.

A. OVCDC's leases with BPDC and BPPDC are less-than-arms-length.

As mentioned, section 37 of OMB Circular A-87 defines a "less-than-arms-length lease" to be "one under which one party to the lease agreement is able to control or substantially influence the actions of the other." 2 C.F.R. Part 225, App. B, § 37.c (Jan. 1, 2013). That provision further states that "[s]uch leases *include, but are not limited to* those between divisions of a governmental unit; governmental units under common control through common officers, directors, or members; and a governmental unit and a director, trustee, officer, or key employee of the governmental unit or his immediate family, either directly or through corporations, trusts, or similar arrangements in which they hold a controlling interest." *Id.* (italics added).

"[T]he Board has taken the approach that the determination that a less-than-arms-length relationship exists does not necessarily depend on any one uncontroverted fact as establishing that one organization had the ability to control or substantially influence the other, but rather on whether 'the totality of the overall relationship' between the two organizations support[s] a finding of substantial influence." *Child Opportunity Program, Inc.*, DAB No. 1700 (1999) (citation omitted)). In deciding whether a lease is less than arms' length, the Board has considered various circumstances, including whether the lessor and lessee coordinated their activities "in a manner uncharacteristic of ordinary business dealings," engaged in "unusual business practices" (such as allowing rent-free occupancy of property), or were subject to common control or influence. *See, e.g., Salt Lake Cmty. Action Program*, DAB No. 1261 (1991) (finding "coordination of activities," "unusual business practices," and other indicia of substantial influence); *Maternal and Family Health Servs., Inc.*, DAB No. 839 (1987) (finding that "common control and coordination of activities" between lessee and lessor were sufficient to conclude that their lease was not an arms-length agreement); *Bullock County Health Servs., Inc.*, DAB No. 360 (1982) (finding lessor and lessee under "common control through common officers, directors, and members").

1. *The BPDC Lease*

Applying the foregoing criteria, we have no difficulty concluding that OVCDC's March 23, 2009 lease with BPDC (App. Ex. 5C) was less than arms' length. As noted, OVCDC (the lessee) is governed by OVBT, and OVBT, in turn, is governed by the seven trustees who represent its three consortium tribes. The majority of the seven trustees are five Bishop tribal members who also constitute the Bishop Tribe's governing body, the Bishop Paiute Tribal Council. These facts plainly demonstrate that the Bishop Tribe controls, or has the ability to control, the decisions and operation of OVCDC. No contrary evidence has been presented by OVCDC.

In addition, the record demonstrates that the Bishop Tribe controls, or has the ability to control or substantially influence, BPDC (the party on the other side of the lease). BPDC was established under articles of incorporation approved by the Bishop Paiute Tribal Council. App. Ex. 18D; App. Ex. 14A (identifying the tribe as the corporation's sole shareholder). BPDC's general "purposes," as specified in its articles, are to promote the tribe's economic development and the general welfare of its members. App. Ex. 18D (arts. III.A and IV.B.15). The corporation's "property, assets, profits and any net income" are "irrevocably dedicated" to advancing those purposes, which include "provid[ing] opportunities for income generation, management, ownership, training, and employment" for tribal members and taking actions "in furtherance of the general economic plan and other written development policies adopted by the Tribal Council or the Corporation." *Id.* (arts. III and VI).

According to its January 9, 2008 by-laws, BPDC is governed by a six-person Board of Directors, one of whom is the Tribal Council's Chair or a Tribal Council "designee."[7] App. Ex. 5A (art. II). Although the five other members of the Board of Directors must be tribal members who do not serve on the Tribal Council, *all* of the corporation's board members are appointed by the Tribal Council to serve limited terms. *Id.* (art. II §§ 2, 5, 6). Compensation of board members is determined and approved by the Tribal Council. *Id.* (art. II § 7). The authority to remove directors for "cause" rests with the Tribal

[7] According to a document prepared by OVCDC for an October 1, 2012 tribal consultation meeting, BPDC's Board of Directors consists of only *five* voting members (not six, as BPDC's January 2008 by-laws state) plus a non-voting Tribal Council "liaison" member, who, at that time, was the Chair of the Bishop Paiute Tribal Council. See App Ex. 60I; App. Ex. 5A (article II § A). The same document also states that on May 10, 2012, the Tribal Council amended BPDC's by-laws to eliminate the voting power of the Tribal Council Chair on the Board of Directors and to make that person (or, alternatively, another Tribal Council member designated by the Council) a non-voting member of the Board of Directors. App. Ex. 60I. However, the record does not include a copy of the May 10, 2012 amendment. Even if OVCDC had produced it, we would not find the document material because (1) the amendment occurred long after the leases in question were signed, (2) there is ample other evidence (discussed in the text) of the tribe's capacity to exert substantial influence over BPDC, and (3) regardless of voting status, a Tribal Council member's presence on the corporation's Board of Directors is some evidence of the Council's ability to influence corporate decisions, especially if that member is the Tribal Council's Chair.

Council, which may take this action if recommended by two-thirds of the voting board members. *Id.* (art. II § 4(B)). In addition, the corporation's by-laws are "subject to approval by" the Tribal Council. *Id.* (art. VII § 1). Finally, the Tribal Council has the power to dissolve the corporation, and any assets remaining after dissolution and payment of debts and liabilities would, in that event, be distributed to the Tribal Council. App. Ex. 18D (art. IX).

OVCDC argues that BPDC is "wholly separate" from the Bishop Tribe and governed "autonomously" by its Board of Directors. App. Br. at 13-16. We accept that BPDC is a separate corporate entity with its own governance structure. We also assume, for purposes of this decision, that BPDC's Board of Directors exercises some degree of control in making decisions on some matters.[8] However, the circumstances we enumerated in the previous two paragraphs – BPDC's stated mission to act for the benefit of the tribe (consistent with economic plans developed by its Tribal Council), the dedication of the corporation's assets and income to tribal purposes, the Tribal Council's presence on the corporation's Board of Directors, and the Tribal Council's authority to appoint board members, determine their compensation, disapprove corporate by-laws, remove directors for cause, and dissolve the corporation – plainly demonstrate that the Bishop Tribe supervises BPDC or has retained substantial authority to do so. We thus disagree with OVCDC's characterization of BPDC as an "autonomous" enterprise. It is more accurate to say that BPDC, notwithstanding its separate corporate identity or existence, is an economic development arm of the Bishop Tribe, ultimately accountable to its governing body.

OVCDC also suggests that its governing board – the OVBT – is not subject to the Bishop Tribe's control or influence because the OVBT is "legally required" by its by-laws, "policies," and "Tribal custom and traditions" to "act in the best interest of OVCDC." App. Br. at 14. According to the OVCDC, "[t]he fiduciary obligations of the OVBT run to the OVCDC, not to the Tribes that cooperatively govern it." *Id.* at 14-15.

OVCDC submitted a copy of OVBT's by-laws as well as a copy of OVBT's policy titled "Standards of Conduct and Ethics." App. Exs. 18B & 18C. We give limited weight to these documents because they were created *after* the leases with BPDC and BPPDC were signed. Apart from that circumstance, we see nothing in the by-laws supporting the notion that OBVT owes "fiduciary obligations" to the OVCDC. According to the by-laws, OVBT's "vision" is to "promote Native American self-sufficiency, culture, and tradition while respecting tribal sovereignty," and its "mission is to provide opportunity

[8] BPDC's by-laws state that the Board of Directors has the authority to "control, manage and conduct the affairs and business of the Corporation," and to "select and remove all employees of the Corporation." App. Ex. 5A (art. III).

for improvement in the quality of life to Native American individuals and communities in designated service areas. . . ." App. Ex. 18B (art. II). The by-laws further explain that OVCDC operates "under the authority" of OVBT, and that the OVCDC was created to carry out OVBT's "mission" and "vision" to serve Native American communities. *Id.* (art. IX). Collectively these provisions imply that to the extent OVBT has fiduciary obligations (to act in another party's "best interest"), those obligations run to Indian tribal governments or communities, including the Bishop Tribe, not to OVCDC.

OVCDC points to sections B and E of the Standards of Conduct and Ethics policy (App. Ex. 18C) to support its contrary claim, but these provisions appear to address conflicts of interest between OVBT and the individual trustees that represent the consortium tribes; they do not purport to define the relationship between OVBT and OVCDC. Furthermore, like the by-laws, the Standards of Conduct and Ethics policy suggests that OVBT's obligations run to Indian tribes and tribal members. *See, e.g.*, App. Ex. 18C, at 1 (stating that the Standards of Conduct prohibit OVBT trustees from placing "private and personal gain above the interest of the OVBT and Tribes they represent").

In sum, we find that the parties to the March 23, 2009 lease – OVCDC and BPDC – are not independent or autonomous actors. They are, in fact, controlled or substantially influenced by a common entity, the Bishop Tribe, acting through the members of its Tribal Council. The evidence concerning the intertwined governance structures of BPDC, OVBT, and the Bishop Tribe is sufficient for us conclude that the lease was less than arms' length.

The lease's unusual terms are additional evidence supporting our conclusion. Most notably, the lease provides that although its three-year term commenced on March 23, 2009, the tenant (OVCDC) was obligated to pay rent "retroactive to October 1, 2008[.]" App. Ex. 5C, *Mem. of Agreement*, ¶¶ 2-3. The lease also states that the tenant "shall pay rent retroactive to October 1, 2005, provided that funds are still available . . . under prior applicable grants." *Id.*, ¶ 3. These retroactive-rent provisions suggest that OVCDC occupied the leased properties, rent-free, prior to March 2009. The annual reports by OVCDC's independent auditor confirm that. Those reports state that prior to March 2009, OVCDC occupied property on the Bishop Paiute reservation (and on the Big Pine reservation) "under informal oral and written agreements which require payment of $1.00 per year or no payment by [OVCDC] to each Tribe." *See, e.g.*, App. Ex. 62, at 28. In *Salt Lake Cmty. Action Program,* we held that transactions lacking adequate consideration are evidence that the parties' relationship is less than arms' length. *See* DAB No. 1261. In this case, OVCDC's rent-free occupation or use of the very property covered by the March 2009 lease, coupled with OVCDC's later agreement to pay BPDC "retroactive" rent, strongly suggests that lessor and lessee operate under common control or influence.

Another provision of the lease states that if, during its three-year term, OVCDC "no longer receives funding to enable it to pay the agreed rent," OVCDC may cancel the agreement upon 30 days' notice. App. Ex. 5C, *Mem. of Agreement*, ¶ 2. However, the provision says nothing about the parties' respective rights, obligations, or remedies concerning possession of the leased property in the event OVCDC exercises its right to cancel. The provision may create an implied duty on the part of the lessee (OVCDC) to surrender possession upon cancellation, but, even so, we doubt that unrelated, arms-length parties to a commercial lease would neglect to deal with that issue expressly. The lease does state that BPDC may retake possession of the leased property upon the tenant's "default," but a default is not defined in the lease to encompass the tenant's cancellation due to inadequate third-party funding. *See* App. Ex. 5C, ¶ 12.

Yet another lease provision states that if OVCDC "receives a verifiable notice from HHS that the rent terms . . . are unacceptable/unallowable" and that "HHS will terminate the current funding grant or otherwise penalize Tenant[ ] unless the rent terms are rescinded," then: (1) OVCDC will suspend "[a]ll future payments" under the lease "until a final resolution with HHS has occurred as to what are allowable rent costs and expenses under this Agreement"; (2) BPDC will "return all non-allowable rents received from Tenant" if that action is "required by HHS as a condition of not terminating the TANF funding grant"; and (3) OVCDC "would be responsible to Landlord only for those costs up to and including the amount to cover Landlord's costs, or that amount allowable under circular A-87 as if Tenant had vested title to the property itself . . . ." App. Ex. 5C, *Mem. of Agreement*, ¶ 3.

An arms' length transaction is ordinarily the product of bargaining by the parties in pursuit of their respective economic and other interests. *See, e.g., A.T. Kearney, Inc. v. Int'l Bus. Machines Corp.*, 73 F.3d 238, 242 (9th Cir. 1995) (contrasting relationships in which one party owes a special duty of care to another, to a relationship in which the parties – "business adversaries in the commercial sense" – negotiate at arm's length to "further their own economic interests" ((internal quotation marks omitted)); *Black's Law Dictionary*, 9th edition (defining "arm's length" in part to mean "[o]f or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power"). The lease provisions we have just quoted hardly seem like the outcome of such bargaining. Instead, they appear to be the product of a coordinated effort to ensure that federally-subsidized rent payments flow to the lessor to the maximum degree permitted under OMB Circular A-87. OVCDC submits that BPDC (the lessor) "negotiates competitive leases for all its realty operations" in order to "promote Tribal economic development and self-sufficiency[.]" App. Br. at 17. However, we see no evidence of a "competitive" negotiation process leading to the parties' agreement.

In prior decisions, the Board has found that a lessor's heavy or complete dependence on rent payments by the lessee-grantee for its economic survival, a lessor's "lack of independent organizational purpose," and the involvement of key employees in the affairs of both lessor and lessee are some factors (among others) which tend to show that a lease is less than arms' length. *Child Opportunity Program, Inc*. (finding a less-than-arms-length relationship where the lessor had "no other purpose than to lease property to" the lessee-grantee); *Enterprise for Progress in the Cmty., Inc.*, DAB No. 1558 (1996) (noting the involvement of the grantee-lessee's employee in the affairs of the lessor and finding that the lessee-grantee, being the "sole source" of the lessor's income, "was in a position to exert substantial influence" over the lessor). OVCDC asserts or implies that some or all of these factors are absent in this case. *See* App. Br. at 17, 19-20; Reply at 7. However, our decisions make clear that the presence or absence of any one circumstance, or any particular combination or quantum of circumstances, does not dictate the outcome. Rather, it is the "totality of the overall relationship" between the parties to the lease that is decisive. *Child Opportunity Program, Inc*. In our judgment, the facts and evidence we discussed earlier concerning organizational structure and governance indicate that the overall relationship between OVCDC (the lessee) and BPDC (the lessor) is one that is controlled or substantially influenced by the Bishop Tribe, acting through its Tribal Council. We disagree that the favorable factors cited by OVCDC – such as BPDC's economic independence from OVCDC – suffice to demonstrate that the lease was arms' length precisely because those factors do not negate the previously discussed evidence that the Bishop Tribe controls or substantially influences both parties to the lease.

OVCDC contends that "policy considerations . . . counsel in favor of encouraging OVCDC to provide market value rents to Tribal organizations rather than non-Tribal entities located off reservation." App. Br. at 22. "Under ACF's hyper-technical interpretation of OMB Circular A-87," says OVCDC, "[t]ribally-administered TANF programs are permitted to lease office space at fair market value from a *non-Tribal lessor*, but are prohibited from leasing space from a *Tribal lessor*." *Id.* (italics in original). OVCDC asserts that "[t]his policy has the effect of diverting precious funds away from Tribes and into the pockets of non-Indian property owners." *Id.* In addition, says OVCDC, ACF's "narrow interpretation" of the relevant cost principles "places Tribally-owned facilities at a competitive disadvantage from their non-Tribal counterparts," thereby "unnecessarily exacerbating the underdevelopment of Indian country." *Id.* at 23.

These "policy considerations" have no relevance here. The Board must decide this appeal based on the applicable statute and regulations, which include the codified OMB cost principles regarding rental costs. *See* 45 C.F.R. § 16.14 (stating that the Board "shall be bound by all applicable laws and regulations"); *California Dept. of Health Servs.*, DAB No. 1240 (1991) (declining to consider "policy implications" as "beyond the scope of the Board's review"). Nothing in the applicable statute or regulations permits or requires us to consider the potential adverse economic effects of applying the OMB cost

principles.[9] And while applying the cost principle concerning less-than-arms-length leases may, in this situation, incidentally restrict the amount of federal TANF dollars that might otherwise flow to some tribal economies, it is important to remember that that principle exists to ensure that the quality of a grantee's decisions about how to use its limited federal TANF dollars is not compromised by potential conflicts of interest and that grant funds are used to advance the specific aims of the grantee's tribal family assistance program.[10] As we said in *Bullock County Health Service*, "[u]nderlying the limitation[ ]" on the allowability of rental costs incurred under less-than-arms-length leases "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." DAB No. 360; *see also Professional Counseling Resources, Inc.*, DAB No. 2448, at 8 (2012) (reaffirming the holding in *Bullock County* and noting that conflict-of-interest rules applicable to federal grants "are intended . . . to ensure that the grantee makes decisions based on the best interest" of the federal grant program (quotation marks omitted)).

Because OVCDC and BPDC are controlled or substantially influenced by a common entity, the Bishop Tribe, we conclude that their lease is less-than-arms-length within the meaning of section 37 of OMB Circular A-87.

[9] We point out one (and perhaps inadvertent) mischaracterization in OVCDC's policy argument. ACF does not, as OVCDC suggests, prohibit a tribally-administered TANF program from leasing property from a tribal lessor, nor does it "require" tribal TANF programs to lease tribal facilities at less than fair market value. ACF has said only that a tribal family assistance grantee may not use federal funds to pay "market rent" when the grantee's lease with a tribal entity is less than arms' length; in that situation, the grantee may charge to the grant only an amount that reflects allowable costs associated with owning the leased property. *See* Response Br. at 1 n.2. As we indicated earlier, in the lead-up to this appeal, ACF made it clear to OVCDC that it may enter into market-rate leases with Indian tribes with which it does not have a less-than-arm's length relationship, including non-consortium tribes that are served by its tribal TANF program. App. Ex. 3.

[10] Those aims are: (1) "[t]o provide assistance to needy families so that their children may be cared for in their own homes"; (2) "[t]o end the dependence of needy parents on government benefits by promoting job preparation, work and marriage"; (3) "[t]o prevent and reduce out-of-wedlock pregnancies"; and (4) "[t]o encourage the formation and maintenance of two-parent families." App. Ex. 60H.

2. *The BPPDC Lease*

We also conclude that OVCDC's lease with BPPDC is less than arms' length, notwithstanding Big Pine's minority representation on the OVBT.[11]

BPPDC (the lessor) is a wholly-owned corporate entity of the Big Pine Tribe. *See* App. Ex. 129 (Sept. 21, 2010 Board of Directors Minutes, item V.A). BPPDC was initially organized under articles of incorporation adopted by the Big Pine Tribal Council on November 9, 2006. App. Ex. 18F, at 4-5. BPPDC was re-organized under articles of incorporation adopted on August 3, 2011 by the Tribal Council pursuant to a tribal corporations ordinance. App. Ex. 60R. The August 3, 2011 articles state that "the purpose of the corporation shall be to develop, own, and operate for-profit enterprises in the best interests of the Tribe, including obtaining self-sufficiency for the Tribe, and to provide opportunities for training, employment, and business development for members of the Tribe." *Id.* (art. II).

BPPDC's affairs are governed by a Board of Directors. App. Ex. 5B (art. III); App. Ex. 18F (art. IV); App. Ex. 60R (art. V); App. Ex. 60Q (¶ 1). The corporation's founding documents – the November 9, 2006 articles of incorporation and corporate by-laws adopted on the same date – indicate that BPPDC's "first board of directors" consisted of the five members of the Big Pine Tribal Council, who were to serve for three years (even if not re-elected to the Tribal Council), after which the board would consist of the Tribal Council's Chair and four tribal members who, though not members of the Tribal Council, were appointed by that body. App. Ex. 5B (art. II); App. Ex. 18F (art. IV). The extent of the Tribal Council's presence on BPPDC's Board of Directors on March 20, 2009 – the

[11] In its opening brief, OVCDC states that its argument "focuses primarily on [its] lease with the Bishop Paiute Development Corporation [BPDC]" because BPPDC prepared a "separate legal brief." App. Br. at 4 n.1. That separate brief, along with several supporting exhibits, is attached as an "addendum" to OVCDC's brief, and OVCDC states that it "incorporates [these documents] by reference" with certain "exceptions" that OVCDC considers irrelevant and that are not, in fact, relevant to our decision of this case. *Id.* at 21. ACF correctly points out that the only "proper appellant" in this matter is OVCDC because it is the grantee but, for reasons we need not reiterate, did not object to the submission of the incorporated materials. While we have considered BPPDC's brief and supporting exhibits to the extent they contain material that is relevant to the issues raised by OVCDC (the grantee), we emphasize that BPPDC is not the appellant and that we have not authorized BPPDC to participate in this appeal as either a "real party in interest" or an "intervenor" with a "clearly identifiable and substantial interest in the outcome of the dispute." S*ee* 45 C.F.R. § 16.16(a), (b).

date the lease in question was signed – is unclear. However, the corporation's founding documents indicate that *at least one* Tribal Council member continued to serve as a board member on that date – namely, the Tribal Council Chair.[12]

Like the Bishop Tribe, the Big Pine Tribe has expressly retained supervisory authority over its wholly owned economic development corporation. BPPDC's articles and by-laws indicate that the Tribal Council has the power to appoint, and to set the compensation of, the members of BPPDC's Board of Directors. App. Ex. 5B (art. II §§ 6-7); App. Ex. 60R (art. V § 5); App. Ex. 60Q (¶¶ 1.2, 1.12). They also vest the Tribal Council with authority to remove a director for "for cause" or "good cause." App. Ex. 5B (art. II § 4); App. Ex. 60Q (¶ 1.12).

There is other evidence of the Tribal Council's supervision. Tribal Council minutes indicate that BPPDC reports its activities to the Council at the latter's regular meetings. *See, e.g.*, App. Ex. 128a, at 5 (discussing a report by the BPPDC board Chair); *id.* at 63 (indicating that "agenda items" included "staff reports" by various departments including the "economic development" department); App. Ex. 128c, at 43 (item 2, "Consent Agenda"). Some minutes reveal the Tribal Council's involvement with "leasing issues" (matters presumably within the corporation's purview), including "leasing issues with the Owens Valley Career Development Center." App. Ex. 128a, at 23 (item 10) and 27 (item 3). Other Tribal Council minutes raise questions about the degree of separation between the tribe and the corporation, especially with respect to finances. For example, in August 2010 (after the lease with OVCDC was signed), an accountant for the tribe, who was reporting on "checking account balances," expressed concern that "[c]urrently the accounting is recording EDC as a program under the Tribe and not its own corporation" and that this issue "need[ed] to be clarified by the Tribal Council." *Id.* at 51. In December 2010, a BPPDC "manger" recommended to the Tribal Council that "OVCDC Rent Funds" be split between the Tribal Council and the BPPDC, with the former receiving 60 percent of the funds. *Id.* at 81. The recommendation was "tabled" until the next Council meeting (it is unclear how the issue was ultimately resolved). *Id.* At its next meeting, on January 5, 2011, the Council approved the use of $2,000 of OVCDC rent funds to complete a renovation of the "Elder's Building," and the Tribal Council Chair asked "to see a budget for the total amount spend [sic] of the 2010 OVCDC Rent Monies." App. Ex. 128b, at 3.

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[12] As amended in August 2011, BPPDC's articles indicate that the Board of Directors presently consists of five voting members, none of whom are members of the Tribal Council, plus two "advisory" (non-voting) members who also serve on the Big Pine Tribal Council. App. Ex. 60R (art. V § 1). The August 2011 articles also indicate the composition of the Board was different during a two-year interim period from August 2011 to August 2013: during that period, the Board consisted of five voting directors, two of whom served on the Tribal Council. *Id.* A revised set of corporate by-laws issued in September 2011 state that advisory board members of BPPDC's Board of Directors "shall be invited to attend all meetings of the Board, shall be included in all Board correspondence, and shall be invited to participate in Board deliberations." App. Ex. 60Q, ¶ 1.17.

The record contains copies of minutes of BPPDC board meetings that span the period from January 2009 through October 2012. App. Ex. 129. In addition to showing that BPPDC's board oversees the tribe's real estate and commercial enterprises, the minutes reveal discussions relating to certain governmental or quasi-governmental functions, including the administration of the tribe's "education center" and various tribal grants. *Id.* Some minutes also imply that the Tribal Council closely supervises the corporation. *Id.* (July 30, 2009 minutes stating that "[w]e need to show Tribal Council how we are going to make use of this money"). Minutes from a January 2009 board meeting suggest that there were unresolved "issues of separation" from the Tribal Council and further state that "[t]he Tribal Council need[ed] to outline what assets belong to the Tribal Administration and what belongs to the Economic Development Corporation." *Id.* (Jan. 9, 2009 minutes). A notable omission is any board minutes *predating* the lease signing (in March 2009) in which the prospective lease with OVCDC is discussed.

Based on the evidence just described, we find that when its lease with OVCDC was signed, BPPDC was an economic development arm of the Big Pine Tribe, operated to serve governmental objectives and supervised by the tribe's governing body, rather than a wholly autonomous commercial enterprise, as OVCDC claims. Accordingly, we conclude that the Big Pine Tribe controlled or substantially influenced the actions of BPPDC.

We further find that the Big Pine Tribe was in a position to influence OVCDC by virtue of its membership on OVCDC's governing board, the OVBT. We recognize that the tribe, having only minority representation on the OVBT, does not "control" OVBT in the sense that it can dictate policy and make operational decisions, with raw voting power, over possible objections of the other consortium members. However, the Board has held that a party's minority representation on an organization's governing board is sufficient to put the minority party in a position to "substantially influence" the organization's decisions and priorities. *See Maternal and Family Health Serv., Inc.* (stating that "[i]t [was] not necessary for [the grantee-lessee] to control an absolute majority" of the members of the lessor's board of directors in order for the grantee-lessee to exercise "substantial influence" over the lessor); *Salt Lake Cmty. Action Program* (reaffirming the holding in *Maternal and Family Health Servs.*).

The record contains a June 3, 2013 declaration by Margaret Romero, who was the Big Pine Tribe's representative to the OVBT when the lease in question was signed (and still held that position in June 2013). *See* App. Ex. 141. Ms. Romero stated in her declaration that she was elected to her position on the OVBT by the adult membership of the Big Pine Tribe; that she is not a member of the Tribal Council or of BPPDC's Board of Directors; that she "report[s] to the adult membership of the Tribe regarding OVBT

issues at meetings of the adult membership of the Tribe"; and that, as an OVBT trustee, she is "not accountable to the Big Pine Tribe Tribal Council or the Big Pine Paiute Development Corporation Board of Directors." *Id.*, ¶¶ 3, 9-10. Concerning BDDPC's lease with the OVCDC, Ms. Romero stated that the lease was "not [her] idea"; that she "did not participate" in its negotiation or drafting; and that she "did not discuss the Lease with my fellow OVBT Board members prior to its approval," "did not attend the meeting of the OVBT when the Lease was approved," and "did not know [the lease] was on the agenda for approval at that meeting." *Id.*, ¶¶ 12-13. Ms. Romero also stated that she "never met with the [BPPDC] with regard to the Lease" and "had no contact with members of the [BPPDC] Board of Directors concerning the Lease. *Id.*, ¶ 14.

Ms. Romero's assertion that she was elected to serve as the Big Pine Tribe's representative on the OVBT by the tribe's general membership is in conflict with a 2010 statement by OVBT Board Chair that "[b]oth the Lone Pine and Big Pine representatives are elected by their respective tribal councils." App. Ex. 15, at 2. We need not resolve this conflict because it makes no difference if Ms. Romero was elected by the tribe's general membership. The general membership (called the "General Council") elects *both* the OVBT representative and the members of the Tribal Council. *See* App. Ex. 40A. Being duly elected by the general membership, *both* the OVBT representative and the Tribal Council must be presumed to have the capacity to represent and advance the tribe's interests.

Although we accept Ms. Romero's allegations of non-involvement in lease-related matters, the issue here is not whether she *actually* participated or influenced decisions concerning the lease but whether she was in a position to do so. As we stated earlier, the objective of the cost principle that limits the allowability of fair market rent paid under a less-than-arms-length lease (and of other rules intended to minimize conflicts-of-interest in grant administration) is to ensure that there is "no *possibility*" that a grantee's decisions are made for reasons other than the best interest of the federally funded program being administered by the grantee. *Professional Counseling Resources, Inc.* at 8 (italics in original); *see also Maternal and Family Health Services, Inc.* (holding that there was "no burden placed on [the federal agency] to distinguish between the actual exercise of influence and the potential for influence"). The Big Pine Tribe's longstanding membership and representation on the OVBT creates a realistic possibility that the tribe could substantially influence OVBT decisions relating to the OVCDC's administration of its tribal family assistance program. None of Ms. Romero's statements obviate that possibility.

In addition to the Romero declaration, the record contains the August 13, 2014 declaration of Genevieve Jones, who stated that she was, on that date, the Chair of the Big Pine Tribal Council (and had served in that capacity since July 2013). App. Ex. 125,

¶ 1. Ms. Jones declared that the Big Pine Tribe "does not share any employees or personnel functions with the OVBT." *Id.*, ¶ 8. She also stated that references in Tribal Council minutes to a "Tribal TANF workgroup meetings" concern "meetings that OVCDC holds regularly with each tribe that has contracted with OVCDC for TANF services where they discuss what specific services they are providing and get feedback from the community." *Id.*, ¶ 9. Ms. Jones also stated that the tribe "independently developed the facilities that are [the] subject of the lease between the BPPDC and the OVCDC, and [that] they were not originally developed with the intent of leasing them to OVCDC." *Id.*, ¶ 10. She also stated that the relationship between the tribe and OVBT "has in general been very collegial" but that the "less-than-arm's length dispute with ACF has made the relationship . . . more adversarial." *Id.*, ¶ 11. "It is clear to the Big Pine Tribal government," Ms. Jones stated, "that we do not control or substantially influence the direction and strategy of the OVBT." *Id.* Finally, she stated:

> During my time as the Chairperson of the Big Pine Tribe, it has been my observation that the Big Pine Tribe's representative to the OVBT did not exercise influence over the decision-making of the Big Pine Tribal Council, nor did the Big Pine Tribal Council exercise influence over the Big Pine Tribe's representative to the OVBT and the OVBT's decision-making. There has been very little, if any communication between the Big Pine Tribal Council and the Big Pine Tribe's representative to the OVBT. It has also been my observation that the Big Pine Tribe's representative to the OVBT does not believe he/she is accountable to the Big Pine Tribal Council.

Id., ¶ 12.

The assertions by Ms. Jones that the tribe's duly elected representative to the OVBT did not *actually* influence OVBT or the OVCDC are immaterial, for the reasons we just explained. Furthermore, her statement that OVCDC and BPPDC do not share employees was made in the present tense – that is, as of August 2014; she did not describe the state of affairs when the lease was signed. And while it may be true, as Ms. Jones asserts, that the leased property was initially developed for purposes other than for use by the

OVCDC, that fact does not negate the substantial evidence of tribal control or influence. The alleged deterioration of the Big Pine Tribe's relationship with the OVBT has minimal, if any relevance, because it occurred long after the lease was signed.[13]

We note also that Ms. Jones appears to have worn multiple hats in various tribal organizations both before and after the leases were signed. In addition to her recent position as Big Pine Tribal Council Chair, Ms. Jones served as a Tribal Council member in November 2006, when the BPPDC was initially formed and, by virtue of that position, was a founding member of BPPDC's Board of Directors. App. Ex. 5B, at 6. In March 2009, she chaired BPPDC's Board of Directors and signed the lease with OVCDC on behalf of the corporation. App. Ex. 5D. It is fair to infer from the latter fact that she had knowledge about how the lease was conceived, the nature of any negotiations between BPPDC and OVCDC concerning that agreement, and the identity of the persons involved. However, her declaration is conspicuously silent about those subjects. We are also concerned that Ms. Jones did not account for a document (evidently prepared in 2011 or 2012) which identifies her as "Director of the Career Education Program at OVCDC." App. Ex. 60M. Her declaration does not mention any past or present affiliation with OVCDC. These and other omissions further substantiate our conclusion that OVCDC has not met its burden in this proceeding of demonstrating that its fair-market rental payments to BPPDC are allowable.

In short, the "totality of the overall relationship" among the various tribal entities demonstrates that the parties to the March 20, 2009 lease were subject to the control or substantial influence of the Big Pine Tribe. The terms of that lease, which are identical to the terms in BPDC's lease (including a provision requiring OVCDC to pay "retroactive" rent), are additional evidence of common control or influence for the reasons discussed in the preceding section. Based on these findings, we conclude that the lease between OVCDC and BPPDC was less than arms' length under section 37 of OMB Circular A-87.

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[13] In a third declaration, dated August 14, 2014, Shannon Romero, the Chair of BPPDC's Board of Directors (as of that date), explained that BPPDC and OVBT have had a difference of opinion about tactics or strategy for reversing ACF's less-than-arms-length determination, stating that BPPDC was "rebuffed, and forced to wait while the OVBT pursued a corrective compliance plan with ACF" and that OVBT's meetings to discuss the response to ACF's decision "took place behind closed doors." App. Ex. 126, ¶ 5. The disagreement led to BPPDC trying to file an appeal with the Board in April 2014. *See* App. Ex. 133. The Board Chair rejected the appeal on jurisdictional grounds. The Board Chair noted BPPDC's admission that it was not the grantee and stated that since the grantee (OVCDC) had not at that time filed an appeal, it was not necessary to decide whether BPPDC would qualify as a real party in interest. (After OVCDC filed its appeal, BPPDC did not move for participation as either a real party in interest or an intervenor under 45 C.F.R. § 16.16(a)(b).) These circumstances tell us little about the relationship of the parties when the lease was signed. They tell us only that the Big Pine Tribe, which stood to benefit financially from the lease, had a strong economic incentive to seek a prompt and decisive resolution of the dispute. *See* App. Ex. 133 (stating that the "Big Pine relied on the rent monies received from the OVCDC for critical economic development and other efforts").

B. The Board may not alter the outcome dictated by applicable laws and regulations based on equitable principles or the federal government's general trust responsibility to Indian nations.

OVCDC contends that ACF violated the federal government's trust obligation to Indian tribes and tribal organizations by finding that its leases with BPDC and BPPDC were less than arms' length. App. Br. at 6-10. OVCDC asserts that ACF is bound under that trust obligation to ensure that the tribal TANF program protects and promotes tribal sovereignty and self-determination and to "give special consideration and pay greater attention to the Owens Valley Tribes' interests in serving Indian people in their Tribal communities." *Id.* at 3, 7; *see also* Reply Br. at 5 (asserting that adherence to the trust obligation, as articulated in judicial decisions and a presidential executive order, "requires ACF to take into account the special circumstances under which the leases were executed"). OVCDC asserts that ACF violated the trust obligation by: (1) not liberally construing or flexibly applying the relevant cost principles in order to resolve alleged "ambiguity" or "reasonable doubt" about their applicability; (2) failing to grant or seek a "waiver" of the cost principles' applicability (an omission that we consider separately in the following section); and (3) failing to consider or account for certain "special circumstances," including the "extremely limited opportunity for leasable building space" in the rural and remote Indian communities of the Owens Valley and "the fact that Indian tribes as sovereigns have the right to structure their commercial and governmental arrangements in ways that reflect the unique characteristics of the communities in which they function." App. Br. at 10; Reply Br. at 3, 6.

The Board's regulations state that it "shall be bound by all applicable laws and regulations." 45 C.F.R. § 16.14. In this case, the "applicable laws and regulations" include the tribal TANF program regulations in 45 C.F.R. Part 286, which expressly prohibit OVCDC from using federal TANF funds in violation of the cost principles in OMB Circular A-87. *See* 45 C.F.R. §§ 286.45(c), 286.200(b). The regulatory requirement that tribal TANF grantees comply with OMB Circular A-87 applies to Indian tribes (as defined to include intertribal consortia) without stated exception or qualification. In addition, we note that OMB Circular A-87 itself applies without exception to "Indian tribal governments." 2 C.F.R. Part 225, App. A, ¶ A.1 (Jan. 1, 2013).

Based on these "applicable laws and regulations," we have determined (for the reasons stated earlier) that ACF correctly determined that OVCDC's leases with the tribal economic development corporations were less-than-arms-length. OVCDC does not point to another applicable statute or regulation that dictates a different result in these specific circumstances. OVCDC asserts that the TANF statute contains "special exceptions" for Indian tribes in recognition of their unique relationship with the United States, *see* App. Br. at 9, but these so-called exceptions do not, on their face, exempt tribal TANF grantees from complying with OMB cost principles or require ACF to interpret or apply those

principles any differently than it did.[14] In addition, OVCDC does not explain how or why the statutory provisions it cites create specific duties on ACF (fiduciary or otherwise) concerning its enforcement or application of cost principles in the context of the tribal TANF program or otherwise override the duly promulgated regulations (cited earlier) that require all tribal TANF grantees to comply with the cost principles.

Being bound by the applicable laws and regulations just mentioned, and having concluded that ACF correctly applied them in these circumstances, we are not authorized to reach a different conclusion based on equitable principles or the federal government's general trust responsibility to Indian tribes. *Crow Creek Sioux Tribe*, DAB No. 2496, at 8 (2013) (holding that because the challenged agency determination was supported by applicable law, the Board could "not avoid or alter that legal conclusion" based on the argument that the agency violated the federal government's trust obligation to Indian nations). Accordingly, we do not reach the merits of OVCDC's trust-obligation argument.

C. Assuming the Board has authority to review the denial of a tribal TANF grantee's request for a "waiver" of an applicable cost principle, ACF did not abuse its discretion in refusing to grant OVCDC a waiver or to seek one from OMB.

OVCDC contends that ACF "has the authority" under its Tribal Consultation Policy (App. Ex. 28B) and under departmental regulations "to waive statutory, regulatory, policy, or procedural requirements when such waiver is not prohibited by statute." *Id.* at 10-11. Despite that authority, says OVCDC, ACF denied "without proper explanation" its request for a waiver of the cost principles applicable to its rental costs under the less-than-arms-length leases. *Id.* at 13. OVCDC also complains that ACF refused to exercise its authority to seek an appropriate waiver from OMB. *Id.* at 5, 11, 13; Reply Br. at 13-14. OVCDC asserts that the refusal to grant or seek a waiver was "arbitrary" in light of ACF's commitment under its Tribal Consultation Policy to "'utilize flexible approaches . . . that preserve the prerogatives and authority of Indian tribes.'" App. Br. at 11 (quoting ACF Tribal Consultation Policy).

[14] The statutes cited by OVCDC are: 42 U.S.C. § 608(a)(7)(A), (D), which concern the length of a needy family's eligibility for TANF assistance; 42 U.S.C. § 612(a)(3)(C)(ii), which relates to certain "waiver" authority of the Secretary of Labor; and 42 U.S.C. § 629b(b)(2)(A), which concerns a program (the Adoption and Safe Families Act) other than the tribal TANF program.

ACF responds that its refusal to waive the applicable cost principles or seek a waiver from OMB "does not present a dispute reviewable by the Board." Response Br. at 22. (Relevant HHS regulations use the term "exception" rather than "waiver,"[15] and we will use the terms interchangeably.) In support of its jurisdictional contention, ACF points to *Salt Lake City Community Action Program*, DAB No. 1261 (1991). In that case, a grantee alleged that ACF had denied (or refused to consider) its request for an exception to the cost principles in OMB Circular A-122 regarding rental costs incurred under less-than-arms-length leases. (At the time, OMB Circular A-122 specified the same limitation on the allowability of rental costs that is at issue here.) After commenting that it was "arguable" that the federal agency "ha[d] discretion under 45 C.F.R. § 74.6 [a provision of HHS's uniform administrative regulations governing grants and other federal awards issued to institutions of higher education and other non-governmental organizations] to grant a deviation from the applicable cost principles," the Board stated that it had "no power to direct OHDS [the federal agency] to waive a disallowance which is clearly authorized by these cost principles or even to consider a request for such a waiver," and that the Board's "function" – to "decide disputes" – "ends here with the determination that the lease agreements were less-than-arms-length."[16] However, *Salt Lake Community Action Program* did not discuss or distinguish two prior decisions in which the Board reviewed an agency's refusal to grant an exception to the cost principles under section 74.6. *See Texas Migrant Council*, DAB No. 842 (1987) (concluding that the federal agency was not "arbitrary and capricious in refusing to approve a deviation [from

[15] During the tribal consultation process, HHS's uniform administrative regulations applicable to state, local, and Indian tribal government grantees, set out in 45 C.F.R. Part 92, contained the following provision:

> **§ 92.6 Additions and exceptions.**
>
> (a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the FEDERAL REGISTER.
>
> (b) Exceptions for classes of grants or grantees may be authorized only by OMB.
>
> (c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

45 C.F.R. § 92.6 (Jan. 1, 2013). The uniform administrative regulations in 45 C.F.R. Parts 74 and 92 – both of which state that a grantee's allowable costs will be "determined in accordance with the cost principles applicable to the organization incurring the costs" (45 C.F.R. §§ 74.27, 92.22 (Jan. 1, 2013)) – have since been superceded by regulations to be codified in 45 C.F.R. Part 75. *See* 79 Fed. Reg. 75,871, 75,899-75,900 (Dec. 19, 2014 interim final rule).

[16] In 1994, section 74.6 was superceded by section 74.4. *See* 59 Fed. Reg. 43,754, 43,762-63 (Aug. 25, 1994).

applicable cost principles] or in refusing to transmit [the grantee's] request to OMB"); *Lorain County Cmty. Action Agency*, DAB No. 1196 (1990) (finding that the federal agency's denial of a "requested deviation" was not "arbitrary or capricious" because it was "reasonable and consistent with practice in prior cases").

We need not resolve this issue because even if review authority is assumed, there is no arguable merit in OVCDC's claim that ACF arbitrarily denied its waiver request. OVCDC has not pointed to any law or regulation which suggests that a grantee's claimed entitlement to an exception is anything but a matter committed to the federal agency's sound discretion. *See Salt Lake Cmty. Action* (noting that "the whole purpose of the waiver authority . . . is to allow the agency to exercise its discretion, taking into consideration all the facts and circumstances of each case). In exercising that discretion in this case, ACF stated that OVCDC had not identified "unique circumstances" justifying an exception. App. Ex. 45, at 2-3. We see nothing in the record indicating that unique circumstances exist. Nor do we see evidence that ACF applied the cost principles regarding rental costs inconsistently in overseeing the tribal TANF expenditures of other Indian tribes or intertribal consortia.

In support of its waiver request, OVCDC referred to "unique circumstances present in the Owens Valley, including an extremely limited land base and lack of available property for OVCDC to rent[.]" App. Ex. 32, at 5. We are not certain what OVCDC intended to convey with this language. One possible meaning is that OVCDC has difficulty finding suitable rental property in the Owens Valley unless it is willing to pay fair market rent. However, that notion is undercut by the fact that the leases it signed with the tribal economic development corporations permitted it to *remain* in the leased property and pay *less than the fair-market rent* in the event ACF penalized OVCDC for charging fair market rental costs to its tribal TANF grant. *See* App. Ex. 5C, ¶ 3 (stating that OVCDC "would be *responsible to Landlord only up to and including the amount cover Landlord's costs, or that amount allowable under circular A-87* as if Tenant had vested title to the property itself," in the event OVCDC "receives a verifiable notice from HHS that the rent terms . . . are unacceptable/unallowable") (italics added).

Finally, as our analysis in the previous section shows, ACF's position that the leases were less than arms' length has ample legal and factual support. In light of all the circumstances, ACF did not abuse its discretion in refusing to grant or seek an exception to the applicable cost principles.

D. <u>OVCDC has not presented any grounds upon which to reduce the penalty imposed by ACF.</u>

Under section 37 of OMB Circular A-87, rental costs incurred under a less-than-arms-length lease are unallowable to the extent they exceed the amount that would be allowed if the grantee owned the leased property. OVCDC violated that cost principle by

charging to its tribal family assistance grant the market-rate rent it paid under its less-than-arms-length leases with BPDC and BPPDC, rather than the allowable ownership costs associated with the leased property. ACF therefore properly concluded that OVCDC misused its grant funds in violation of 45 C.F.R. § 286.200(b) and is subject to a fiscal penalty under 45 C.F.R. § 286.195(a)(1).

There being no finding by ACF that OVCDC "intentionally misused" its grant funds, *see* 45 C.F.R. § 286.195(a)(2), the size of the fiscal penalty is based on the amount of grant funds misused, *id.* § 286.195(a)(1).[17] In this case, ACF determined that the amount misused is equal to the rent payments made under OVCDC's less-than-arms-length leases during fiscal years 2009, 2010, and 2011. As we just noted, however, rental costs incurred under a less-than-arms-length lease are allowable up the amount of any allowable ownership costs (*e.g.*, depreciation, insurance) associated with the leased property. However, OVCDC did not present evidence about ownership costs or raise any other issue concerning the amount of the fiscal penalty assessed by ACF. In its response brief, ACF states that it "has not been able to calculate the lesser allowable amount [of rental costs] because [OVCDC] disagrees with ACF's position and, thus far, has provided incomplete information about the properties in question." Response Br. at 1 n.1. OVCDC made no response to that statement in its reply brief. We therefore have no grounds to reduce the amount of the fiscal penalty.[18]

[17] That regulation states: "If we [ACF] determine that a Tribe misused its Tribal Family Assistance Grant funds, including providing assistance beyond the Tribe's negotiated time limit under § 286.115, we will reduce the TFAG for the following fiscal year by the amount so used[.]"

[18] Our decision, of course, does not preclude ACF from voluntarily reducing the amount of the fiscal penalty at some later date should OVCDC produce sufficient documentation of allowable ownership costs associated with the leased property.

CONCLUSION

Based on the foregoing analysis, we sustain ACF's determination to impose a $1,732,049 fiscal penalty on OVCDC under 45 C.F.R. § 286.195(a)(1).

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member