Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Michigan Department of Health and Human Services, Office of Child Support
Docket No. A-18-12
Decision No. 2868
April 27, 2018

DECISION

Michigan Department of Health and Human Services, Office of Child Support (Michigan) appeals a determination by the Administration for Children & Families, Office of Child Support Enforcement (ACF) disallowing $26,175 in payroll costs. ACF based its determination on an audit of Michigan's financial statements for its Children's Trust Fund for the period from October 1, 2006 through September 30, 2008 by the Michigan Office of the Auditor General (Auditor), which found that Michigan did not maintain the required certifications to support the claimed payroll costs of $26,175. For the reasons discussed below, the Board sustains the disallowance.

Background

The federal Child Support Enforcement Program established under Title IV-D of the Social Security Act (Act) (sections 451-469B of the Act), 42 U.S.C. §§ 651-669b, is a cooperative federal-state program that aims to enforce child support obligations owed by noncustodial parents to their children. Act § 451; *Ky. Cabinet for Human Res.*, DAB No 1130, at 1 (1990). The basic functions of the program include locating absent parents, determining paternity, establishing the amount of child support obligation, and collecting support payments. DAB No. 1130, at 1; *Md. Dep't of Human Res.*, DAB No. 1875, at 1 (2003). States operate their child support enforcement programs subject to oversight by ACF's Office of Child Support Enforcement. To receive Title IV-D funding, a state-grantee must operate its Title IV-D program in accordance with a federally-approved state plan and applicable federal regulations. *See* 45 C.F.R. §§ 301.0 *et seq.* During the period at issue, the applicable federal regulations included the uniform administrative requirements and cost principles in 45 C.F.R. Part 92 and in Office of Management and Budget (OMB) Circular A-87, "Cost Principles for State, Local, and Indian Tribal Governments." A state grantee receiving Title IV-D funding in excess of a certain amount is also subject to audits in accordance with the Single Audit Act, 31 U.S.C.

§§ 7501 *et seq.*, as amended, and OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations."[1]

In 2009, the Auditor performed a single audit of Michigan's financial statements for its Children's Trust Fund for fiscal years (FYs) 2007 and 2008, covering the period from October 1, 2006 to September 30, 2008. The September 2009 audit report questioned, among other things, Michigan's Child Support Enforcement Program costs of $26,175 for one employee as not having been "in compliance with federal regulations regarding federal payroll documentation," ACF Ex. 1, at 94, because –

> [Michigan] did not properly document that this employee worked solely on a single federal program . . . .
>
> For this employee, [Michigan] did not complete a semiannual certification or a pay period specific certification covering the selected payroll period.
>
> * * *
>
> The certification must be prepared at least semiannually and must be signed by the employee or supervisory official having firsthand knowledge of the work performed by the employee.

Id. at 94-95 (Finding 4310910), citing OMB Circular A-87, App. B., § 8. The Auditor recommended that Michigan improve its internal controls over its Child Support Enforcement Program to ensure compliance with applicable federal law and regulations on allowable costs and cost principles. *Id.* at 96. In response, Michigan stated that it "agree[d] with the finding" as to the questioned costs of $26,175 and planned corrective action to require managers and supervisors who are funded entirely by a single federal funding source to submit semiannual certifications to Michigan's Division of Accounting. *Id.* at 193.

[1] Prior to 2014, the cost principles for state and local governments were contained in OMB Circular A-87, which OMB issued in 1981, revised in 1995, and codified at 2 C.F.R. Part 225 in 2005. 46 Fed. Reg. 9548 (Jan. 28, 1981); 60 Fed. Reg. 26,484 (May 17, 1995); 70 Fed. Reg. 51,910 (Aug. 31, 2005). In 2013, OMB consolidated the contents of Circular A-87 and other OMB circulars into one streamlined set of uniform administrative requirements, cost principles, and audit requirements for federal awards, currently at 2 C.F.R. Part 200. 78 Fed. Reg. 78,590 (Dec. 26, 2013). In December 2014, HHS codified the text of 2 C.F.R. Part 200, with HHS-specific amendments, in 45 C.F.R. Part 75, "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards." 79 Fed. Reg. 75,871, 75,889 (Dec. 19, 2014). We cite to and apply the Part 92 regulations and OMB circulars in effect during the period October 1, 2006 through September 30, 2008.

On November 13, 2009, the U.S. Department of Health & Human Services, Office of Inspector General, Office of Audit Services (OIG), notified Michigan that it had reviewed the audit report, which revealed "serious" "weaknesses," and "recommend[ed] closer monitoring and increased attention by grants management staff to protect the Federal interest." ACF Ex. 2, at 2. With respect to the finding as to the questioned costs of $26,175, the OIG recommended that "procedures be strengthened to ensure payroll expenditures charged to Federal programs are supported by adequate documentation." *Id.* at 8 (Recommendation 053000100).

On review of the audit results and OIG recommendation, ACF issued a notice of disallowance dated October 10, 2017. ACF Ex. 3. ACF disallowed $26,175 in questioned costs,[2] stating as follows:

> [Michigan] did not maintain the required certifications to support payroll costs charged for one employee.
>
> Because [Michigan] did not properly document that this employee worked solely on a single federal program, it was not in compliance with federal regulations regarding federal payroll documentation. . . .
>
> For this employee, [Michigan] did not complete a semiannual certification covering the selected pay period.

Id. at 1-2, citing OMB Circular A-87, App. B, § 8(h)(3) and 45 C.F.R. § 92.43(a)(2); *see also* 45 C.F.R. § 92.22(b) (stating that allowability of costs will be determined in accordance with the cost principles in OMB Circular A-87).

Michigan's appeal

On November 1, 2017, Michigan timely appealed ACF's October 10, 2017 disallowance of $26,175 to the Board in accordance with the procedural regulations in 45 C.F.R. Part 16. Michigan "asks that the decision to disallow [the funds] be rescinded" because ACF failed to act timely on the September 2009 audit report. Michigan's Appeal (Appeal) at 1.[3] To support its argument, Michigan relies on OMB Circular A-133, § 400(c)(5), which

[2] These costs evidently were associated with fiscal year 2007, which ended on September 30, 2007. ACF Ex. 1, at 94 (audit report, referring to "Award Number" "G 07 04 MI 4004" for the period from October 1, 2006 through September 30, 2007); ACF Ex. 3, at 1 (notice of disallowance, referring to grant number "0704MI4004").

[3] By Acknowledgment of Notice of Appeal dated November 6, 2017, the Board informed Michigan that it would have 30 days from its receipt of the Board's Acknowledgment to submit argument and evidence in support of its appeal. On December 13, 2017, Michigan uploaded to the Board's electronic filing system (DAB E-File) an undated letter stating that it elects not to submit a brief in support of its appeal. Michigan did not later avail itself of the opportunity to submit a reply brief within 15 days after ACF filed its response brief.

provides that the federal awarding agency "shall … [i]ssue a management decision on audit findings within six months after receipt of the audit report and ensure that the recipient takes appropriate and timely corrective action." Michigan asserts that ACF, the federal awarding agency here, failed to comply with the provision inasmuch as the October 10, 2017 notice of disallowance was issued "approximately nine years" after ACF received the audit report. Appeal at 1.

Michigan states that, "to its disadvantage, [it] no longer has the documents" concerning the subject employee who, according to Michigan, spent "100%" of his or her time on Title IV-D program activities. *Id.* Michigan also says, however, that those documents "would have . . . eliminate[d] or significantly reduce[d]" the questioned costs because the employee "would have been certified on the PV-010"[4] during "multiple payrolls" for both fiscal years 2007 and 2008, during which time Michigan was "required to complete" the certifications. *Id.* According to Michigan, it "did not/does not have employees [who] split time with other programs or non-IV-D work" and, accordingly, it "would have certified any employee as 100% IV-D child support at least twelve times during the fiscal year, even though for federal purposes only a semi-annual certification was required." *Id.* Michigan moreover states that, while it is possible that its Accounting Department was unable to produce a PV-010 certification for a pay period that the auditors reviewed, it would be "highly unlikely" that all twelve, covering the entire fiscal year, were unavailable. Michigan says that since the employees who handled PV-010 certifications during the audit period are no longer employed with Michigan, it is unable to speak to whether anyone in its Accounting Department had attempted to submit "evidence of the mitigating controls in place." *Id.*

Discussion

I. Michigan has not met its burden to produce the certifications required to support the disallowed costs.

It is well-settled that, "[i]n 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), *aff'd*, *Me. Dep't of Human Servs. v. U.S. Dep't of Health & Human Servs.*, 766 F. Supp. 2d 288 (D. Me. 2011). If the federal

[4] Michigan informs the Board that "PV-010" is a "required monthly certification that employees were properly coded in their payroll system," Appeal at 1, and provides a printout of a 2014 PV-010 report for an employee (name redacted) bearing a signed certification that the employee is "100% Federally Funded." It also offers what appears to be a sample PV-010 certification list, for fiscal year 2014, for four individuals (names redacted) who purportedly worked on the Title IV-D program, as well as a monthly PV-010 certification schedule for fiscal years 2007 and 2008, indicating the pay period numbers, the beginning and ending dates of the pay periods, the "pull dates" and the "certification dates." *See* attachments to Appeal. We will address the attachments later.

agency carries this burden, which the Board has said is "minimal," then the non-federal party must show that the costs are allowable. *Mass. Exec. Office of Health & Human Servs.*, DAB No. 2218, at 11 (2008), *aff'd*, *Mass. v. Sebelius*, 701 F. Supp. 2d 182 (D. Mass. 2010). To be allowable, a cost must be reasonable for the performance of the award, allocable thereto, and conform to any limitation or exclusion in the applicable cost principles. OMB Circular A-87, App. A, § C.1. "It is well-established that the burden of demonstrating that an expenditure claimed under [a] grant is supported by adequate documentation, once that question has been raised by the granting agency, lies with the grantee." *Southeastern Mich. Health Assoc.*, DAB No. 2682, at 3 (2016) (citations omitted).

In addition to these overarching requirements, the cost principles set out specific documentation requirements for different types of costs. Relevant here, OMB Circular A-87 provides that salaries and wages for employees who are "expected to work solely on a single Federal award . . . will be supported by periodic certifications that the employees worked solely on that program for the period covered by the certification." OMB Circular A-87, App. B, § 8(h)(3). The certifications must be prepared "at least semi-annually and will be signed by the employee or supervisory official having first hand knowledge of the work performed by the employee." *Id.* Also relevant here, the grantee "must maintain records which adequately identify the source and application of funds provided for financially-assisted activities." 45 C.F.R. § 92.20(b)(2).

Michigan does not dispute the applicability of these provisions on which ACF relies to support the disallowance, or produce the requisite certifications (prepared at least semi-annually and signed by the employee or supervisory official) for the disallowed costs. ACF Ex. 3, at 1; ACF Response at 3. Nor does Michigan directly dispute that it failed to maintain this type of certification to support the payroll costs for the employee who allegedly worked solely on a single federal program. Moreover, Michigan does *not* actually assert, or show, that the required certification records *ever* existed. To the contrary, the audit report expressly states that Michigan "did not complete a semiannual certification or a pay period specific certification covering the selected payroll period," ACF Ex. 1, at 94, and, in 2009, Michigan effectively acknowledged that it did not maintain the required certification as it reportedly indicated then that it "agree[d] with the [audit] finding." ACF Ex. 1, at 193.

Michigan represents that it "did not/does not have employees that split time with other programs or non-IV-D work." Appeal at 1. Even were we to accept this representation at face value and assume that during the audit period Michigan's employees who worked on Title IV-D program activities spent all of their work hours performing only Title IV-D program activities, Michigan still would not prevail because Michigan had to maintain the required certification that the employee who was the subject of the questioned costs was in fact working solely on a single federal program, but has never produced any evidence of certification. The printouts of the 2014 PV-010 records (submitted with the

Appeal) long post-date the audit period in question (fiscal years 2007 and 2008), and in any case are not even shown to be records associated with the employee whose compensation was the subject of the audit findings and the disallowance and, thus, are not evidence of the required certifications for the audit period in question. Moreover, even if Michigan had shown that these 2014 PV-010 records might arguably have some relevance to fiscal years 2007 and 2008 and to the specific employee in question (which it has not), the Board has declined to consider non-contemporaneous records absent a reasonable explanation of why contemporaneous evidence is not available. *See, e.g., Indiana Dep't of Pub. Welfare*, DAB No. 772, at 2-5 (1986) (in a Title IV-D case, stating that "other documentation may be presented" where the grantee has a reasonable explanation for why contemporaneous evidence is unavailable, but ultimately rejecting the grantee's attempt to prove that an employee had performed solely child support program functions by a retrospective affidavit in part because the affidavit contained "after-the-fact statements which were unsupported by any documentation from the time period in question, such as a job description, organizational charts, or actual evidence of work performed"). Michigan has offered no explanation at all for why contemporaneous evidence is not available. Indeed, as discussed elsewhere herein, Michigan effectively admitted, in 2009, that it did not have the certification records. As for the PV-010 certification schedule for fiscal years 2007 and 2008 (also submitted with the Appeal), it shows, at most, that Michigan had a certification schedule in place during the audit period. It is not evidence that Michigan actually submitted certification reports according to that schedule, much less that it submitted the required certification for the employee in question.

We also note that the 2009 audit report memorialized Michigan's "Planned Corrective Action" as follows: "[A] policy was issued on July 23, 2008 that requires managers and supervisors of staff who are funded 100% by a single federal funding source to submit semiannual certifications to the Division of Accounting. The Division of Accounting will send out a list of those staff and the forms for each certification period." ACF Ex. 1, at 193. Referring to the July 23, 2008 policy as a "new" policy, ACF states that Michigan's institution of the policy suggests that Michigan was not completing the required certifications *before* July 23, 2008, "including most of the time period covered by the audit."[5] ACF Response at 7-8. As noted, Michigan has opted not to submit briefs in support of its appeal. Accordingly, the Board does not have the benefit of considering Michigan's position in response to this specific statement by ACF. In any event, regardless of whether the July 23, 2008 policy was in fact a new policy at that time, the Board has before it no evidence on which to determine that ACF lacks a basis for

[5] As noted earlier, the disallowed costs of $26,175 appear to have been associated with the fiscal year that ended September 30, 2007. Thus, if Michigan did not institute a policy of requiring management to submit semiannual certifications for staff who are funded entirely by one federal funding source until July 2008, then it would appear that Michigan did not maintain the certification for the employee in question – consistent with Michigan's 2009 agreement with the audit finding that Michigan did not maintain such certification.

disallowing $26,175 in payroll costs.

In essence, Michigan asks the Board to accept mere conjecture that the certification records could have existed at one time and, if they existed, would have complied with the applicable certification requirement. We reject that conjecture. We hold Michigan to producing affirmative evidence showing that the disallowed costs were in fact wrongly disallowed. Michigan has failed to do so.

II. ACF's delay in issuing the determination does not bar the disallowance.

As noted above, Michigan argues that the disallowance should "be rescinded" because ACF did not issue the disallowance within the six-month period set out in OMB Circular A-133, § 400(c)(5), which provides that the federal awarding agency "shall . . . [i]ssue a management decision on audit findings within six months after receipt of the audit report and ensure that the recipient takes appropriate and timely corrective action." Michigan asserts that ACF's delay in acting on the 2009 audit findings until October 2017 put Michigan in a disadvantaged position, such that Michigan is now unable to provide evidence that would support the disallowed costs.

ACF acknowledges that its notice of disallowance "was not issued in accordance with" the time frame in OMB Circular A-133, § 400(c)(5), but asserts that that failure "does not provide a basis for rescinding the disallowance." ACF Response at 8. While section 400(c)(5) "sets out a six-month time frame to issue management decisions,"[6] ACF says, "this time frame serves as an administrative goal, not a statute of limitations for disallowances." *Id.* ACF cited several Board decisions supporting its position.

Michigan did not directly respond to this argument and, indeed, chose not to file any reply brief. Moreover, Michigan's appeal does not explain how the wording of section 400(c)(5) precludes ACF from taking the disallowance in this case or dispute ACF's understanding of the meaning of the OMB Circular's language. Nor does the appeal identify any law or regulation that limits the time period for ACF to issue a disallowance determination based on audit findings. Michigan thus has offered no legal basis barring ACF from disallowing the costs at issue or for reversing the disallowance due to the delay, and we know of none. *See Md. Dep't of Human Res*., DAB No. 519, at 2-4 (1984) (there is no statute of limitations or laches which can be applied against the federal government unless it is specifically provided for by Congress).

As ACF noted, the Board has rejected similar challenges to allegedly "untimely" disallowance determinations, stating that "[i]t is well established in Board precedent that

[6] The term "management decision" means the "evaluation by the Federal awarding agency . . . of the audit findings and corrective action plan and the issuance of a written decision as to what corrective action is necessary." OMB Circular A-133, § 105.

grantees have a fundamental obligation to document costs which is not defeated per se by the passage of [any applicable] records retention period." *S.W. Va. Comm. Health Systems, Inc.*, DAB No. 2605, at 5 (2014), quoting *Ky. Cabinet for Human Res.*, DAB No. 957, at 6 (1988) (citations omitted). "[G]enerally a disallowance may be considered untimely only if a grantee can prove prejudice that is 'attributable to the loss of records resulting from their innocent loss or destruction after [the] expiration of [any applicable] record retention period.'" *Ca. Dep't of Health Care Servs.*, DAB No. 2204, at 11 (2008), citing *Ca. Dep't of Health Servs.*, DAB No. 1490, at 8 (1994), quoting *Ca. Dep't of Soc. Servs.*, DAB No. 855, at 3 (1987). Moreover, "there is no presumption that a grantee kept pertinent records and retained them for the requisite period." *N.Y.C. Human Res. Admin.*, DAB No. 1199, at 11 (1990).

In this case, Michigan has not specifically asserted, or shown, that the required certifications to support the disallowed payroll costs ever existed. Indeed, the most reasonable conclusion we are able to draw based on the record before us is that the required certifications pertaining to the employee in question never existed because Michigan stated, *at the time of the audit*, that it "agree[d] with the finding" (ACF Ex. 1, at 193) that it "did not complete a semiannual certification or a pay period specific certification covering the selected payroll period" (ACF Ex. 1, at 94). Accordingly, here, we need not further inquire what record retention requirements apply to this case, whether Michigan did or did not adhere to them, and whether any certification records may now be unavailable due only to their innocent destruction in accordance with the applicable records retention schedule.

Lastly, to the extent Michigan's appeal asks the Board to estop ACF from taking the disallowance or to provide some other type of equitable relief, the Board, being "bound by applicable laws and regulations," 45 C.F.R. § 16.14, is not authorized to grant equitable remedies. *See Mental Health Ass'n of Oregon*, DAB No. 2590, at 9 (2014) ("The Board has no authority to waive a disallowance on the basis of equitable principles."); *Puerto Rico Dep't of Health*, DAB No. 2385, at 29 (2011) (and cases cited therein); *River East Econ. Revitalization Corp.*, DAB No. 2087, at 12 (2007) ("general claim of 'equity' . . . is not available as a basis for dispensing federal funds"); *The Children's Center, Inc.*, DAB No. 2506, at 8 (2013) ("The Board is not authorized to reverse a disallowance based on equity."); *Camden Cnty. Council on Econ. Opportunity*, DAB No. 881, at 7-8 (1987) ("The Board is bound by all applicable laws, and cannot invent equitable remedies without a basis in law.").

Conclusion

The Board sustains ACF's October 10, 2017 disallowance of $26,175.

/s/
Sheila Ann Hegy

/s/
Christopher S. Randolph

/s/
Susan S. Yim
Presiding Board Member