DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Nevada Department of Human Resources DATE: October 31, 1980
Docket No. 79-218-NV-SS
Decision No. 132

DECISION

This is an appeal of a disallowance of $89,165 claimed by the State of Nevada under Title IV-A of the Social Security Act, as amended. Title IV-A is the basis for the Aid to Families with Dependent Children - Foster Care program (AFDC-FC). By letter dated November 15, 1979, the State timely requested the Board to reconsider the decision of the Social Security Administration (Agency) that the disallowed amount reflected expenditures for foster child care in profit-making institutions, in violation of statutory and regulatory provisions requiring use only of nonprofit private facilities.

Background

Section 408(b) of the Social Security Act states that the term "aid to families with dependent children" includes care --

1. in the foster family home of any individual, whether the payment therefore is made to such individual or to a public or nonprofit private child-placement or child-care agency, or

2. in a child-care institution, whether the payment therefore is made to such institution or to a public or nonprofit private child-placement or child-care agency....

Section 408(f) defines "child-care institution" to mean "a nonprofit private child-care institution."

The applicable regulation (45 C.F.R. 233.110(b)(2)) states --

> Federal financial participation is available in AFDC-FC payments made to an individual providing care in a foster family home, to a private nonprofit child care institution, or to a cooperating public or nonprofit private child placement or child-care agency.

The record in this case includes an audit report and a Regional Commissioner's Decision which cite the foregoing and quote substantially identical provisions from Nevada's approved State plan for AFDC-FC and from the State's own Eligibility and Payments Manual for the AFDC-FC program (see the Board's Order to Show Cause, May 9, 1980, pp. 4-5).

Discussion

The Agency disallowance was based on audit findings that the State had placed AFDC-FC children in eight ineligible profit-making institutions during the period July 1, 1975, through September 30, 1978. The audit report states that the State "did not consider whether child care institutions were profit-making or nonprofit before placing AFDC-FC children." (p. 5).

In its response dated July 17, 1979, to the audit report, the State said "we concur with the findings of the audit that FFP [i.e., federal financial participation] under AFDC-FC was claimed [on] behalf of children placed in eight institutional facilities that were determined to be profit making institutions." But the State disagreed with the proposed disallowance, arguing that Nevada is in a "very unique position" because there are "almost no" facilities in the State for placement of children with emotional problems, so that Nevada often must use out-of-state facilities. Nevada said it used out-of-state facilities in 23 out of 30 cases. The State's argument essentially appeared to be that expediency required that children sometimes be placed without regard to the nature of the receiving facility. Two months later, the State expanded its argument to point out that there were no "federal guidelines. . .relative to what constitutes verification of a facility's non-profit or profit-making status" (State's letter of March 20, 1979, to the Agency's Assistant Regional Commissioner for Family Assistance; see also the State's letter of July 23, 1979, to the Associate Commissioner of the Social Security Administration).

On May 9, 1980, the Board issued an Order to Show Cause which reached the tentative conclusion that the State's appeal should be denied because the law and regulations clearly made the costs in question unallowable. In its response of June 2, 1980, to that Order, the State relied solely on its argument that the term "non-profit" was undefined and ambiguous.

By letter dated September 25, 1980, the Board served both parties with a list of questions designed to elicit information clarifying the use of the "non-profit" standard. In response to a request for any evidence which would show the eight facilities were nonprofit under State standards, the State submitted documentation pertaining only to four facilities, as follows:

1. The State submitted documents indicating that all stock in one proprietary organization (Secret Harbor Farms, Inc., one of the eight facilities for which costs were disallowed) was willed in 1977 to the Johnson-Gallagher Foundation (JGF), an organization determined by the U. S. Internal Revenue Service in November, 1978, to be tax exempt. The documents indicate that JGF was established as a nonprofit organization, but that JGF's ownership of Secret Harbor Farms stock would be effective only upon the effective date of the bequest of the stock; the latter

would only occur upon distribution of estate assets, which was not to be completed until July 3, 1979 (see letter of June 18, 1979, from Secret Harbor Farms, and letter dated April 7, 1978, from Jones, Grey and Bayley, Attorneys-at-Law). Thus, there is no evidence that this organization was other than proprietary during the period audited, whatever its later status may have become.

2. The State also submitted articles of incorporation filed in 1972 in California for a "Western Institute Foundation," showing it to be organized under the general nonprofit corporation law of California. However, the audit report questioned expenditures attributable to a "Western Institute for Human Resources." No connection between the two was argued by the State, nor is any apparent from the record. The State has had ample opportunity to submit evidence to the auditors and the Agency that the two entities are the same, and has not done so. For purposes of our review, the material submitted is irrelevant.

3. The State submitted articles of incorporation filed in November, 1978, for California Living Centers, Inc., which purport to show that organization's nonprofit status. However, the status of this organization after September, 1978, is not relevant to the period for which costs were disallowed.

4. The State submitted an incomplete set of articles of incorporation for the Ahern Ranch Treatment Center, dated May, 1977, with a blank for the day left unfilled and without all signatures for whom names were typed on the last page. Furthermore, unlike other submissions, this document was unaccompanied by any evidence of when or whether it was filed with proper State authorities in California. The audit report indicated that Ahern Ranch was incorporated as a nonprofit institution on June 28, 1977, and the disallowed costs associated with this organization appear to be attributable to the period before that date. Thus, this evidence at best only supports the audit findings.

The foregoing materials were submitted in response to the Board's request for State documentation "which shows that, at the time the children were placed, the eight institutions questioned by the auditors were nonprofit under State standards." The materials submitted by the State do not show that. In the case of three of the disputed organizations (Secret Harbor Farms, Inc., California Living Centers, Inc., and Ahern Ranch), the materials support the Agency's position that there is no evidence that the organizations were nonprofit during the period audited. In the fourth case, the material simply is not relevant. The State submitted no information concerning the other four organizations.

The State said in its response of September 25, 1980, that "the State used the Articles of Incorporation as a general standard to show non-profit status," and the submitted materials show that the State did, indeed, base its determinations of nonprofit status largely on articles of incorporation. In its response dated October 16, 1980, the Agency stated that "the Federal Agency utilizes the generally accepted practice of analyzing the facility's articles of incorporation."*

Based on the foregoing, the Board finds the State's arguments unsupported in the record. The State had an admitted obligation, clear from even its own plan and manual, to determine whether an organization was proprietary or nonprofit. The State's argument that the term "non-profit" is fatally ambiguous--aside from the argument's appearance of being a post-hoc rationalization--is without merit because however ambiguous the term may be, the State was consistently using a measure of nonprofit status which the Agency acknowledges is valid. This finding is highlighted by the State's own submission, in response to a specific request for evidence supporting the eligibility of any of the questioned organizations, of material made up almost exclusively of articles of incorporation. Unfortunately for the State, the submitted materials did not relate to the time frame in question or were otherwise irrelevant.

Even if the foregoing did not otherwise compel us to reject the State's arguments, it still would not be clear that the term "nonprofit" is so ambiguous as to require definition through rule-making, for the term seems to envision a fairly narrow and obvious range of evidentiary choices.

There is no substantial evidence in the record to support any conclusion other than that the State failed to meet a clear and acknowledged obligation to determine the proprietary or nonprofit status of the organizations with which it dealt. What the State did may have been fair and expedient for its needy children, but Federal law specifically provides that Federal financing is available only where the organization involved in AFDC-FC is non-profit. Thus, the State must bear these costs from non-Federal funds.

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* There is some dispute in the record whether the State was at some point told by the Agency to use Internal Revenue Service tax exemptions (see State's letter of September 25, 1980, and discussion in Agency's response of October 16, 1980, p. 2). But, as indicated above, the record shows that the State depended upon articles of incorporation "as a general standard," and as a specific basis for eligibility in the case of at least four of the questioned organizations. In any event, the State has submitted no evidence of eligibility under an IRS standard where a determination of ineligibility resulted (or would have) from use of articles of incorporation.

CONCLUSION

For the foregoing reasons, the appeal of the State of Nevada is denied.

/s/ Clarence M. Coster

/s/ Donald G. Przybylinski

/s/ Norval D. (John) Settle, Panel Chair