Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Pennsylvania Department of Public Welfare
Docket No. A-08-118
Decision No. 2243

DATE: April 16, 2009

DECISION

The Pennsylvania Department of Public Welfare (Pennsylvania) appealed a determination by the Administration for Children and Families (ACF) requiring Pennsylvania to remit $5,609,572 to the Federal Government. Based on an audit report, ACF determined that, in the period October 1, 1996 through June 30, 2006, Pennsylvania had recovered $10,598,095 in overpayments made to individuals who received cash assistance payments under the Aid to Families with Dependent Children (AFDC) program, but that Pennsylvania did not reimburse ACF for the federal share of those overpayments.

On appeal, Pennsylvania does not dispute ACF's finding that Pennsylvania recovered the $10,598,095 in AFDC overpayments or challenge how the auditors calculated the federal share of those overpayments. Also, Pennsylvania does not deny that the overpayments did not meet the conditions for federal funding under the AFDC program or that AFDC program requirements provided for the return of the federal share of any such overpayments. Pennsylvania admits that it used the federal funds from recovered overpayments to supplement its funding under the Temporary Assistance for Needy Families (TANF) program. Pennsylvania argues, on the one hand, that an ACF program instruction excused a state from repaying recoveries made prior to September 1, 2000 if the state followed a reasonable interpretation of statutory requirements or any previous guidance provided by ACF and that an earlier program instruction (issued but then rescinded by ACF) allowed Pennsylvania to use the recovered funds for TANF program costs.

On the other hand, Pennsylvania argues that ACF's later issuances instructing states to pay back the federal share of AFDC overpayments via check were illegal. Pennsylvania also argues more generally that the ACF determination is inconsistent with the procedures (in the law that enacted the TANF program) for resolving any claims in connection with the closeout of AFDC programs.

For the reasons explained below, we reject Pennsylvania's arguments and uphold the ACF determination. Pennsylvania has neither shown that it effectively paid back the federal funds it drew down to cover the AFDC overpayments nor established that it followed a reasonable interpretation of law or ACF guidance when it applied more federal funds to TANF expenditures than the amount authorized in its TANF grant awards. ACF's determination is, moreover, consistent with the AFDC closeout procedures.

Legal Background

A. The AFDC Program

Title IV-A of the Social Security Act (Act) originally established a program of aid for needy dependent children and the parents or relatives with whom they were living, known as the AFDC program.[1] The Act provided for reimbursement of a percentage "of the total amounts expended" by a state during each quarter "as aid to families with dependent children under the State plan." Act § 403(b). The Act set out detailed requirements for a "State plan for aid and services to needy families with children." Act § 402(a)(1)-(44). The Act also provided for reimbursement of a specified percentage of the amounts expended for such aid under the state plan, as well as a percentage of state expenditures "found necessary by the Secretary for the proper and efficient administration of the State plan." Act § 403.

States had a responsibility under title IV-A AFDC programs to recover overpayments made to individuals or families. AFDC regulations required that a "State must take all reasonable steps necessary to promptly correct any overpayment" and defined "overpayment" to mean "a financial assistance payment received by or for an assistance unit [individual or family] for

[1] Title IV-A of the Act has been codified at 42 U.S.C. §§ 601 *et seq.* both before and after amendment.

the payment month which exceeds the amount for which that unit was eligible." 45 C.F.R. § 233.20(a)(13)(i)(A) (1995).

Section 403(b) of the Act set out the "method of computing and paying" federal grant awards to states for the amounts expended under an approved state plan. This method was implemented by regulations at 45 C.F.R. § 201.5 (1995). Prior to the beginning of each quarter, the Secretary would estimate the amount payable to a state for that quarter, based on the state's estimate and other information. The state would also submit a quarterly statement of expenditures for the program – an "accounting statement of the disposition of the Federal funds granted for past periods" which also provided the "basis for making the adjustments necessary when the State's estimate for any prior quarter was greater or less than the amount the State actually expended in that quarter." 45 C.F.R. § 201.5(a)(3). The statement was also to show "the share of the Federal Government in any recoupment, from whatever source . . . of expenditures claimed in a prior period, and also in expenditures not properly subject to Federal financial participation . . . ." Id. The grant award computation for AFDC would show "the amount of the estimate for the ensuing quarter, and the amounts by which the estimate is reduced or increased because of over- or under-estimate for the prior quarter and for other adjustments." 45 C.F.R. § 201.5(c). This would determine the amount certified to the Treasury as the amount payable to the state, that is, the amount of the grant award for that quarter. Id. In other words, the award amount was adjusted so that the total amount awarded would correspond to the federal share of allowable, actual expenditures previously claimed by the state and the estimated expenditures for the current quarter. This would enable the state to draw that amount, as needed, through a continuing letter of credit. 45 C.F.R. § 201.5(c) and (d).

Because the amount of federal funds payable to a state was determined in general by the amount of allowable expenditures a state incurred and because recipients meeting federal and state plan requirements were entitled to payment, the AFDC program was considered an "open-ended entitlement program." See 53 Fed. Reg. 8028 (Mar. 11, 1988). HHS entitlement programs were (with certain exceptions) subject to uniform administrative requirements in 45 C.F.R. Part 74. 45 C.F.R. § 201.5(e).

B. The TANF Program

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Public Law No. 104-193, amended title IV-A

to establish a program of "Block Grants to States for Temporary Assistance for Needy Families" to replace the AFDC program. Each state which submits a state plan outlining how it will conduct the program and making certain certifications is eligible for an annual "State family assistance grant" (SFAG). The amount of the SFAG is based on amounts previously paid to the state for AFDC and several AFDC-related programs. See Act § 403(a)(1). A state's SFAG is reduced on a dollar-for-dollar basis if in the prior year the state failed to meet a "maintenance of effort" (MOE) requirement to annually expend state funds equal to a percentage (usually at least 80%) of its historic expenditures for certain types of benefits or services. See Act § 409(a)(7); 45 C.F.R. Part 263. The amount payable to a state under section 403(a)(1) of the Act (that is, the state's SFAG amount) may also be reduced by other penalties to which the state is subject. Act § 409.

In addition to providing for an SFAG, section 403 of the Act (as originally amended by PRWORA) provided that an state could be eligible to receive a bonus grant to reward the state for a decrease in its illegitimacy ratio, a supplemental grant for a population increase, contingency funds if the state is needy, or a bonus grant to reward the state for high performance. Act §§ 403(a)(2),(3), and (4) and 403(b).[2] A state may also be entitled to a welfare-to-work grant if it meets specified requirements. Act § 403(a)(5).

Each grant payable to a state under section 403, as amended, is made in quarterly installments, based on an estimate of the amount to be paid "reduced or increased to the extent of any underpayment or overpayment which [ACF] determines was made under [part A of title IV] to the State for any prior quarter and with respect to which adjustment has not been made under this paragraph." Act § 405.

Unlike AFDC, the TANF program is not an open-ended entitlement program. The amendments to title IV-A were made to increase the flexibility of states in operating a program designed, among other things, to "provide assistance to needy families so that children may be cared for in their own homes or in the homes of

[2] The Deficit Reduction Act of 2005, Public Law 109-171, made some changes with respect to additional grant authorities in section 403, but neither party has said these changes are relevant here.

relatives." Act § 401(a). In exchange, states gave up their entitlement to be paid federal funds for all cash assistance payments meeting federal requirements. Thus, Congress was able to slow the growth of federal welfare spending. See H.R. Conf. Rep. No. 725, 104th Cong., 2nd Sess. 261-2 (1996).

States were eligible to start participating in the TANF program beginning as early as October 1, 1996. PRWORA section 116 addressed provisions for closeout of the AFDC program.

C. Payment methods

The methods for awarding grants under these programs and for accounting for grant expenditures are different from the methods for transferring and accounting for federal funds advanced to cover the federal share of the expenditures. A state receiving federal funds must have an agreement with the Treasury under the Cash Management Improvement Act (CMIA) and must meet the requirements of Treasury regulations at 31 C.F.R. Part 205 regarding the timing of the transfer of funds from the federal Treasury and their disbursement for program purposes. These regulations were amended in 2002 to, among other things, require the electronic transfer of funds in accordance with the Debt Collection Improvement Act of 1996. 67 Fed. Reg. 31,880 (May 10, 2002).

As mentioned above, a letter of credit system allows a state to draw down cash as needed, consistent with awards authorizing use of such funds. See 45 C.F.R. Part 77. When cash advances are made by letter of credit or electronic funds transfer methods, the grantee must time any draw down to be as close as possible to the time of making disbursements. See 31 C.F.R. § 205.11; 45 C.F.R. § 92.20(b)(7). (The term "draw down" means "a process in which a State requests and receives Federal funds." 31 C.F.R. § 205.2.) In general, grantees should disburse amounts from sources such as refunds or audit recoveries before requesting additional cash payments. See 45 C.F.R. § 92.21(f).

D. ACF's issuances

Under the AFDC program, a state would generally recover overpayments to an AFDC recipient either through an offset to a cash assistance payment for a later period or through a cash repayment from the recipients. Since the recipients were by definition needy, often repayment would be in installments over a period of time. The state would then report the amounts collected as a downward adjustment to prior quarter expenditures

on its quarterly expenditure report for the AFDC program. The state could also then use the federal share of the recovered funds to replace federal cash that it otherwise would have had to draw down to cover current expenditures.

Once the TANF program was implemented, however, the question arose how states should repay the federal share of any continuing recoveries of AFDC overpayments from recipients. ACF first addressed the process for repayment of the federal share in TANF-ACF-PI-99-2, issued in March 1999. PA Ex. 2, at unnumbered pages 4-6. That instruction stated that the federal share of recoveries of AFDC overpayments made on or before September 30, 1996 was to be returned by means of a check payable to the federal Department of Health and Human Services (HHS). For an AFDC or TANF overpayment made on or after October 1, 1996, the instruction stated that the "amounts recovered must be credited against the grant applicable to the fiscal year of the overpayment, not the fiscal year in which the overpayment was recovered." Id. The instruction went on to say that the "amounts recovered cannot be used to meet the State's Maintenance of Effort (MOE) goal in the year of recovery, but must be allocated towards the State's TANF and MOE expenditures in the year of the overpayment expenditures in the same proportion as the State's other expenditures for that year." Id. The instruction also indicated that states were not required to report the amount recovered and expended on their quarterly expenditure reports, but were required to maintain records of the recovered overpayments. Id.

In May 2000, ACF issued a revised instruction, TANF-ACF-PI-99 (Revised). PA Ex. 2, at unnumbered pages 7-9. The revised instruction states that the transmittal is effective for recoveries made after September 30, 1996, and that "[r]ecoveries made prior to the date of this transmittal will be evaluated on reasonable interpretation of statutory requirements or any previous guidance provided by ACF." Id. This instruction refers to both AFDC and TANF overpayments, stating that the full amount of these recovered overpayments is to be retained by the State and used for TANF Program costs." Id. The revised instruction then goes on to set out the procedures to be followed. Under the revised procedures, the amounts recovered "must be credited against the current grant in the fiscal year in which the overpayment was recovered." Id. The procedures include how to determine the amounts to be credited for TANF or for AFDC recoveries and when "[r]ecoveries credited to TANF" must be used. Id.

In September 2000, ACF issued TANF-ACF-PI-2000-2 to "clarify ACF policy with regard to treatment of overpayment recoveries." Id. at unnumbered pages 10-17. This program instruction rescinded and replaced both of the previous instructions. Id. Like the prior one, it states that it is effective for recoveries made after September 30, 1996, and that "[r]ecoveries made prior to the date of this transmittal will be evaluated on reasonable interpretation of statutory requirements or any previous guidance provided by ACF." Id. With respect to recoveries of overpayments to recipients made before October 1, 1996, ACF noted that state practice had varied on treatment of the overpayment recoveries between October 1, 1996 and August 21, 1998 (when the final expenditure report for AFDC was due), as follows:

> In some cases, States continued to report AFDC overpayment recoveries during this period via submission of ACF-231 Quarterly Expenditure Reports. In these situations, the Federal share of the amounts recovered were reported on Lines 9 and/or 10, as appropriate, depending on whether the recoveries were made via recoupment from current cash assistance payments or via cash repayment. For States that followed these procedures, negative AFDC program grant awards were issued to effect the "repayment" of the Federal share of the overpayments recovered.
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> In other cases, States tracked overpayment recoveries during this period, computed the Federal share, and remitted the computed amount to ACF via check.
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> In still other cases, States may have used a combination of the above-described procedures to "repay" the Federal share of AFDC overpayment recoveries received to ACF . . . .
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> In some cases, States may have taken no action to ensure that the Federal share of AFDC recoveries on overpayments occurring prior to October 1, 1996 was returned to ACF.

Id.

TANF-ACF-PI-2000-2 then set out what "actions should be taken to ensure that the Federal share of all AFDC overpayment recoveries has been or is returned to ACF," depending on whether a state had been properly tracking the recoveries and repaying the federal share. Id. States that had been properly tracking the recoveries and making repayments through one of the described methods (or a combination of those methods) were to continue to

make repayments to ACF via check. States that were tracking the overpayments but had not returned all or any of the federal share were to remit the total accumulated amounts to ACF via check no later than October 31, 2000. States not properly tracking the recoveries were to identify the recoveries and remit the federal share to ACF via check no later than December 31, 2000. After becoming current with regard to past due remittances, a state was to submit checks to ACF no less frequently than quarterly. The applicable federal medical assistance percentage rate for fiscal year 1996 was to be used to compute the federal share of the recoveries. Id.

Over five years later, ACF issued TANF-ACF-PI-2006-03 to update and reissue the policy on treatment of overpayments. Id. at unnumbered pages 18-25. This transmittal noted that many states continue to collect and remit AFDC overpayments. ACF therefore updated the policy to eliminate final remissions deadlines, to include the current mailing address for checks, and to clarify agency identification standards for check payments. Id.

All of these issuances made it clear that, although the AFDC program was repealed and replaced with the TANF program, the requirements to recover AFDC overpayments and to return the federal share of those overpayments remain in place.

Prior Board Decisions

A. Pennsylvania's argument about prior Board decisions

The Board has addressed AFDC overpayment recoveries made after TANF was implemented in three prior decisions: Wisconsin Dept. of Workforce Development, DAB No. 2137 (2007); Texas Dept. of Human Services, DAB No. 1954 (2004); and Iowa Dept. of Human Services, DAB No. 1874 (2003). Pennsylvania argues here that these cases were wrongly decided and that the Board must disregard these decisions in making its decision here. According to Pennsylvania, the federal Administrative Procedure Act (APA) "prohibits the Board from giving *stare decisis* effect" because Board decisions are not mailed to the states and because the "listing" of Board decisions on the Board's website is not indexed by key word or otherwise. PA Br. at 5, citing 5 U.S.C. § 552(a)(2). Thus, Pennsylvania argues, "the Board is required by law to consider the issues completely *de novo* and it cannot give any weight whatsoever to its prior decisions by virtue of being prior decisions" without "running afoul of the prohibition against relying upon, using, or citing as a precedent, matters that are not indexed." Id. at 6 (emphasis in original).

The premises for Pennsylvania's argument are erroneous. First, the Board's website does meet the APA requirements since the decisions are not only listed, but are searchable by key word, as well as by title.[3] The purpose of an index under the APA is to "provide identifying information." 5 U.S.C. § 552(a)(2)(E). Pennsylvania cites nothing to support its view that the way Board decisions are made available to the public violates the cited APA provision, which specifically permits making records available "by computer telecommunications or . . . other electronic means." Id. Moreover, Pennsylvania was able to identify the relevant Board decisions since it cited them.

Second, the Board does review the issues in each case *de novo.* Pennsylvania does not cite any authority for its argument that a requirement for such *de novo* review precludes the Board from giving any weight to its own prior decisions, and we know of none.

In any event, while we next set out the key conclusions reached in past Board decisions and address below Pennsylvania's argument that those cases were wrongly decided, our decision here is based on our analysis of the applicable legal authorities and the facts of this case, as determined on the record before us.

B. The Board's decision in Iowa

Iowa had used AFDC overpayment recoveries to make new payments under its TANF cash assistance program. ACF determined that Iowa's use of the funds involved a transfer of funds from one appropriation account (AFDC) to another (TANF), and that such a transfer was prohibited by federal appropriations law, specifically 31 U.S.C. § 1301(a).[4] Although Iowa alleged that

[3] Board decisions are also available by subscription from WESTLAW, LEXIS-NEXIS, and other on-line sources.

[4] That section provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." The requirement has been described as follows: "Simply stated, 31 U.S.C. § 1301(a) says that public funds may be used only for the purpose or purposes for which they were appropriated." Principles of Federal Appropriations Law, 2d ed., U.S. General Accounting

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its use of the overpayment recoveries for new cash assistance payments reduced its drawdown of TANF funds, the Board concluded that Iowa had failed to document that any such reduction occurred or to show that the reduction was authorized by statute. "In the absence of a documented (and authorized) reduction," the Board concluded, Iowa's "use of these funds for cash assistance payments under TANF violates federal appropriations law." Iowa at 1. "Under these circumstances," the Board stated, "any lack of clear guidance from ACF regarding the treatment of AFDC overpayment recoveries is not a basis for reversing any part of the disallowance." Id.

B. The Board's decision in Texas

Texas argued that it had properly accounted for the federal share of AFDC overpayment recoveries by spending the recovered funds for TANF benefits that exceeded the amount funded through its TANF grant because the funds served the same purpose as the AFDC program. According to Texas, the AFDC appropriations language, not specifically considered in Iowa, "can be read to authorize the use of AFDC overpayment recoveries for the TANF program." Texas at 5. The Board concluded that, even if funds appropriated for AFDC could be used to pay for costs that would otherwise be funded by TANF, "AFDC funds may not be used to augment a state's TANF grant." Id. (emphasis in original). In particular, the Board stated:

> Section 403(a)(1) of the Act sets a dollar limit, or cap, on the amount of expenditures that can be reimbursed as costs of the TANF program. If a state that had claimed all of the funds to which it was entitled under the cap were permitted to use AFDC funds for costs of its program under TANF, the total amount of program costs paid with federal funds would exceed the TANF cap.

Id. at 5. The Board also noted: 1) former section 403(b)(2)(B) of the Act did not authorize states to make expenditures that would not otherwise be authorized under title IV-A; 2) nothing in the "transition rules" in section 116(b) of PRWORA provides for using AFDC funds for TANF costs; and 3) although section 404(a)(1) of the Act, as interpreted by ACF, authorizes the use

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Office, Office of the General Counsel, July 1991, OGC-91-5, at 4-2.

of TANF funds for AFDC costs, there is no comparable provision in the Act for using AFDC funds for TANF costs. Id. at 5-6. The Board rejected the argument by Texas that it lacked timely notice that it would not be permitted to use its AFDC overpayment recoveries to augment its TANF grant. The Board concluded that, in the absence of any guidance that a state was permitted to augment its TANF grant by the amount of AFDC overpayment recoveries, as Texas did, the authorities the Board had identified provided timely notice that it was not permitted. Id. at 6-7.

D. The Board's decision in Wisconsin

Wisconsin initially said that it had accounted for AFDC overpayment recoveries made after October 1, 1996 by reducing the amount claimed under its TANF grants, but later said that it had included the recovered federal share amount "in its available TANF funds." Wisconsin at 4 n.3. Wisconsin also acknowledged that it fully spent its TANF grants for the years in question. Id. Wisconsin did not dispute ACF's assertion that "permitting Wisconsin to spend all of its TANF block grant funds plus the federal share of the AFDC overpayment recoveries on the TANF program would result in Wisconsin exceeding TANF's statutory cap, and, therefore, in receiving more federal funds for TANF purposes than authorized by statute." Id. at 5. Instead, Wisconsin argued that it had accounted for the recoveries in accordance with TANF-ACF-PI-99-2 (Revised), which permitted AFDC overpayment recoveries to be "credited to the TANF grant." The Board found, however, that this statement did not apply to the facts of Wisconsin since "TANF-ACF-PI-99-2 (Revised) did not authorize a state to augment its TANF grant, but rather required that the amount of cash drawn down under a state's TANF grant be reduced by the amount of its AFDC overpayment recoveries." Id. "In this situation," the Board said, "the federal share of cash from the recoveries would substitute for federal cash the state otherwise would have been entitled to draw down for allowable TANF expenditures." Id.

Background of this case

A. The audit report and disallowance

On August 7, 2007, the Office of the Inspector General (OIG), HHS, issued a report of a review of states' reimbursement of the federal share of AFDC overpayment recoveries. PA Ex. 1, at 4 *et seq.* The OIG reported that, of the 43 states reviewed, 24 states had complied with federal requirements. Id. at 4. The

OIG also reported that the remaining 19 states and the District of Columbia continued to recover overpayments from former AFDC recipients after the program ended, but did not reimburse ACF for the federal share, as required. Id. The OIG attributed this in part to ACF's failure to monitor to ensure that the Federal Government received its share of the recoveries. Id.

With respect to Pennsylvania, the OIG found that, during the period October 1, 1996 to June 30, 2006, Pennsylvania had recovered $10,598,095 in AFDC overpayments but had not reimbursed the federal share. Id. at 18. The OIG identified the federal share due as $5,609,572. Id.

The OIG reported in general that "[s]ome States reported that because of staff turnover, they were unaware of the requirement to separately track and refund AFDC overpayments," while other states "did not have identifiers in their systems to distinguish AFDC overpayments from TANF overpayments and thus treated both AFDC and TANF overpayments as TANF overpayments." Id. at 14.

On June 26, 2008, ACF issued a letter to Pennsylvania requesting that Pennsylvania remit the federal share ($5,609,572) of the AFDC overpayments identified in the audit by a check payable to HHS within 30 days.

B. Pennsylvania's appeal

Pennsylvania appealed. After being granted extensions of time of about three months to permit discovery, Pennsylvania submitted its brief and appeal file.

It is important to note that, on appeal, Pennsylvania does not contest the audit finding that Pennsylvania recovered $10,598,095 in AFDC overpayments during the period October 1, 1996 through June 1, 2006, or challenge how the OIG calculated the federal share of those overpayments. Also, Pennsylvania does not assert that the overpayments met the conditions for federal funding under the AFDC program or deny that AFDC requirements provided for the return of the federal share of any overpayment recoveries. In addition, Pennsylvania does not directly contest the finding that Pennsylvania did not reimburse the federal share of the overpayments. In fact, Pennsylvania concedes that it "did not return these collections to ACF, but instead used the money to enhance services provided to needy families under the [TANF] block grant program." PA Br. at 1. Pennsylvania identifies itself as one of 11 states that "used

the collected money to supplement their TANF funding." Id., citing PA Ex. 6 (OIG working paper).

Pennsylvania argues, however, that the ACF disallowance is contrary to law because section 116(b) of PRWORA required ACF to use Single Audit Act procedures for closeout of the AFDC program. Pennsylvania further argues that Pennsylvania may, at the very least, retain collections made prior to September 1, 2000 because "it was not unreasonable for the State to interpret the statute as allowing it to retain the AFDC collections." PA Br. at 7. Pennsylvania also argues that it may retain collections made after September 1, 2000, even if that violated ACF policy, because Congress specifically prohibited ACF from issuing guidance documents to the states when it enacted section 417 of the Act.

Pennsylvania also submitted two declarations from State officials containing factual assertions relevant to the legal issues Pennsylvania raises.

One declaration is by Randy Sprout, Division Chief in the Office of the Budget, Comptroller Operations for the Pennsylvania Department of Public Welfare (DPW). PA Ex. 8. He attests to the following two statements:

> 2. When the overpayment collections are recorded in the accounting system they post as minus expenditures against the grant and the Commonwealth returns the federal funding via the drawdown process. This then increases the amount of TANF funding available to the State and allows the state to incur additional expenses against the TANF program and drawdown federal funding to match the expenditures.
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> 3. DPW receives a specified amount of federal TANF funding each year. The Federal drawdown system prevents the Commonwealth from exceeding the amount of TANF funding authorized according to the award document. However, the Commonwealth's total expenditures can, in theory, exceed the amount in the award document to the extent minus expenditures are posted to the account.

Id.

The other declaration is by Gary L. Weaver, Director of the Bureau of Financial Reporting, Office of the Budget, DPW. PA Ex. 5. He attests that, although DPW's federal programs, including TANF, have been subject to a Single Audit Act audit

from the inception of TANF in 1996, no Single Audit Act audit resulted in an exception taken or finding made relative to DPW's retention of AFDC overpayment recoveries. Id.

Analysis

In this section, we first address Pennsylvania's arguments in support of its position that is entitled to retain AFDC overpayments recovered before September 1, 2000. We then address Pennsylvania's arguments in support of its position that it may also retain collections made after September 1, 2000. Finally, we address Pennsylvania's arguments based on the PRWORA closeout provision.

A. Pennsylvania is not allowed to retain recoveries made prior to September 1, 2000.

Pennsylvania argues that the Board "made two fundamental errors in its prior decisions." PA Br. at 6. First, Pennsylvania asserts, "the Board overlooked that the Government Accountability Office [GAO] has recognized an exception to the general rule that overpayments collections must be credited to the originating appropriation." Id. Second, Pennsylvania asserts, "the Board misapprehended the distinction between the State Family Assistance Grant (SFAG) provided under section 403(a)(1) of the Act . . . and TANF Federal funds and erroneously interpreted the SFAG as establishing a 'hard cap' on TANF Federal funds." Id. Pennsylvania points out that TANF-ACF-PI-2000-2 states that "recoveries made prior to the date of this transmittal will be evaluated based on reasonable interpretation of statutory requirements or any previous guidance provided by ACF." According to Pennsylvania, it was "not unreasonable for the State to interpret the statute as allowing it to retain the AFDC collections" since 1) "Federal appropriation law did not absolutely prohibit such retention"; 2) "TANF-99-02 construed PRWORA to authorize such retention"; and 3) "Section 403(a)(1) does not establish the dollar limit or cap that would be exceeded by allowing the State to retain the collections." PA Br. at 8.

These arguments have no merit. With respect to appropriations law, Pennsylvania says that the Board was correct in Iowa "when it said that 31 U.S.C. § 1301(a) requires that overpayment collections be credited to the original appropriation." Id. at 6. Pennsylvania nonetheless argues that the GAO has recognized an exception "where other statutes authorize an agency to credit collections to a current appropriation." Id. at 7, citing PA

Ex. 3, at 3-15 (GAO Opinion B-179708). The cited GAO decision, however, is inapposite. It discusses the basic rule in 31 U.S.C. § 686(b) regarding how a federal agency should account for reimbursements resulting from inter- or intra-agency transactions involving the furnishing of materials, work, or services on a reimbursable basis (as permitted by section 686(a)), and relies on specific statutory exceptions to section 686(b), not on any exception to section 1301(a). PA Ex. 3, at 4-5.

Moreover, the Board's prior decisions did not overlook the possibility that Congress might by statute effectively override the general appropriation provision in 31 U.S.C. § 1301 by authorizing the use of AFDC funds for TANF purposes. Instead, the Board pointed out that, while Congress had specifically provided for use of TANF funds for AFDC purposes, nothing in the statute authorizes the use of AFDC funds for TANF purposes. Texas at 5-6. Pennsylvania points to nothing in the statute providing such authority.

Pennsylvania's second assertion of error in the Board's past decisions is also of no avail. Pennsylvania is correct that the term "Federal TANF funds" is used to refer not only to the SFAG funds under section 403(a)(1) of the Act, but also to other funds which may be awarded under sections 403 of the Act, except for Welfare-to-Work funds. 45 C.F.R. § 260.30; 64 Fed. Reg. 17,720, 17,753 (Apr. 12, 1999). In the past Board cases, no state sought to rely on such a distinction. While Pennsylvania faults the Board for not recognizing the distinction, Pennsylvania does not state how this distinction makes a difference here. Regardless of whether a state in theory could be authorized to spend more federal TANF funds than its SFAG amount (in which event the SFAG amount would not represent the total amount of federal funds the state could spend for TANF purposes), any additional TANF funds awarded under section 403 of the Act would similarly be in amounts set by statutory formula. In other words, for a state receiving bonus, supplemental, or other federal TANF funds, the limit would be higher than just the SFAG amount, but the total amount awarded would still provide a cap on the amount of federal TANF funds the state would be authorized to use to cover TANF expenditures.

Here, Pennsylvania does not allege that it had been awarded any such additional funds during the relevant period, much less that it used the federal share of AFDC overpayment recoveries to substitute for federal cash it otherwise could have drawn down, consistent with the total amount of federal TANF funds it had

been granted. Indeed, Mr. Sprout acknowledges in his declaration that Pennsylvania "receives a specified amount of federal TANF funding each year" and that, by posting the overpayment collections as "minus expenditures against the grant," Pennsylvania is able to draw down additional federal funding. PA. Ex. 8. While Mr. Sprout acknowledges only that "in theory" this could permit Pennsylvania's total TANF expenditures to "exceed the amount in the award document," Pennsylvania has provided no evidence that this did not, in fact, occur.

While Pennsylvania cites no statutory authority permitting it to augment its TANF funds with AFDC recoveries, Pennsylvania nonetheless argues that TANF-ACF-PI-99-02 (Revised) provides the requisite authority because it "construed PRWORA to authorize" retention of AFDC overpayment collections. PA Br. at 8. That program instruction does not, however, purport to interpret any provision in PRWORA. Moreover, while the instruction says that the "amount of these recovered overpayments is to be retained by the State and used for TANF Program costs," it also says that the "amounts recovered must be credited against the current grant in the fiscal year in which the overpayment was recovered." PA Ex. 2, at 8. The instruction says nothing about using the recovered amounts, in effect, to increase the amount of federal funds available for TANF purposes. The instruction as a whole can be reconciled with the statutory and regulatory provisions if read to mean that a state may substitute the recovered amounts for cash it otherwise would draw down to cover current TANF expenditures, so long as the state also credits the cash amounts against its current TANF grant authority. Pennsylvania does not argue here that it did credit the recovered amounts against its current TANF grant or grants in such a way that the total amount of federal cash used as federal TANF funds with respect to any funding period would not exceed the amount awarded and available for that period. Instead, as discussed above, Pennsylvania acknowledges that it treated collected amounts as "minus expenditures" in a way that allowed Pennsylvania to draw down more cash under its TANF authority than it otherwise would have and to "supplement" its TANF funds.

Finally, Pennsylvania provides no evidence that it in fact developed and relied on an interpretation of the statute or of ACF guidance in determining how to treat the federal share of

the recovered AFDC overpayments.[5] Thus, Pennsylvania has not shown that ACF's policy required ACF to evaluate Pennsylvania's situation in light of such an interpretation, for periods prior to September 1, 2000.

B. Pennsylvania is not allowed to retain recoveries made after September 1, 2000.

As discussed above, TANF-ACF-PI-2000-2 (issued September 1, 2000) instructed states to determine the amount of the federal share of any AFDC overpayment recoveries that had not already been paid back and to remit a check for that amount. Pennsylvania thus "acknowledges that its retention of AFDC collections after September 1, 2000 violated ACF policy." PA Br. at 9. Pennsylvania argues, however, that it is not bound by ACF policy issuances because "Congress specifically prohibited ACF from issuing guidance documents to the States when it enacted section 417 of the Act . . . ." Id. at 9. Pennsylvania quotes section 417, as amended, which provides:

> No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part.

According to Pennsylvania, most of the program instructions ACF has issued to the states are "illegal under [section] 417." Id. at 9-10. In this case, Pennsylvania asserts, "there is no provision in the TANF statute that authorizes ACF to provide direction to the states on how to account for their AFDC

[5] Pennsylvania suggests in a document submitted with its reply brief that it is unfair to expect Pennsylvania to defend the "validity" of TANF-ACF-PI-99-2 (Revised) without requiring ACF to produce documents showing what its reasons were for issuing the program instruction in the first place. We disagree. First, the alleged need to defend TANF-ACF-PI-99-2 (Revised) is premised on Pennsylvania's view of that instruction as interpreting the statute to permit use of federal AFDC funds to supplement federal TANF funds – a view that Pennsylvania simply failed to support. Second, Pennsylvania had ample opportunity to identify any statutory provision that might support its arguments and also had ample opportunity (prior to submitting its initial brief) to seek to discover any documents related to ACF's issuances, but did not do either.

collections." Id. at 9-10. Pennsylvania further asserts that, under section 417, "the power to choose between competing reasonable interpretations of the statute is vested in the State, not ACF." Id. at 10. "So long as the TANF statute can be reasonably construed to allow the State to retain AFDC collections for TANF purposes, the State is entitled to follow its own construction of the statute and disregard the ACF interpretation." Id. at 9.

The key problem with this argument is that, again, Pennsylvania fails to point to any statutory language that could reasonably be interpreted as allowing a state to augment its TANF funds with AFDC overpayment recovery amounts. Instead, Pennsylvania points to TANF-ACF-PI-99-2 as establishing that "the State's actions were reasonable." Id. Pennsylvania does not explain how the program instruction could both be illegal and be reasonably relied on by a state. Moreover, even if Pennsylvania reasonably thought for a period of time, based on that program instruction, that Pennsylvania could use funds from AFDC overpayment recoveries for TANF program purposes, that does not mean that Pennsylvania reasonably interpreted the statute (or even the program instruction) to permit Pennsylvania to account for these expenditures in the way that it did. Pennsylvania's treatment of the funds did not, in fact, result in repayment of the federal share of the recoveries, but instead resulted in Pennsylvania using more federal funds for TANF purposes than the amounts authorized under the statute and its grant awards.

We also note that, to the extent ACF's program instructions provided guidance on the procedures for collection and repayment of AFDC overpayments, the instructions are arguably outside the scope of section 417. ACF could and apparently did reasonably interpret that section as limiting regulation of states' conduct only under part A of title IV as amended by PRWORA (and then only as referring to how states conduct a TANF program, not to how states return the federal share of overpayments). The issue here is how states may account for the federal share of amounts improperly claimed under title IV-A prior to amendment.

In any event, in the absence of ACF's program instructions, the statutory and regulatory provisions applicable to the AFDC funds would have required the states to continue to submit expenditure reports identifying the AFDC collections as downward adjustments of expenditures for the quarters in which the payments were made – a more onerous way of reporting the recoveries than the method ACF ultimately chose in its instructions. Such downward adjustments would, in turn, have warranted ACF reducing the

total amount of AFDC funds awarded to the state, thus requiring the state to repay the excess amount received. Pennsylvania has not shown that it is any worse off from having to now repay the federal share of the overpayment recoveries by submitting a check in the total amount as found in the audit report than it would have been based on the AFDC reporting requirements.

C. The closeout provision of PRWORA does not require reversal of ACF's determination.

Pennsylvania argues that the federal APA requires reversal of agency actions taken "without observance of procedure required by law." PA Br. at 4, citing 5 U.S.C. § 706. Here, Pennsylvania asserts, "ACF failed to follow the procedures required by the close-out provision for the AFDC program contained in section 116(b)(2) of PRWORA." Id. Specifically, Pennsylvania asserts that section 116(b) states that ACF "shall . . . use the single audit procedure to review and resolve any claims in connection with the close out of programs under such State [AFDC] plans." Id. (emphasis in original). Pennsylvania points out that the word "shall" is mandatory and describes the words "any claims in connection with" as "about as broad as can be imagined." Id. According to Pennsylvania, "the plain meaning of the statute is that ACF is forced to rely exclusively upon single audits to resolve all claim-related issues that arise out of the close-out of the AFDC program" and "has no discretion to use OIG audit findings to help close-out AFDC-related claims." Id. (emphasis in original).

Pennsylvania also asserts that Pennsylvania was "subjected to single audits covering the entire audit period," but the "auditors made no adverse finding against the State relative to its use of the AFDC collections." Id.

This argument has no merit. First, the language of section 116(b) is not as plain as Pennsylvania asserts. As ACF points out, the language immediately preceding the part quoted by Pennsylvania (which is from section 116(b)(3), rather than from 116(b)(2)) provides:

> Each State shall complete the filing of all claims under the State plan (as so in effect) within 2 years after the date of the enactment of this Act.

In TANF-ACF-PI-97-4, issued August 29, 1997, ACF explained that this meant that "[c]laims for expenditures must meet the two year limit for filing claims for expenditures in accordance with

Section 1132 of the Social Security Act and 45 C.F.R. Part 95, Subpart A." ACF Ex. B, at 2. Thus, in context, the reference to "claims in connection with" the closeout of the AFDC program can reasonably be read to refer more narrowly to only those claims for expenditures submitted by a state within the two-year period. Moreover, the term "claim" is defined in reference to the two-year filing period under section 1132 of the Act to mean "a request for Federal financial participation in the manner and format required by [HHS] program regulations, and instructions or directives issued thereunder." 45 C.F.R. § 95.4. Thus, it is at the very least unclear whether the reference in section 116(b)(3) of PRWORA to use of single audit procedures to resolve "claims" in connection with the closeout of the AFDC program was intended to encompass financial transactions that did not result in a state requesting additional federal funds, but instead resulted in recoveries of overpayments for which a state had already requested and received federal funds. Pennsylvania points to nothing in the statutory language or history that clearly indicates that Congress intended to require ACF to use single audit procedures before ACF could require a state to repay such funds.

As ACF points out, moreover, the purpose of the Single Audit Act is so that a single audit conducted by an independent auditor in accordance with that Act will be "in lieu of any financial audit of Federal awards which a non-Federal entity is required to undergo under any other Federal law or regulation." 31 U.S.C. § 7503(a) (emphasis added). The Single Audit Act specifically does not limit the authority of federal agencies or the Inspector General to conduct audits of federal awards. 31 U.S.C. §§ 7503(b) and (c).

In any event, even if a state's single audit were to be the only procedure to be used to close out a state's AFDC program, regulations that applied to the AFDC program at the time the funds were awarded provided for further procedures after the closeout of an award. Specifically, section 74.72(a) of 45 C.F.R. provides that the "closeout of an award" does not affect the "right of the HHS awarding agency to disallow costs and recover any funds on the basis of an audit or other review" or the "obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions."

Thus, ACF is not barred from recovering the federal share of AFDC overpayment recoveries merely because they were not part of a closeout of the AFDC grant under single audit procedures.

Conclusion

For the reasons stated above, we uphold ACF's determination that Pennsylvania must repay $5,609,572 in federal funds.

_____/s/_____
Leslie A. Sussan

_____/s/_____
Constance B. Tobias

_____/s/_____
Judith A. Ballard
Presiding Board Member